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### A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation

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# OREGON LAW REVIEW

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## *Articles*

**SARAH KRAKOFF\***

### A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation

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\* Associate Professor, University of Colorado School of Law. Grants from the Impact Fund of the University of Colorado and the University of Colorado School of Law were essential to conducting the research for this study. I am deeply indebted to the following people for sharing their insights and knowledge about the impacts of federal law on the Navajo Nation: Amy Alderman, Steve Boos, Raymond Etcitty, Veronika Fabian, Lorene Ferguson, Marcelino Gomez, Levon Henry, T.J. Holgate, Anna Marie Johnson, Allan Sloan, and Luralene Tapahe. I also want to thank Andrea Waye, Lauren Templeton, Justin Blum, and Chris Nerbonne for creative and persistent help with research and editing. Dan Rosenberg deserves special mention for his intrepid adventures in Window Rock, which were above and beyond the call of the R.A. job description. Members of the faculties of the University of Colorado and University of Denver Schools of Law provided thoughtful and constructive feedback on an earlier draft. Phil Frickey contributed helpful written comments in the late stages of the Article as well as encouragement at the earliest stages of conceiving of the project. Thanks also to Izzy, John, Mary Jo, and Sean for the hospitable working environment and great coffee at Penny Lane.

This Article is dedicated to the memory of Claudeen Bates Arthur, Chief Justice of the Navajo Nation.

"In my view, the tribes either are or are not separate sovereigns, and our federal Indian law cases *untenably* hold both positions simultaneously."<sup>1</sup>

"The [U.S.] Constitution never took away Indian self-governance; that governance flows from the people. The Courts are trying to do what the [executive and legislative] branch[es] have learned they cannot do—eliminate tribes."<sup>2</sup>

Does American Indian tribal sovereignty exist? In some sense it is a strange question to ask. More than 540 federally recognized American Indian tribes function as sovereign nations in many significant respects. To the members of these tribes and to many non-members who spend time in Indian country, the answer is a resounding "yes." Yet the doctrine of American Indian tribal sovereignty is a legal and conceptual conundrum. "Domestic dependent nations," as Justice John Marshall famously labeled Indian tribes,<sup>3</sup> are unique and paradoxical constructions. Sovereignty ordinarily entails powers of self-protection for which a nation-state requires no positive legal authority, as well as the right of a state to exercise power freely within its territory.<sup>4</sup> American case law, however, has limited tribal governmental authority to domestic and internal matters,<sup>5</sup> and has declared that even these powers are subject to defeasance by Congress.<sup>6</sup> Because of these limitations and the often inscrutable way in which the Supreme Court arrives at them, the legal construct of Indian tribal sovereignty has been subject to much criticism, including most recently by members of the Court itself. In *United States v. Lara*, a case affirming Congress's power to recognize inherent tribal criminal jurisdiction over non-member Indians,<sup>7</sup> Justice Thomas concurred in the result but wrote separately to decry what he sees as the contradictory premises

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<sup>1</sup> *United States v. Lara*, 541 U.S. 193, 215 (2004) (Thomas, J., concurring).

<sup>2</sup> Telephone Interview with Raymond C. Etcitty, Navajo Nation Legislative Counsel (July 7, 2003) (on file with author).

<sup>3</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

<sup>4</sup> See F.H. HINSLEY, *SOVEREIGNTY* 1, 3-5 (Cambridge Univ. Press 1986) (1966); Eric Ting-Lun Huang, *The Modern Concept of Sovereignty, Statehood and Recognition: A Case Study of Taiwan*, 16 N.Y. INT'L L. REV. 99, 110-13 (2003).

<sup>5</sup> See *Worcester v. Georgia*, 31 U.S. 515, 581-82 (1832).

<sup>6</sup> See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-67 (1903).

<sup>7</sup> "Non-member Indians" refers to American Indians who are members of a tribe different from the one attempting to assert jurisdiction over them. The term "non-members" elsewhere in this Article may also refer both to non-member Indians and non-Indians. Sometimes federal Indian law treats all non-members identically, and sometimes distinctions are made between non-member Indians and non-members who are not Indians.

that lie at the heart of the doctrine of tribal sovereignty.<sup>8</sup> Justice Thomas suggested that one solution is for the Supreme Court to declare that tribal sovereignty does not exist.<sup>9</sup>

Such a declaration would be met with shock and outrage by many members of tribal nations for whom "sovereignty" is as common and heartfelt a term as "rights" is to most other Americans. Many tribal members perceive that their cultural survival is inextricably linked to their existence as separate, self-governing nations, and that dealing a final blow to the legal doctrine of sovereignty would be akin to terminating tribal people themselves. Former Chief Justice of the Navajo Nation Robert Yazzie, in testimony before the U.S. Senate Committee on Indian Affairs, put it this way: "In short, the Navajo Nation is faced with nothing less than a threat of cultural, economic, and political genocide."<sup>10</sup> These are strong words, particularly when aimed at the least dangerous branch of government, one that sits at quiet remove from the daily struggles for survival in Indian country.

How can we account for the gap between Justice Thomas and Justice Yazzie? A critique of the legal doctrine is not enough. What is required is a narrative of sovereignty that informs courts, legislators, and the public about what tribal sovereignty actually looks like on the ground and why it matters. This Article provides that narrative by examining the interplay between U.S. Supreme Court decisions defining the contours of tribal sovereignty and actions by and within the Navajo Nation regarding its sovereignty from 1970 to 2003. In studying the legal and political developments within the Navajo Nation, this Article addresses the following questions: What impacts have U.S. Supreme Court decisions had on the development of the Navajo Nation's political and legal systems? How, in turn, have the functions of Navajo sovereignty been affected? Those functions include concerns of practical governance, such as providing economic opportunities and peace and security, as well as the more elusive expressive aspects associated with preserving a distinct and endemic culture.

Providing a narrative of sovereignty is particularly salient now

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<sup>8</sup> 541 U.S. 193, 213-26 (2004) (Thomas, J., concurring).

<sup>9</sup> *Id.* at 216-19.

<sup>10</sup> Testimony of Honorable Chief Justice Robert Yazzie of the Navajo Nation Before the U.S. Senate Committee on Indian Affairs Regarding the Impact and Affect of the Recent Supreme Court Decisions on Navajo Sovereignty 4 (Feb. 27, 2002), available at [http://indian.senate.gov/2002hrsgs/022702trust/022702scourt\\_wit.htm](http://indian.senate.gov/2002hrsgs/022702trust/022702scourt_wit.htm) [hereinafter Testimony of Chief Justice Yazzie].

due to the active role that the Supreme Court is taking in defining tribal governmental powers. The Supreme Court has granted certiorari on a surprisingly disproportionate number of Indian law cases during the last several decades.<sup>11</sup> The Court's recent decisions in these cases have left scholars with ample questions concerning the constitutional<sup>12</sup> and common law<sup>13</sup> underpinnings of the Court's reasoning, and much scholarly attention has been devoted to addressing these questions. The cases have also left scholars and tribal advocates with the more practical problem of how to respond to the Court's narrowing of tribal powers.<sup>14</sup> The Court's activity and the legal and practical questions it raises highlight the need for an engaged discussion about what tribal sovereignty is in practice, how it is affected by Supreme Court decisions, and why it matters. Virtually no scholarship has addressed these questions directly.<sup>15</sup> As Phil Frickey has noted,

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<sup>11</sup> 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, 292 (2001) (noting that in the last four decades, the Supreme Court has decided a "surprisingly high percentage of Indian cases"); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1268-72 (2001) (discussing and charting the number of Indian law cases decided since 1991).

<sup>12</sup> See L. Scott Gould, *Tough Love for Tribes: Rethinking Sovereignty After Atkinson and Hicks*, 37 NEW ENG. L. REV. 669, 674-75 (2003) (arguing that the absence of constitutional underpinnings to tribal inherent sovereignty explains the Supreme Court's reluctance to recognize tribal control over non-members); Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 657-59 (2003) (asserting that inherent tribal sovereignty is recognized and affirmed in the Constitution); David E. Wilkins, *A Constitutional Confession: The Permanent If Malleable Status of Indigenous Nations*, 37 NEW ENG. L. REV. 473, 482 (2003) (discussing uncertainties in tribal status that stem in part from contradictory constitutional rulings with respect to tribes).

<sup>13</sup> See generally 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); Getches, *supra* note 11.

<sup>14</sup> See Gould, *supra* note 12, at 691-92 (suggesting a congressional fix that would restore tribal territorial sovereignty in exchange for tribes incorporating many aspects of the U.S. Constitution into their governmental structure); Frank Pommerheim, *Is There a (Little, or Not So Little) Constitutional Crisis Developing in Federal Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271, 284-85 (2003) (proposing congressional restoration of tribal inherent powers and, ultimately, a constitutional amendment protecting sovereignty); see also Singer, *supra* note 12, at 667 (stating that the Supreme Court should stop unilaterally divesting tribes of inherent powers; any perceived unfairness to non-members should be redressed by Congress, which has the power to require federal judicial review of tribal court decisions).

<sup>15</sup> See Robert B. Porter, *Cleaning Up the Colonizer's Mess: An Important Role for Legal Scholarship About the Indigenous Nations*, 50 U. KAN. L. REV. 431, 432 (2002) (noting dearth of legal scholarship about indigenous nation law and

"One major piece that is missing in the law review writing is a narrative of success . . . . Scholars need to educate the federal courts—as well as ourselves—that tribal self-government can prosper in the twenty-first century in ways that are efficacious and appropriate."<sup>16</sup> Otherwise, the impression will continue in the minds of some members of the Court and many members of the public that tribal sovereignty is nothing more than an inconsistent, paradoxical legal shell that American case law has constructed. To fill in this problematic gap in understanding, this Article examines how the Navajo Nation has both adapted to and resisted federal decisions and, in the process, forged its own unique responses to the question of the significance of tribal sovereignty. Emerging from this localized study is a theory of American Indian tribal sovereignty grounded in the law as well as the life of tribes.<sup>17</sup> Such a theory should be more useful than the oft-criticized legal doctrine of tribal sovereignty<sup>18</sup> for assessing whether to perpetuate or curtail the separate political existence of Indian nations.

Part I of this Article describes legal and political developments in the Navajo Nation that relate to moments when the Supreme Court has redefined legal sovereignty. What emerges is a picture of a nation hard at work, enacting its sovereignty in creative ways. The Navajo Nation's adaptation and resistance to federal

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processes, and observing that the scholarship that has emerged tends to focus solely on tribal courts).

<sup>16</sup> Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf*, 38 TULSA L. REV. 5, 12 n.37 (2002).

<sup>17</sup> This Article is thus part of the emerging body of scholarship that heeds Frank Pommersheim's call to provide a reservation-based view of federal Indian law. See FRANK POMMERSEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 8 (1995); see also Bethany Berger, *Justice and the Outsider: Jurisdiction Over Non-Members in Tribal Legal Systems*, UNIV. CONN. SCHOOL OF LAW WORKING PAPERS 16 (2004) (examining Navajo Nation tribal court decisions involving non-tribal members), available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1015&context=uconn/ucwps> (last visited Feb. 18, 2005).

<sup>18</sup> See, for example, Getches, *supra* note 11, and Frickey, *supra* note 13, for articles critiquing the legal doctrine. In particular, Getches's and Frickey's analyses expose the worrisome absence of theory guiding the Court's decisions about legal doctrine. According to Getches, the Court's agenda in other areas of law fills its otherwise empty Indian law vessel. Getches, *supra* note 11, at 329; see also Singer, *supra* note 12, at 659-60 (observing the Court's inconsistent application of norms in the state/federal context and the tribal Indian law context). Justice Thomas's concurrence in *United States v. Lara* further highlights the problem of viewing tribal sovereignty solely through the lens of the Court's own definitions of it. 541 U.S. 193, 213-26 (2004) (Thomas, J., concurring).

law allows a distinctly Navajo political and cultural life to continue. Simultaneously, it is clear that the overlay of federal decisional law has a profound and at times confining effect on the Navajo Nation's ability to engage in meaningful self-governance.

In Part II, theories of American Indian tribal sovereignty are reconsidered. The unsatisfactory nature of legal sovereignty has led some scholars to suggest that sovereignty ought to be defined from the inside, by looking at what tribes are doing to protect what is essential about their cultures, rather than from the outside, by looking solely to the cramped and contradictory legal definitions of sovereignty that issue from the federal courts. The term "cultural sovereignty" has emerged to capture the project of theorizing about tribal sovereignty from the internal tribal perspective. Yet this study of the Navajo Nation indicates that part of what some tribes are doing to further cultural sovereignty is adapting to federal decisional law. The legal framework is inescapable and has constructed not just the avenues available to tribes for perpetuating their cultures, but aspects of tribal identity itself; the ability of tribes to define sovereignty internally depends on their adeptness at responding to legal rules issuing from the "[c]ourts of the conqueror."<sup>19</sup> This Article suggests that cultural theories of sovereignty on the one hand and doctrinal definitions of sovereignty on the other are both enriched by experiential accounts, like this one of the Navajo Nation, that describe the relationship between the two. Without understanding the significance of cultural sovereignty, reforming the legal doctrine of sovereignty runs the risk of becoming a dry exercise in formalism. And a theory of cultural sovereignty that does not account for the role of federal Indian law erects an artificial barrier between culture and law that risks obscuring the effects of legal doctrine on tribal cultural survival.

Part III applies the lessons from the Navajo, and the experiential theory of tribal sovereignty, to various suggestions concerning the direction the federal law ought to take if protecting tribal existence is one of its goals. Solutions to the problem of the Supreme Court's redefinition of legal sovereignty should account for the diversity in the ways Indian tribes enact their sovereignty on the ground. And any solution should have sufficient elasticity to allow Indian tribes to adapt legal sovereignty to serve the purpose of perpetuating their unique and irreplaceable cultures.

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<sup>19</sup> *Johnson v. McIntosh*, 21 U.S. 543, 588 (1823).

## I

THE NAVAJO NATION: A CASE STUDY IN  
ENACTING SOVEREIGNTY

The Navajo Nation is one of the most studied tribes. Academics, journalists, and others are drawn to the Diné<sup>20</sup> homeland, located in the four corners area of the Southwest, for a variety of compelling reasons. It is the Indian nation with the largest land base; Navajo Indian country comprises twenty-seven thousand square miles,<sup>21</sup> or roughly seventeen million acres, which is slightly larger than West Virginia and comparable in size to Ireland. It is also the second-most populous Indian nation, with 298,197 tribal members, 168,000 of whom reside in Navajo Indian country.<sup>22</sup> For legal scholars, the Navajo Nation's highly active and developed tribal court system and substantial body of decisional law, including Navajo customary law, constitute a significant draw. For historians and anthropologists, the Navajo's resilience and consequent ability to maintain an intact yet ever-evolving culture provide ample fodder for study. And for all of these reasons and more, the Navajo Nation is an interesting and unique place to spend time. In addition, with respect to this study in particular, access to research materials such as council resolutions and minutes, interviews with key participants in the Navajo legal system, and other intangibles making research possible were facilitated by my familiarity with the place and at least some of its players.<sup>23</sup>

First, a brief word on methodology is called for. The primary sources reviewed for this study included legal documents (comprising tribal council resolutions and minutes as well as tribal case law), periodicals, tax department documents, and other ma-

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<sup>20</sup> Diné is the word in the Navajo language that the Navajo use to refer to themselves.

<sup>21</sup> See Navajo Nation Washington Office, at <http://www.nnwo.org/nnprofile.htm> (last visited Feb. 11, 2005).

<sup>22</sup> U.S. Census Bureau, Summary File 4, at [http://www.census.gov/Press\\_Release/www/2003/SF4.html](http://www.census.gov/Press_Release/www/2003/SF4.html) (last visited Feb. 18, 2005).

<sup>23</sup> I spent three years, from 1993-96, working for DNA-People's Legal Services in Tuba City, Navajo Nation. DNA is a non-profit organization that has provided free legal services to low-income residents of the Navajo and Hopi Nations as well as some surrounding areas since 1968. From 1996-1999, through my work as the director of the Indian Law Clinic at the University of Colorado School of Law, I continued to represent Navajo families in cases involving equal access to education. In addition, the Clinic assisted the Navajo Nation Supreme Court by providing law clerks to research cases and draft bench memoranda.

terial relevant to how the Navajo Nation has reacted to Supreme Court decisions defining the contours of tribal sovereignty from the period between 1970 and 2003. In addition, I interviewed key participants in the Navajo legal and political systems. During many of the interviews, it was clear that there is an aspect of tribal sovereignty that is expressive for tribal members. They feel deeply that sovereignty matters, and that any unilateral incursions by the Supreme Court are an affront to justice, or even survival, for Indian people. While it is hard to quantify these expressions of sovereignty, they are an integral part of my conclusions concerning the centrality of tribal political sovereignty to the continued existence of Indian tribes as separate cultures. The study thus includes quantitative as well as qualitative elements in its attempt to assess the impacts of federal law on some of the core values that sovereignty, by almost any definition, is intended to protect.<sup>24</sup> Those values include providing peace and security, developing economic opportunities, and allowing for the expression of social, cultural, and linguistic patterns.<sup>25</sup> While this study is no doubt incomplete in some respects, it provides thorough information about legal responses to federal decisions, and makes a concerted effort to explain, at least partially, how the legal responses relate to Navajo life and culture. We know for certain, for example, how much revenue the Navajo Nation receives from taxation. We also know, in only the uncertain way that these things can ever be known, that Navajo identity is bound up with the separate political existence of the Navajo Nation.

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<sup>24</sup> There is a vast, argumentative literature regarding the appropriate justification for national sovereignty. See, e.g., HINSLEY, *supra* note 4, at 16 (discussing moral coercion as the basis for state sovereignty); *id.* at 126-57 (discussing consent-based theories, including those of Hobbes and Locke); see also MARGARET CANOVAN, *THE POLITICAL THOUGHT OF HANNAH ARENDT* 68, 70 (1974) (summarizing Arendt's view that the notion of sovereignty is entirely incompatible with the ideal of democratic politics). Regardless of conflicting theories of the legitimacy of sovereignty, however, it is possible to canvass agreement concerning what "sovereignty" is intended to protect. See, e.g., HURST HANNUM, *AUTONOMY, SOVEREIGNTY, SELF-DETERMINATION* 4, 95 (1990) (domestic functions of sovereignty encompass the right to self-determination, which includes forging a political system, guiding economic and social development, and protecting cultural and religious values).

<sup>25</sup> See KIRKE KICKINGBIRD ET AL., *INDIAN SOVEREIGNTY* 1-2 (1977). Tribal definitions of sovereignty quoted in this volume include the inherent right to select a system of government; the power to govern in ways that meet the political, social, and cultural needs of the people; and the right to exist without external exploitation or interference. *Id.*; see also HANNUM, *supra* note 24, at 95.

Two brief overviews are necessary before getting into the details of the study conducted for this Article. First, because the legal definition of tribal sovereignty is a necessary prerequisite for understanding what tribal sovereignty is on the ground, an introduction to the federal law of tribal sovereignty is required. Second, some historical background regarding the emergence of the modern Navajo Nation is necessary to understand the legal and political nature of Navajo cultural identity.

A. *Legal Sovereignty: Introduction to the Framework of Federal Decisional Law*

American Indian tribes have a unique legal status. They are sovereign nations whose existence pre-dates the Constitution,<sup>26</sup> and yet they have been folded into the United States and its domestic legal framework through a series of court decisions and other legislative and political acts. Indian tribes have also been subject to fluctuating federal policies regarding their right to exist as separate sovereigns, sometimes with effects that long outlive the federal policies themselves. The two most serious examples of such effects include the lingering consequences of the divestiture of Indian lands<sup>27</sup> and the inter-generational impacts of the break-up of Indian families and other efforts to eradicate Indian languages and cultures.<sup>28</sup> Both of these policies were ascendant during the allotment period at the end of the nineteenth century,<sup>29</sup> and yet have cultural and legal repercussions on tribal self-governance today. It is therefore difficult and artificial to summarize the domestic legal status of tribes by looking solely to

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<sup>26</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).

<sup>27</sup> See generally Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L. J. 1 (1995).

<sup>28</sup> See Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy In Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 776-805 (1997) (recounting educational and other policies that enlisted religious assistance to assimilate American Indians) [hereinafter Dussias, *Ghost Dance*]; Allison M. Dussias, *Waging War With Words: Native Americans' Continuing Struggle Against the Suppression of Their Languages*, 60 OHIO ST. L.J. 901, 905-21 (1999) (describing policies aimed at eliminating Native language and culture) [hereinafter Dussias, *Waging War With Words*].

<sup>29</sup> See Royster, *supra* note 27, at 9 (summarizing philosophy and practices of the allotment era). Royster aptly observes: "Despite the 'flat, miserable failure' of previous experiments in allotment, advocates of the policy believed that individual ownership of property would turn the Indians from a savage, primitive, tribal way of life to a settled, agrarian, and civilized one." *Id.* (citations omitted).

the Supreme Court and its pronouncements. Yet because the Supreme Court has taken such an extraordinarily active role in defining that status lately, it is nonetheless necessary to focus on the Court's definitions of tribal self-governance.

Justice John Marshall made the first foray into defining the domestic legal status of American Indian tribes. In a trilogy of cases decided in the 1820s and 1830s, Justice Marshall held that Indian tribes are subject to the greater power of the federal government with respect to the disposition of property,<sup>30</sup> that Indian tribes do not have the status of foreign nations,<sup>31</sup> and that Indian tribes nonetheless retain their pre-constitutional powers of self-governance over their members and their territory, subject only to the superior power of the federal government, and not to that of states.<sup>32</sup> The status of tribes as separate sovereigns was affirmed in two cases toward the end of the nineteenth century. Both cases involved criminal matters. In *Ex Parte Crow Dog*, the Court held that tribes have exclusive jurisdiction over criminal acts committed by Indians against Indians within a tribe's reservation boundaries.<sup>33</sup> In *Talton v. Mayes*, the Court determined that tribes were not required to provide Fifth Amendment grand jury proceedings in criminal cases because tribal governmental authority predates the Constitution and therefore is not subject to restraints contained in the Bill of Rights.<sup>34</sup> One final nineteenth century case sets the backdrop of decisional law with respect to tribal self-governance. In *United States v. McBratney*, the Court held that states have criminal jurisdiction over non-Indians who commit crimes against non-Indians within the boundaries of an Indian reservation.<sup>35</sup> Based on these cases, at the dawn of the twentieth century, federal Indian law embodied the following principles: American Indian tribes are sovereign governments subject to the greater power of the federal government but not that of individual states; tribes thus lack the status of foreign nations and are unable to engage in foreign diplomacy; but tribes, as pre-constitutional sovereigns, have authority over their internal affairs, subject to a very narrow exception for crim-

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<sup>30</sup> *Johnson v. McIntosh*, 21 U.S. 543, 585 (1823).

<sup>31</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 38 (1831).

<sup>32</sup> *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

<sup>33</sup> 109 U.S. 556, 559 (1883).

<sup>34</sup> 163 U.S. 376, 384 (1896).

<sup>35</sup> 104 U.S. 621, 624 (1881).

inal matters between non-Indians.<sup>36</sup>

The Supreme Court decided a very significant federal Indian law case at the beginning of the next century. In *Lone Wolf v. Hitchcock*, the Court deferred to what it called the “plenary authority”<sup>37</sup> of Congress, and refused to subject to judicial scrutiny a congressional act that unilaterally abrogated a tribe’s treaty rights.<sup>38</sup> The Kiowa tribe’s treaty included a provision that prohibited further land cessions by the tribe unless consented to by a supermajority of tribal members.<sup>39</sup> Congress nonetheless enacted a statute mandating the allotment of the Kiowa reservation. The *Lone Wolf* decision has been heavily criticized both for its dubious reasoning<sup>40</sup> and its harsh consequences.<sup>41</sup> As to the latter, after briefly summarizing the devastating effects of allotment policies on tribes, Phil Frickey concludes that “allotment vividly documents that *Lone Wolf* [sic] has two key facets. First, it concerns the attribution of a dangerous, unchecked power to Congress, authority that seems inconsistent with the rule of law. Second, it involved the use of that power for misbegotten purposes with disastrous consequences.”<sup>42</sup> The former consequence, the unchecked power to Congress, has not yet been redressed in the law, and thus exacerbates the already troubled concept of tribal sovereignty. Indian tribes, according to Justice Marshall, became subordinate to the superior power of the federal government by virtue of colonization.<sup>43</sup> And less than a century later in *Lone Wolf*, the Court found that the nature of this colonized state is subject to the sole discretion of the legislative branch.<sup>44</sup> What kind of sovereignty can it be that depends, for its continued existence, on the pleasure of a branch of government of another nation? This question has plagued scholars for some

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<sup>36</sup> See CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 24-25 (1987).

<sup>37</sup> 187 U.S. 553, 565 (1903).

<sup>38</sup> *Id.* at 564.

<sup>39</sup> *Id.* at 568.

<sup>40</sup> See generally Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195 (1984) (providing critical historical review of origins of plenary power doctrine).

<sup>41</sup> See Frickey, *supra* note 16, at 6-7.

<sup>42</sup> *Id.* at 7.

<sup>43</sup> *Worcester v. Georgia*, 31 U.S. 515, 559 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

<sup>44</sup> For a lengthy essay critiquing the constitutional underpinnings of the plenary power doctrine, see generally Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002).

time, and now has been raised by a member of the Supreme Court.<sup>45</sup>

Notwithstanding the potential fragility, as a legal matter, of tribal sovereignty as the allotment period came to a close, the Supreme Court did not weigh in significantly on matters of tribal self-governance for the next fifty years.<sup>46</sup> During that time, allotment policies were abandoned, and the executive and legislative branches generally supported policies of tribal self-determination.<sup>47</sup> Still, allotment resulted in complicated land patterns and, in some cases, unclear reservation boundaries, leaving some lower courts and scholars to question whether the framework of tribal sovereignty continued to exist.<sup>48</sup> As Charles Wilkinson has noted, the lower court cases led one commentator, writing in 1959, to query whether Indian tribal sovereignty "has been pure legal fiction for decades."<sup>49</sup>

As it turned out, the Supreme Court addressed the question of the continued vitality of tribal sovereignty that same year. In *Williams v. Lee*, the Court clarified that tribal sovereignty was not legal fiction, at least no more so than any other legal doctrine.<sup>50</sup> *Williams* involved a lawsuit against Navajo tribal members by a non-Indian trader. The trader filed a collection action against the tribal members in Arizona state court. The Court held that state courts lack jurisdiction over matters involving Indian defendants that arise within an Indian tribe's reservation boundaries, even when the plaintiff is non-Indian.<sup>51</sup> The Court weighed in firmly on the side of a presumption in favor of tribal self-governance against the intrusions of state law into Indian

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<sup>45</sup> See *United States v. Lara*, 541 U.S. 193, 215 (2004) (Thomas, J., concurring) (questioning whether tribal sovereignty persists notwithstanding the contradictory premises that lie at the core of the Court's doctrine). While most of the scholarly criticism points in the direction of limiting federal plenary power as the solution to this paradox, Justice Thomas suggests that another solution would be to eliminate tribal inherent sovereignty. See *id.* at 218-19.

<sup>46</sup> WILKINSON, *supra* note 36, at 23-31 (noting that the Supreme Court decided a handful of cases at the end of the nineteenth and beginning of the twentieth centuries, but most of the action up until 1959 was in lower federal courts or state courts).

<sup>47</sup> The termination era was a brief, and to tribes, frightening exception to this trend. See VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE*, 15-20 (1983) (discussing the termination era policies from 1945-1961).

<sup>48</sup> See WILKINSON, *supra* note 36, at 26-27 (noting that both courts and scholars voiced skepticism regarding independent powers of tribal self-governance).

<sup>49</sup> *Id.* at 27 (citing Robert W. Oliver, *The Legal Status of American Indian Tribes*, 38 OR. L. REV. 193, 231 (1959)).

<sup>50</sup> 358 U.S. 217, 219 (1959).

<sup>51</sup> *Id.* at 223.

country, concluding that “absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”<sup>52</sup>

After *Williams*, there was a gap of a little over a decade before the Court revisited Indian law again in a serious way. It has been largely from the early 1970s on that the Court has refined the contours of tribal sovereignty. On one end of the spectrum, the Court has affirmed and strengthened the inherent sovereign authority of tribes. These cases, which I will refer to as Category A, include ones in which the Court recognizes inherent tribal powers to govern tribal members or non-members as well as those in which the Court has held that states lack power to regulate the activities of tribal members or non-members within Indian country. *Williams*, for example, fits both of these descriptions. It recognized the inherent powers of tribes to regulate the conduct of those, including non-members, who engage in commercial transactions within a tribe’s reservation boundaries, and also held that the state could not extend its laws into Indian country, even by way of a state’s judicial decisions, absent clear congressional authorization.<sup>53</sup>

On the other end of the spectrum, the Court has limited tribal governmental authority in two ways. In Category B cases, the Court has allowed greater and more intrusive forms of state regulation within Indian country. In Category C cases, the Court has limited tribal authority over non-members in Indian country. Almost all of the Supreme Court decisions that might have some direct effect on tribal governance fit within these three categories.<sup>54</sup> In Part I.C., the cases within each category will be consid-

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<sup>52</sup> *Id.* at 220.

<sup>53</sup> *Id.* at 223.

<sup>54</sup> I add the caveat “almost” because there certainly are some cases that do not address tribal powers head-on that nonetheless have impacts on tribes and their abilities to govern. For example, the Supreme Court recently decided two cases in which tribes sued the federal government alleging violations of the federal trust obligation. See *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (finding in favor of the tribe in a matter involving federal trust obligation to maintain physical property); *United States v. Navajo Nation*, 537 U.S. 488 (2003) (holding that the Indian Mineral Leasing Act does not impose trust obligation such that federal government is financially liable to tribe for behavior by government officials that was alleged to have blatantly undermined tribal interests). While these cases may have fairly substantial effects on tribal economic health, and in that sense impact tribal self-governance, they are primarily about limitations, or their absence, on federal governmental behavior rather than tribal governmental behavior. Thus

ered in terms of how they have impacted the Navajo Nation.

*B. Historical Background of the Navajo Nation*

The history of the Navajo people is a story of constancy and change. The most significant constant is that of place. Place is central to Navajo culture and identity, and understanding the modern Navajo Nation necessitates an understanding of the interconnectedness between the Diné and their land base.<sup>55</sup> Historian Peter Iverson begins his informative history of the Navajo with an overview of the Navajo origin story.<sup>56</sup> He does so in order to emphasize that the Navajo literally come into being, in terms of defining themselves as a distinct people, through a relationship to their homeland. Another crucial place-based story for the Navajo is the narrative of their forced march away from their homeland, the "Long Walk," and their eventual triumphant return in 1868 after surviving imprisonment in the Bosque Redondo in New Mexico.<sup>57</sup>

Recognizing the Navajo as a people who self-define through attachment to place rather than solely through lineal descent is one key to understanding the political nature of Navajo identity, which has been forged by adaptation and change.<sup>58</sup> The indispensable constant in historical times has been connection to the beautiful, sparse, dry, and wind-swept landscape between the Navajo's four sacred mountains. With identity firmly rooted in place, the Navajo have been otherwise free to incorporate other people, their traditions, their economic practices, and still remain Navajo.<sup>59</sup> The political nature of Navajo identity reinforces the significance of the tribe's sovereignty; without the status of a sov-

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these cases, and others with similarly limited relevance to the particular issues of this study, were not examined in terms of their impacts on tribal self-governance.

<sup>55</sup> See PETER IVERSON, *DINÉ: A HISTORY OF THE NAVAJO* 5, 7-8 (2002).

<sup>56</sup> *Id.* at 8-12.

<sup>57</sup> See *id.* at 8, 51-53.

<sup>58</sup> Iverson puts it this way:

The Navajos' vibrant culture has never stood still. Through time it has demonstrated that it is through contact with others that a community truly enjoys vitality. All along the way, the Diné have incorporated new elements, new peoples, and new ways of doing things . . . In time, whether it be a so-called squash blossom necklace or a modern sport called basketball, it will not matter where it came from. It becomes Navajo.

*Id.* at 6.

<sup>59</sup> *Id.* "Through the centuries Navajos have brought in all sorts of other folks—Puebloans, Apacheans, and others—and, in time, made them, or their children or their children's children, into Diné." *Id.*

ereign, the Navajo Nation would not be able to protect the distinct evolving nature of Navajo culture. The constancy of place leaves room for the changing nature of what is still distinctly Navajo.

Regarding the Navajo origin story, oral histories describe a transition from the first world to the third world that in some respects tracks the story of evolution.<sup>60</sup> The final transition is to the fourth, or glittering, world, which is the site of present day Navajo land. The land is identified by the four sacred mountains at the perimeter: Blanca Peak in Colorado in the East, Mount Taylor in New Mexico in the South, the San Francisco Peaks in Arizona in the West, and Hesperus Peak in Colorado in the North. The fourth world represents the period of increased contact between Athabaskan people and people of Puebloan heritage.<sup>61</sup> From the outset, Navajo identity was forged through the consensual melding of various cultures, for it is in the fourth world that the Navajo emerge as a mature and distinct people.<sup>62</sup> The Navajo origin story itself defines the Diné at a moment of adaptation.

In this respect, the historical record affirms the Navajo origin story. For many years, the historical orthodoxy was that the Navajo, Apache, and other tribes whose languages are Athabaskan arrived in the Southwest in the late 1400s or early 1500s, and then displaced the Puebloan peoples who had arrived earlier.<sup>63</sup> Any Navajo adaptation of Pueblo artifacts or culture was seen derisively as stealing from people who had been there before. Many modern historians, however, have a more nuanced explanation of the arrival of the Navajo and other Athabaskan peoples. First, the date of arrival of the Navajo and Apache has been called into question, with some suggesting that it could be as early as the 1100s or 1200s.<sup>64</sup> Second, the melding of cultural and economic practices was often voluntary, as groups of individuals joined the Athabaskan-speaking people who became,

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<sup>60</sup> See *id.* at 8, 11; see also RAYMOND FRIDAY LOCKE, *THE BOOK OF THE NAVAJO* 55-136 (1976) (recounting the Navajo creation story). Animal complexity increases with each transition to a new world, thus loosely tracking Darwinian evolution.

<sup>61</sup> IVERSON, *supra* note 55, at 12; see also LOCKE, *supra* note 60, at 129-36 (noting that the Navajo clans emerge from Zuni, Apache, Pueblo, and Ute peoples' joining the Diné).

<sup>62</sup> See IVERSON, *supra* note 55, at 14; LOCKE, *supra* note 60, at 56.

<sup>63</sup> See IVERSON, *supra* note 55, at 13-15.

<sup>64</sup> See *id.* at 16.

through this process of mutual infusion, Navajo.<sup>65</sup> The Navajo were not a distinct, separate group who came from the north as a blank cultural slate to steal from others.<sup>66</sup> Rather, the people who emerged as Navajo by the fifteenth century were a blend of Athabaskan, Puebloan, and other peoples: "Those who joined or became part of the Navajos brought ideas, knowledge, and material items with them. The expansion of the Diné cultural repertoire therefore came about through infusion of new people rather than by borrowing or duplication."<sup>67</sup> The story of the fourth world includes this narrative of becoming Diné through blending with others.<sup>68</sup>

The mutual infusion model continued after the arrival of Europeans. When the Spanish came to the Rio Grande Valley in what is now New Mexico, they brought horses, goats, sheep, and cattle, all of which have since become integral to the traditional Navajo way of life. Sheep, in particular, have a talismanic place in Navajo culture; sheep have been identified with motherhood and, therefore, with the very core of perpetuating Navajo existence.<sup>69</sup> There are sheep on the Navajo Nation flag. "Sheep is Life," has become the phrase that embodies the centrality of sheep to Navajo livelihood.<sup>70</sup> As Bethany Berger notes, sheep butchering is one of the categories that young Navajo women must master to compete for the title of Miss Navajo Nation.<sup>71</sup> In the world of pan-Indian humor, jokes about Navajo and mutton

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<sup>65</sup> See *id.* at 13-21.

<sup>66</sup> See *id.* at 14 (concluding that at a minimum there is "sufficient uncertainty . . . that we have every right to be skeptical about orthodox archaeological accounts in which Navajos arrive essentially intact as a linguistic community, but curiously empty-handed otherwise").

<sup>67</sup> *Id.* at 19.

<sup>68</sup> See LOCKE, *supra* note 60, at 129-36.

<sup>69</sup> See IVERSON, *supra* note 55, at 23 ("Sheep, goats, horses, and cattle were all central to the evolution of Diné society and economy, but from the beginning, the sheep mattered most."); see also *id.* (quoting an attendee at the "Sheep is Life" conference: "My mother taught us that the sheep is our mother. They will care for you."). Betty Reid, a reporter for the *Arizona Republic*, put it this way, "It tickles my non-Navajo friends in Phoenix to think I tend sheep some weekends. What they don't know, and I can't describe for them, is how much the sheep are still part of me and have been the focus of Navajo life for generations." Betty Reid, *Returning to the Flock: Family Sheep Camp Remains a Big Part of Writer's Navajo Tradition*, ARIZ. REPUBLIC, May 9, 1999, at A1, available at <http://www.azcentral.com/news/reid/sheepherding.shtml>.

<sup>70</sup> IVERSON, *supra* note 55, at 23; see generally JOHN J. WOOD ET AL., "SHEEP IS LIFE": AN ASSESSMENT OF LIVESTOCK REDUCTION IN THE FORMER NAVAJO-HOPI JOINT USE AREA (1982).

<sup>71</sup> Berger, *supra* note 17, at 99.

abound.<sup>72</sup> And Navajo comedian Vincent Craig has created the cartoon "Mutton Man," which chronicles the life of a typical Navajo kid and his family and friends, and includes tales of boarding school life and other Navajo trials and tribulations.<sup>73</sup> The integration of sheep into Navajo life is emblematic of the *modus operandi* of Navajo adaptation and identity creation; a European introduction has become central to Diné culture.

The Spanish-Mexican influence continued until the Mexican-American War and the Treaty of Guadalupe Hidalgo in 1848, which transferred the governance of most of the West from Spain to the United States. The Spanish-Mexican period was not without its violent clashes. The Navajo were perceived as a persistent, recalcitrant problem by many within the colonial leadership.<sup>74</sup> But the mutual infusion of cultures occurred alongside attempts at colonial rule. In addition to incorporating livestock, the Navajo adopted designs and techniques for weaving and silver-smithing that would become as inherent to their material culture as sheep.<sup>75</sup> In addition, Pueblo peoples fleeing Spanish persecution intermixed with and became Navajo, bringing agricultural knowledge as well as religious and social practices.<sup>76</sup> Thus, notwithstanding the many difficulties of the period from the sixteenth through the mid-nineteenth century for the Navajo,<sup>77</sup> it was also a time of continued growth and consolidation of the Navajo identity. By 1848, the Navajo had become a "people who mattered."<sup>78</sup>

But being "a people who mattered" under U.S. colonial rule was not necessarily a good thing. The Navajo's growing population, dispersed leadership, and at times aggressive behavior toward their Indian and non-Indian neighbors made them the bane

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<sup>72</sup> For example, the following appears on a Native American humor website: "You might be a Navajo Jedi if . . . You discover that Ewoks taste like mutton." Native American Jokes and Humor, at <http://home.att.net/~native-jokes/page21.html> (last visited Feb. 18, 2005).

<sup>73</sup> The *Navajo Times* runs the Mutton Man comic strips, which I used to read regularly when I lived in Tuba City.

<sup>74</sup> See IVERSON, *supra* note 55, at 24-32.

<sup>75</sup> *Id.* at 32, 24 (describing introduction of indigo dye, red fabric, and looms); *id.* at 33 (documenting access to broader markets for Navajo weaving).

<sup>76</sup> See EDWARD H. SPICER, *CYCLES OF CONQUEST: THE IMPACT OF SPAIN, MEXICO, AND THE UNITED STATES ON THE INDIANS OF THE SOUTHWEST, 1533-1960*, at 212 (1962).

<sup>77</sup> See IVERSON, *supra* note 55, at 24-32 (noting that hardships included slavery and violent suppressions).

<sup>78</sup> *Id.* at 33.

of the Arizona and New Mexico territorial governments. After the Civil War settled the question of slavery and therefore opened the West for expansion, the pressure to make the area "safe" for railroads, miners, and homesteaders increased. From 1846 through 1860, the relationship between the Navajo, the military, and the territorial governments was unsteady, fluctuating between violence and attempts at treaties.<sup>79</sup> By the early 1860s historical forces converged to result in a policy of deliberate removal of the Navajo from their homeland in order to "civilize" them and settle the territory.<sup>80</sup>

From 1863-1866, the United States undertook a military campaign aimed at destroying Navajo livelihood in order to force the people off the land and remove them to an area known as the Bosque Redondo at Fort Sumner in New Mexico. Led by Kit Carson, the campaign was brutal and included actions such as destroying orchards, burning cornfields, filling in water sources, and exterminating Navajo who were too old or weak to endure the forced march of several hundred miles.<sup>81</sup> The process of forcibly removing Navajo people from their homeland took several years and entailed at least fifty-three different episodes of herding tribal members to the Bosque.<sup>82</sup> Not all Navajo were removed. Several thousand Navajo, particularly in the remote and rugged areas of Black Mesa and Navajo Mountain, managed to evade the soldiers.<sup>83</sup> Others chose to end their lives rather than leave.<sup>84</sup> Most, however, were rounded up and led on foot to the sparse land along the Rio Grande that became, to them, a prison. This period has become known to Navajo as the "Long Walk," in much the same way that the lengthy campaign to remove the Cherokee from their eastern homelands to the Indian Territory became known as the "Trail of Tears."

The Long Walk and its aftermath of imprisonment at the Bosque have become integral to Navajo identity. The experience of hardship and suffering, and the emergence to return to the Navajo homeland under the terms of the Treaty of 1868, are foundational Diné narratives.<sup>85</sup> That the treaty secured at least a

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<sup>79</sup> *Id.* at 37-46

<sup>80</sup> *Id.* at 48-51.

<sup>81</sup> *Id.* at 51-57.

<sup>82</sup> *Id.* at 52.

<sup>83</sup> *Id.* at 57

<sup>84</sup> *Id.* at 55.

<sup>85</sup> *See id.* at 64-65.

part of the Navajo's land base was a major triumph, given that the Indian policy at the time heavily encouraged removal of all Indians to the Indian Territory.<sup>86</sup> And the Long Walk, imprisonment, and the treaty negotiations solidified the Navajo as a single people. As Peter Iverson observes, the Navajo "had learned as they went through so much with each other, that they had much in common. The U.S. government had insisted on dealing with them as one people, and this era had increased their own sense of themselves in this way."<sup>87</sup>

For these reasons, the Treaty of 1868 bears a similar emotional place in Navajo history to that of the Declaration of Independence in the history of the United States. The treaty marks Navajo liberation from imprisonment, return to the Navajo homeland, and embodies the promise of a perpetual separate existence.<sup>88</sup> The significance of 1868, the year of the treaty, is elegantly embodied in a poetry collection by Navajo writer Sherwin Bitsui. The collection includes three poems of import here. The first, entitled *Asterisk*, begins "Fourteen ninety-something, *something* happened."<sup>89</sup> The third, *Atlas*, includes the question "How many Indians have stepped onto train tracks, hearing the hoof beat of horses in the bend above the river rushing at them like a cluster of veins scrawled into words on the unmade bed?"<sup>90</sup> Sandwiched between the two is a poem, the entire text of which consists of the numbers "1868" on an otherwise blank page.<sup>91</sup>

The land set aside for the Navajo in the 1868 Treaty was, however, only a fraction of the territory the Navajo considered home. Over time, through a series of executive orders, the Navajo reservation was expanded until it reached its current size with the last addition in 1934.<sup>92</sup> Also over time, the Navajo Nation's political system evolved to reach its current unique balance between Anglo-American tri-partite government and traditional Navajo structures and laws.<sup>93</sup>

The period from 1868 to 1930 entailed restructuring Navajo

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<sup>86</sup> See *id.*

<sup>87</sup> *Id.* at 64.

<sup>88</sup> See *id.* at 3.

<sup>89</sup> See Sherwin Bitsui, SHAPESHIFT 3 (2003).

<sup>90</sup> *Id.* at 6-7.

<sup>91</sup> *Id.* at 5.

<sup>92</sup> PETER IVERSON, THE NAVAJO NATION 14-15 (Univ. of N.M. Press 1983) (1981); see also IVERSON, *supra* note 55, at 72.

<sup>93</sup> See Tom Tso, 1992 Navajo Nation Code of Judicial Conduct: Moral Principles, Traditions, and Fairness in the Navajo, 76 JUDICATURE 15, 16 (1992) (summarizing

government and the nation's being reintroduced to the U.S. economy.<sup>94</sup> Significant events in terms of the system of law and order included the installation of courts overseen by the Bureau of Indian Affairs in 1892.<sup>95</sup> Initially known as "C.F.R." courts, and then as the Court of Indian Offenses, these tribunals were intended to serve an assimilative role, enforcing matters such as the prohibition on tribal customs.<sup>96</sup> The first Navajo-wide governing body was also introduced during this period. In 1923, in order to facilitate oil and gas extraction from the reservation, the Department of the Interior initiated the creation of the Navajo Tribal Council.<sup>97</sup> While initiated by the Department, and fairly limited in terms of its governmental powers, the Council nonetheless created an important forum for influential Navajo leaders to meet and consider the collective future of their people.<sup>98</sup> Indeed, in the face of the next serious challenge to Navajo dignity and survival, the Navajo increased their control over the Tribal Council. In the late 1920s and early 1930s, the poor condition of the range and the desire of non-Indians to have greater access to Navajo lands resulted in the Navajo stock reduction program.<sup>99</sup> The federal policies of forcibly removing and slaughtering Nav-

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history of Navajo Nation judicial system and gradual evolution reincorporating Navajo customary law).

<sup>94</sup> See IVERSON, *supra* note 55, at 97-136; see also Michael D. Lieder, *Navajo Dispute Resolution and Promissory Obligations: Continuity and Change in the Largest Native American Nation*, 18 AM. INDIAN L. REV. 1, 23 (1993).

<sup>95</sup> See Tso, *supra* note 93, at 16; Honorable Robert Yazzie, "Life Comes From It": *Navajo Justice Concepts*, 24 N.M. L. REV. 175, 177 (1994).

<sup>96</sup> See Tso, *supra* note 93, at 16. The Courts of Indian Offenses "were administrative bodies of the U.S. government designed to destroy Indian cultural practices and educate Indians in the methods of American justice." Nonetheless, the Navajo judges appointed to these positions were often able to incorporate Navajo principles of decision making. *Id.*

<sup>97</sup> IVERSON, *supra* note 55, at 134.

<sup>98</sup> See *id.* at 134-35. Iverson notes that:

It is certainly fair to conclude that the Council was created not to protect or to assert Navajo sovereignty, but to provide a stamp to approve leases and other forms of exploitation. Nevertheless, the creation of the Council is a significant landmark—not so much for what the Council did as for what it would become.

*Id.* at 134. Iverson also adds that:

Diné delegates began to demonstrate an interest in central questions that faced the people. They began, in many instances, to take a broader view of particular concerns. They began to see how the Council eventually might become a vehicle to express their views and to work for the benefit of all Diné.

*Id.* at 135.

<sup>99</sup> See *id.* at 187; WOOD ET AL., *supra* note 70.

ajo livestock enraged Navajo people. To many Navajo, it rivaled the Long Walk and imprisonment at the Bosque in terms of its inhumanity.<sup>100</sup> In response to the federally imposed livestock destruction, the Navajo people insisted on greater control of their government.<sup>101</sup>

Emerging from the period of livestock reduction and moving into the 1950s, the Navajo faced another threat to their way of life. From the late 1940s until the mid 1950s, Congress enacted measures intended to terminate the federal relationship with Indian tribes.<sup>102</sup> In order to fend off efforts at federal termination, which included assumption of civil and criminal jurisdiction by the states, the Navajo assumed greater control over their systems of law and order, and modeled them closely after Anglo systems.<sup>103</sup> As Stephen Conn notes in his illuminating study of this period, the Anglicization was quite deliberate.<sup>104</sup> In order to preserve control over the system, the Navajo Nation shrewdly capitulated on its form: "The Navajos were concerned with the establishment of a legal forum which would be accepted by those who would challenge the tribe's ability to govern."<sup>105</sup> The case of *Williams v. Lee* played a role as well.<sup>106</sup> Knowing that the Supreme Court would need assurance that debt collection actions could be brought in tribal court, Navajo tribal lawyers pushed reform measures before the tribal council.<sup>107</sup> In 1958, the Navajo Tribal Council created a Navajo judicial branch, and in 1959 abolished the Navajo Courts of Indian Offenses in order to establish that Navajo tribal courts from then on would be instrumentalities of the Navajo tribal government, and not of the Department of the Interior.<sup>108</sup> The Court's decision in *Williams* affirmed the exclusive jurisdiction of the tribal courts to hear matters by non-Indian plaintiffs against tribal member defend-

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<sup>100</sup> See IVERSON, *supra* note 55, at 153 ; see also WOOD ET AL., *supra* note 70, at 11.

<sup>101</sup> See Lieder, *supra* note 94, at 29 & n.131.

<sup>102</sup> DELORIA & LYTLE, *supra* note 47, at 10-20 (discussing termination policies of 1945-1961).

<sup>103</sup> See Stephen Conn, *Mid-Passage—The Navajo Tribe and Its First Legal Revolution*, 6 AM. INDIAN L. REV. 329, 332 (1978).

<sup>104</sup> *Id.* at 338-39.

<sup>105</sup> *Id.*

<sup>106</sup> 358 U.S. 217 (1959); see Conn, *supra* note 103, at 358; see also *supra* notes 50-53 and accompanying text (for discussion of *Williams*).

<sup>107</sup> See Conn, *supra* note 103, at 358-59.

<sup>108</sup> *Id.* at 359, 362.

ants, thus ensuring that these defensive maneuvers by the Navajo Nation were not futile. The Navajo Nation's defensive exercise in constructing its own legal system proved to be a savvy act of creative sovereignty, one that likely played a significant role in achieving the Supreme Court precedent, *Williams*, that would ensure the future of that same legal system.<sup>109</sup>

By the late 1960s, the period of termination had been put to rest. In 1970, President Nixon formally repudiated the legal policy of termination and initiated programs to shift responsibility for Indian programs from the Bureau of Indian Affairs to tribes.<sup>110</sup> The Indian Self Determination and Education Assistance Act, passed in 1975, authorized tribes to assume control over a variety of federally funded programs.<sup>111</sup> Due to the events of the late 1950s, the Navajo Nation was poised to take advantage of this new phase in federal policy. After establishing the court system, the Navajo Nation undertook a series of measures designed to reinforce the procedural and substantive fairness of the courts. In the 1960s, legal training was required for tribal members acting as advocates in tribal court.<sup>112</sup> In 1967 the Navajo Nation Tribal Council passed a Bill of Rights, guaranteeing due process, equal protection, and other individual rights and liberties.<sup>113</sup> In 1969, the Navajo Nation courts began publishing their written decisions, making the law accessible to all litigants appearing therein.<sup>114</sup> The Navajo Nation, more so than many other Indian nations, had the basic governmental structures in place to take advantage of the new federal support of tribal sovereignty.

### C. *Strands of Sovereignty in the Modern Era*

The foregoing basic introduction to the framework of federal Indian law and relevant background regarding the Navajo Nation sets the scene for this Article's analysis of how the Navajo Nation has enacted its sovereignty in the shadow of Supreme Court doc-

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<sup>109</sup> See *id.* at 358.

<sup>110</sup> H.R. Doc. No. 91-363, at 4-7 (1970) (enhancing tribal self-sufficiency through a more limited role for the Bureau of Indian Affairs (BIA) and other federal agencies).

<sup>111</sup> 25 U.S.C. §§ 450-458 (2000).

<sup>112</sup> See *Lieder*, *supra* note 94, at 42.

<sup>113</sup> Res. of the Navajo Tribal Council, CO-63-67 (Oct. 9, 1967) (codified at NATION CODE tit. 1, §§ 1-8 (Equity 1977)).

<sup>114</sup> See *Lieder*, *supra* note 94, at 5 n.13.

trine. The following sections analyze how the Navajo Nation's exercise of various attributes of sovereignty has been affected by Supreme Court decisions in the modern era. For reasons that track the substantive areas of the Supreme Court's cases as well as the different departments and functions of Navajo government, general civil regulatory and adjudicative authority, taxation, and criminal authority are considered separately. Because the Supreme Court's cases regarding tribal powers occasionally impact more than one substantive area, however, there is some cross-referencing and overlap with regard to the discussion of the Court's doctrine. To the extent that it is both possible and helpful, the cases that affirm tribal sovereignty either by recognizing tribal inherent powers or limiting state jurisdiction in Indian country (Category A cases), the cases that allow concurrent state jurisdiction in Indian country (Category B cases), and the cases that divest tribes of categories of jurisdiction over non-tribal members (Category C cases) are analyzed in turn for their effects on the particular functional aspect of tribal self-governance.

### 1. *General Civil Regulatory and Adjudicative Power*

#### a. *Acting on the Power to Regulate and Adjudicate*

The Supreme Court has affirmed the general notion that Indian tribes retain inherent authority to govern, through civil regulation or adjudication, the activities of tribal members and non-Indians within the boundaries of tribal territory. The exceptions to this general notion, which in the context of non-Indians have become significant, are addressed in Parts I.C.1.c. and I.C.2.c., below. As discussed above, *Williams v. Lee* affirmed the vitality of tribal sovereignty in a case deciding whether a state court could assert jurisdiction over a debt collection case between a non-Indian plaintiff and Navajo defendants.<sup>115</sup> The Court held that Congress had not authorized any such intrusion of state law into Navajo territory, and that in the absence of such authorization, state laws that "infringed" on tribal self-governance would not apply.<sup>116</sup> The Court thus ousted state court jurisdiction, and simultaneously affirmed that the Navajo Nation itself was the exclusive forum in which the non-Navajo debt collector could seek relief.<sup>117</sup>

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<sup>115</sup> 358 U.S. 217 (1959).

<sup>116</sup> *Id.* at 222-23.

<sup>117</sup> *Id.* at 223.

*Williams* is a high-water mark for the principle of exclusive tribal jurisdiction. *Williams* ousted state court jurisdiction completely, even in a case involving a non-tribal member. Furthermore, *Williams* did not express any qualms about the alternative forum—that of the tribal court—as a just and fair one for resolving the underlying dispute.<sup>118</sup> To the contrary, the Navajo Nation's judicial system provided justification for the Court's decision.<sup>119</sup> Finally, *Williams* appeared to adhere to the territorial vision of tribal jurisdiction embraced by Marshall in *Worcester*.<sup>120</sup> The language in *Williams* left enough room, however, for subsequent blurring of these relatively clear boundaries, as discussed in Parts I.C.1.c. and I.C.2.b.-c., below.

In *Santa Clara Pueblo v. Martinez*,<sup>121</sup> in a very different factual and legal context, the Court again recognized the unique sovereign status, and attendant governmental powers, of tribes. In *Santa Clara*, a female member of the Santa Clara Pueblo filed a lawsuit in federal court alleging that the Pueblo's membership rules violated the equal protection provisions of the Indian Civil Rights Act ("ICRA").<sup>122</sup> The Court determined that Martinez's case turned on whether the ICRA provided a private right of action, beyond its express mention of habeas corpus relief, to enforce its terms.<sup>123</sup> Before applying the conventional, non-Indian law doctrine of implied rights of action, the Court emphasized the unique context of this case:

[W]e must bear in mind that providing a federal forum for issues arising under [the ICRA] constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself . . . . Although Congress clearly has power to authorize civil actions against tribal officers, and has done so with respect to habeas corpus relief . . . a proper respect both for tribal sovereignty itself and for the

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<sup>118</sup> *Id.* at 222.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 219; see *Worcester v. Georgia* 31 U.S. 515, 561 (1832). In *Worcester*, the Court stated:

The Cherokee nation . . . is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.

*Id.*

<sup>121</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

<sup>122</sup> 25 U.S.C. § 1302(8) (2000).

<sup>123</sup> *Santa Clara Pueblo*, 436 U.S. at 59.

plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.<sup>124</sup>

Against this “backdrop”<sup>125</sup> of tribal sovereignty (and congressional plenary power), the Court held that the statute did not contain an implied right of action. The ICRA included two overarching goals: the promotion of tribal self-governance and the protection of individual rights. The former goal would be undermined, the Court determined, if the statute were read to allow federal suits against tribes to further the latter goal.<sup>126</sup> In coming to this conclusion, the Court took particular note of the frail financial health of many tribes, as well as the likelihood that tribal forums would be disrespected if tribal actions could be readily challenged in federal court.<sup>127</sup> Some commentators have criticized *Santa Clara*, claiming that it lacks nuance in embracing a patriarchal, and arguably relatively recent, manifestation of tribal sovereignty at the expense of the political rights of a tribal member.<sup>128</sup> Others have claimed, on a more practical level, that the *Santa Clara* Court did tribes a disservice in the long run by finding no private right of action in the ICRA, because the non-reviewability of tribal decisions has led to the piecemeal divestment of tribal jurisdiction over non-Indians.<sup>129</sup> But as the *Santa Clara* Court itself recognized, the heavy hand of the federal courts had the potential to play a dominating and disruptive role in the nascent development of modern tribal governments.<sup>130</sup> While the

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<sup>124</sup> *Id.* at 59-60.

<sup>125</sup> *Id.* at 60 (quoting *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172 (1973)).

<sup>126</sup> *Santa Clara Pueblo*, 436 U.S. at 64-65.

<sup>127</sup> *Id.*

<sup>128</sup> See Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 727 (1989). For critiques of this position, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990), and Bethany R. Berger, *Indian Policy and the Imagined Indian Woman*, 14 KAN. J.L. & PUB. POL'Y 103 (2004).

<sup>129</sup> See generally Robert Laurence, *Martinez, Oliphant and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 10 CAMPBELL L. REV. 411 (1988); Robert Laurence, *Symmetry and Asymmetry in Federal Indian Law*, 42 ARIZ. L. REV. 861 (2000); see also Gould, *supra* note 12, at 681-85 (criticizing *Santa Clara* and positing that absent incorporation of the Bill of Rights into tribal law, tribal courts will be unlikely ever to obtain jurisdiction over non-Indians outside of very narrow circumstances).

<sup>130</sup> See generally Rina Swentzell, *Testimony of a Santa Clara Woman*, 14 KAN. J.L. & PUB. POL'Y 97 (2004). In this essay, Swentzell, a Santa Clara Pueblo tribal member, powerfully describes her sentiments in support of the *Santa Clara* decision.

day had long passed when tribes could evolve beyond the influence of the federal government, the Court's heightened sensitivity to its institutional role, given the potential for federal courts to overwhelm tribal self-direction, was appropriate as well as consistent with a moderate view of Congress's plenary power over Indian affairs.<sup>131</sup>

Two decisions from the 1980s, *National Farmer's Insurance Co. v. Crow Tribe*<sup>132</sup> and *Iowa Mutual Insurance Co. v. La Plante*,<sup>133</sup> showed similar institutional sensitivity. In *National Farmer's*, the Court developed what has become known as the tribal court exhaustion doctrine, a prudential rule requiring non-Indian litigants to exhaust their remedies through the tribal court process before challenging tribal jurisdiction in federal court.<sup>134</sup> *Iowa Mutual* affirmed the exhaustion rule, even in a case involving a non-Indian defendant who was a citizen of a different state than the Indian plaintiffs.<sup>135</sup> Neither *National Farmer's* nor *Iowa Mutual* addressed the tribal jurisdiction question itself, leaving open the possibility that the Supreme Court would later take away what it appeared to endorse. Indeed, as will be discussed in Parts I.C.1.c. and I.C.2.c., that possibility has become reality to a fairly significant extent.<sup>136</sup> But the exhaustion doctrine nonetheless put a damper on non-Indian defendants' tendency to flee tribal courts, and as discussed below, resulted in a strong presumption by many litigants of tribal court jurisdiction over a variety of matters.<sup>137</sup>

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Swentzell describes the ways in which she and her daughters and granddaughters have been pained by the Santa Clara constitutional provision, but that all of her female family members nonetheless agree that they are better off as Indian women addressing the issues within the tribe than risking destroying the tribe through federal judicial surveillance. *Id.* at 99-100.

<sup>131</sup> The Court's approach in *Santa Clara* is thus sensitive to institutional roles in two directions. First, it is mindful of the potentially stifling role that federal court review could play in the context of the development of tribal governments. Second, it is careful, given Congress's power in Indian affairs, to require any divestments of tribal autonomy to be stated clearly. With respect to the second "clear statement" requirement, the Court is arguably implementing an appropriate judicial tempering of the plenary power doctrine.

<sup>132</sup> 471 U.S. 845 (1985).

<sup>133</sup> 480 U.S. 9 (1987).

<sup>134</sup> 471 U.S. at 856-57.

<sup>135</sup> 480 U.S. at 16.

<sup>136</sup> See *infra* notes 216-31 and accompanying text (discussing *Montana* and *Strate*).

<sup>137</sup> See *infra* notes 216-31 and accompanying text (discussing pre-*Strate* assumptions by non-Indians of the extent of tribal jurisdiction).

A final civil case recognizing inherent tribal powers to regulate non-Indians is both complicated and arguably obsolete. In *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, the Court, in a fractured opinion, upheld the tribe's authority to impose its zoning requirements on non-Indians living within a portion of the tribe's reservation deemed by the Court to have retained its "tribal character."<sup>138</sup> The "tribal character" test has not survived much beyond *Brendale*, and the Court has opted for other ways to cabin the reach of inherent tribal powers over non-Indians.<sup>139</sup>

Complementing the "inherent tribal powers" cases are the cases in which the Supreme Court has recognized restrictions on the reach of state power. *Worcester v. Georgia* is the initial precedent for the concept of state jurisdiction stopping at reservation boundaries,<sup>140</sup> and *Williams v. Lee* is the leading modern case limiting state authority in Indian country.<sup>141</sup> In *Williams*, the Supreme Court held that state courthouse doors are closed to non-Indians suing tribal members for causes of action arising in tribal territory.<sup>142</sup> Since *Williams*, the Court has developed two vocabularies for determining whether states can exercise governmental powers in Indian country. The first is to inquire whether state authority has been "preempted" by federal recognition of exclusive tribal powers. The other looks to whether the state's attempt to regulate "infringes" on tribal inherent powers. Both of these vocabularies became prominent as a result of another Navajo-based case, *McClanahan v. Arizona State Tax Commission*.<sup>143</sup>

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<sup>138</sup> 492 U.S. 408, 441 (1989).

<sup>139</sup> See *infra* notes 275-80 and accompanying text (discussing *Montana*, *Strate*, and *Atkinson*).

<sup>140</sup> See 31 U.S. 515 (1832); see also *supra* notes 5, 43 and accompanying text (discussing *Worcester*).

<sup>141</sup> 358 U.S. 217 (1959); see also *supra* discussion of *Williams* at notes 50-53 and accompanying text.

<sup>142</sup> 358 U.S. at 223; see also *supra* discussion of *Williams* at notes 50-53 and accompanying text.

<sup>143</sup> 411 U.S. 164 (1973). Although *McClanahan* involves the ouster of state jurisdiction to tax, I discuss it here in the prelude to general civil authority, rather than tax authority. Its approach is one of broad institutional sensitivity to the background presumption that Indian tribes are to be left alone, free from overlapping state laws, unless Congress clearly says otherwise. In other words, I think *McClanahan* is more important for its stance toward perpetuating what Charles Wilkinson has called tribes' "measured separatism," than it is for anything directly related to the Navajo Nation tax program. See WILKINSON, *supra* note 36, at 4-5, 14-19. There

In *McClanahan*, Rosalind McClanahan, a Navajo tribal member, filed a refund claim in Arizona state court arguing that the state lacked authority to tax her income, which was earned at a bank located within the boundaries of the Navajo reservation. Justice Marshall, writing for a unanimous court, acknowledged that the Indian sovereignty doctrine had not "remained static during the 141 years since *Worcester* was decided," and therefore the assertion of tribal sovereignty by Rosalind McClanahan did not, in and of itself, defeat the state's taxing power.<sup>144</sup> But Justice Marshall also found that tribal sovereignty, though modified, was still alive and well, and served as a "backdrop" against which to interpret the relevant treaties and federal statutes to determine if the overall federal-tribal scheme left any room for state taxation.<sup>145</sup> The Court then reviewed the 1868 Treaty and various federal statutory enactments that consistently affirmed the assumption that states lacked jurisdiction over Navajos living on the reservation. Conceding that no federal statutes explicitly exempted on-reservation Indians from state income tax,<sup>146</sup> the Court nonetheless inferred preemption from various general acknowledgments of the independence of the Navajo Nation, as well as Arizona's recognition of the tax-exempt status of Indian lands.<sup>147</sup> The preemption analysis emerging from *McClanahan* is therefore one that is generous toward tribes. General statements about tribal independence from state control can lead to the conclusion of a specific prohibition on state authority.<sup>148</sup>

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is, to date, no Navajo Nation income tax, and it seems unlikely, given poverty levels on the Navajo Nation, that there will be one any time soon.

<sup>144</sup> *McClanahan*, 411 U.S. at 171.

<sup>145</sup> *Id.* at 172.

<sup>146</sup> *See id.* at 176-77.

<sup>147</sup> *Id.* For more on Indian law preemption analysis, see generally DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 432-37 (4th ed. 1998); FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (Rennard Strickland et al. eds., 1982); WILKINSON, *supra* note 36, at ch. 4.

<sup>148</sup> After *McClanahan*, the Court extended the prohibition on state taxation of tribal member property, even in the context of a statute that explicitly permitted other forms of civil regulatory powers in Indian country. *See Bryan v. Itasca County*, 426 U.S. 373, 377 (1976) (finding that Public Law 280, which extended state civil jurisdiction over reservations, did not explicitly extend state taxing authority, and thus state tax of a reservation mobile home was invalid). In the context of taxation of tribal members residing within Indian country, the states' lack of authority has since hardened into a categorical rule. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) (holding that a state cannot apply motor fuel tax to fuels sold by tribe in Indian country). Rather than undergo the specific preemption analysis for each tribe, the Supreme Court assumes exemption from state taxation if

The Supreme Court has also ousted state court jurisdiction definitively in a case involving a family law matter. In *Fisher v. District Court*, the Court held that a state court had no power to hear a child custody proceeding involving tribal members who resided within Indian country.<sup>149</sup>

The cases recognizing inherent tribal powers to regulate and adjudicate and restricting the reach of state authority in Indian country appear to endorse a vision of tribal evolution to govern a range of civil matters, including matters involving non-Indians. The cases, when considered together, also appear particularly solicitous of tribal courts and the extent to which federal intermeddling could undermine tribal judicial authority. Subsequent cases are not so solicitous, and have placed significant limitations on tribal authority over non-members.<sup>150</sup> But the vision and institutional sensitivity of the Category A cases nonetheless resulted in significant opportunities for tribes to develop their regulatory and judicial systems.

The Navajo Nation has taken advantage of these Supreme Court decisions in a range of ways, and today has a robust government that has taken on many of the same functions as state governments.<sup>151</sup> First, the Navajo have developed, and re-tribalized, one of the most respected and busy<sup>152</sup> American Indian tribal court systems in the country. The development of the Navajo Nation judicial system has been studied by many legal scholars.<sup>153</sup> In addition, Navajo Nation Supreme Court justices have been prolific themselves, and have shared many insights concern-

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the legal incidence of the tax falls on tribal members within Indian country. *Id.* at 459.

<sup>149</sup> 424 U.S. 382, 386 (1976). In another child custody case, the Court again affirmed exclusive tribal court jurisdiction. See *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52-53 (1989). In *Holyfield*, however, the Court was construing a federal statute, the Indian Child Welfare Act, rather than making federal Indian common law. *Id.*

<sup>150</sup> See discussion *infra* Parts I.C.1.c, 2.c, 3.b.

<sup>151</sup> See *infra* app. A.

<sup>152</sup> The Navajo Nation Judicial Branch reports a total number of court cases in excess of 88,000 for each year from 2001-2003. See *infra* app. B.

<sup>153</sup> See, e.g., Conn, *supra* note 103; Lieder, *supra* note 94; Daniel L. Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience 1969-1992*, 18 AM. INDIAN L. REV. 379 (1993); Marianne O. Nielsen, *Navajo Nation Courts, Peacemaking and Restorative Justice Issues*, 44 J. LEGAL PLURALISM 105 (1999); Jayne Wallingford, *The Role of Tradition in the Navajo Judiciary: Reemergence and Revival*, 19 OKLA. CITY U. L. REV. 141 (1994); James W. Zion, *Civil Rights in Navajo Common Law*, 50 U. KAN. L. REV. 523 (2002); James W. Zion, *Navajo Therapeutic Jurisprudence*, 18 Touro L. REV. 563 (2002).

ing the history and development of Navajo law.<sup>154</sup> That work will therefore not be repeated here, but it is important to note that the common refrain is the unique melding of Anglo-American-style judicial systems and traditional Navajo customary law.<sup>155</sup> In the context of its court system, the Navajo Nation story of mutual infusion persists. On one hand, principles from federal law, such as the interpretation of due process in the context of personal jurisdiction, have been adopted by the tribal courts.<sup>156</sup> On the other, the Navajo Nation has incorporated Navajo customary law and traditional dispute resolution into its legal system so successfully that the concepts have been studied for application elsewhere.<sup>157</sup> The Navajo Nation has enacted inherent sovereignty in the judicial realm by developing a judicial system that successfully straddles two worlds, providing a fair and familiar forum for non-Navajo persons<sup>158</sup> and a culturally coherent body of laws and procedures for tribal members.

Less has been written about substantive Navajo law, and in particular Navajo legislation. The Navajo Nation has enacted laws that protect individual rights and liberties, some of which exceed the protections in the U.S. Constitution. In 1967, the Navajo Nation enacted a Bill of Rights, including due process and equal protection provisions.<sup>159</sup> In 1980, the Navajo Nation took a step that the United States has yet to take: the Navajo Tribal Council voted by an overwhelming majority to adopt an Equal Rights Provision, explicitly providing for legal equality between the sexes.<sup>160</sup>

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<sup>154</sup> See generally Raymond D. Austin, *ADR and the Navajo Peacemaker Court*, 32:2 JUDGES J. 8 (1993); Tom Tso, *Indian Nations and the Human Right to an Independent Judiciary*, 3 N.Y. CITY L. REV. 105 (1998); Tso, *supra* note 93; Robert Yazzie, "Hozho Nahasdlii" - *We Are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117 (1996); Robert Yazzie, "Life Comes From It": *Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994); Robert Yazzie, *Navajo Peacekeeping: Technology and Traditional Indian Law*, 10 ST. THOMAS L. REV. 95 (1997).

<sup>155</sup> See Lowery, *supra* note 153; Tso, *supra* note 93; Wallingford, *supra* note 153.

<sup>156</sup> See, e.g., *Thompson v. Wayne Lovelady's Frontier Ford*, 1 NAVAJO RPTR. 282 (Navajo 1978) (applying "minimum contacts" analysis from federal cases to determine whether the Navajo Nation has personal jurisdiction over foreign defendants).

<sup>157</sup> See generally Austin, *supra* note 154; Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 U.C.L.A. L. REV. 1 (1999); Nielsen, *supra* note 153.

<sup>158</sup> See generally Berger, *supra* note 17 (concluding that tribal courts treat non-members fairly).

<sup>159</sup> NATION CODE tit. 1, §§ 101-09 (Equity 1995).

<sup>160</sup> Res. of the Navajo Tribal Council, CF-9-80 (1980) (on file with author); see

The *Williams* line of cases and the era of self-determination also gave the Navajo Nation the breathing room to develop consumer protection, employment, and other statutory laws that relate to core aspects of practical sovereignty, such as provision of jobs and protection from unfair economic practices. As a precursor to these substantive laws, in 1980 the tribal council approved legislation expanding the jurisdiction of the Navajo Nation tribal courts.<sup>161</sup> The Council Resolution notes that while the U.S. Supreme Court limited criminal jurisdiction over non-Indians, no such limitations had been placed on tribal civil jurisdiction over non-Indians “within Navajo Indian country.”<sup>162</sup> The resolution also makes reference to the need for expanded access to the Navajo legal system: “Many non-Indians reside or do business or conduct other activities within the Navajo Nation (Navajo Indian country) and it is appropriate that these persons be called upon to account for their activities and the effect thereof in the Courts of the Navajo Nation.”<sup>163</sup> The resolution then amended the Navajo jurisdictional statute to “include civil actions in which the defendant is a resident of Navajo Indian country, or has caused an action to occur in Navajo Indian country.”<sup>164</sup>

With this expanded jurisdiction, the Navajo Nation was able to pass laws regulating the behavior of tribal members as well as non-members. One of the earliest, and most significant, consumer protection laws was the Navajo Nation Repossession Law.<sup>165</sup> The statute requires consent to repossession of a vehicle on tribal lands, or resort to the Navajo Nation courts to obtain an order. This law has proved to be an important tool for warding

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also *Amending the Navajo Bill of Rights by Adding an Equal Rights Provision*, Navajo Tribal Council (Feb. 7, 1980) (on file with author). Traditional Navajo society was and is matrilineal in many respects, and yet tribal membership was then and is now determined by blood quantum, irrespective of the sex of the tribal member parent. Therefore, women’s rights as well as formal legal equality between the sexes were unproblematic concepts to the Navajo Tribal Council. Commentators concerned about the sexist implications of *Santa Clara* should take note of this particular exercise of tribal sovereignty. See *supra* note 128 and accompanying text.

<sup>161</sup> Res. of the Navajo Tribal Council, CF-19-80 (1980) (on file with author).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* Presumably, the reference to “Navajo Indian country” is meant to acknowledge the fact that there might be jurisdictional limits over non-Indians on fee land, but that these limits were presumed not to apply on tribal lands. Note that *Montana* was pending before the U.S. Supreme Court when this Resolution was passed. See *infra* notes 216-19 and accompanying text (discussing *Montana*).

<sup>164</sup> Res. of Navajo Tribal Council, CF-19-80 (1980).

<sup>165</sup> NATION CODE tit. 7, § 607 (Equity 1995).

off unscrupulous business practices by car dealers, most of whom are located off the Navajo reservation. Legal services lawyers employed by DNA-People's Legal Services, the organization that provides free legal assistance to low income residents of the Navajo and Hopi reservations, report that unethical and often illegal practices by off-reservation businesses constitute a significant percentage of the cases they handle.<sup>166</sup>

Protecting tribal members from questionable consumer practices in reservation border towns has proved to be a continuing challenge. The relative dearth of commercial ventures on the reservation leads many tribal members to shop for cars, mobile homes, appliances, and other durable goods in the towns bordering the Navajo Nation, such as Flagstaff and Page in Arizona and Gallup and Farmington in New Mexico. In 1999, the Navajo Nation Tribal Council passed various consumer protection provisions in order to curb problematic commercial behavior, including inordinately high interest rates, unscrupulous pawn shop policies, and "a host of unscrupulous, dishonest and predatory business practices."<sup>167</sup> The legislation includes remedies for unfair and deceptive trade practices, a ban on chain referral sales techniques, penalties for misrepresentation of motor vehicles, and a host of other pro-consumer provisions.<sup>168</sup>

Providing employment for tribal members is another recurring challenge for the Navajo Nation. The unemployment rate on the Navajo Nation is very high, ranging from thirty-six percent to over fifty percent.<sup>169</sup> The "brain drain" of talented tribal members who leave the Navajo Nation to find meaningful employ-

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<sup>166</sup> Interview with Anna Marie Johnson, Acting Director, DNA-People's Legal Services, in Window Rock, Ariz. (July 8, 2003) (on file with author); Interview with Levon Henry, Executive Director, DNA-People's Legal Services, in Window Rock, Ariz. (Dec. 10, 2003) (on file with author); *see also* Interview with T.J. Holgate, Navajo Nation District Court Judge, and Allen Sloan, Navajo Nation District Court Judge, in Window Rock, Ariz. (July 9, 2003) (noting that lack of representation in consumer cases is one of the biggest problems in the district court; non-Indian businesses know that they can get away with questionable behavior) (on file with author); DNA—PEOPLE'S LEGAL SERVICES, LEGAL SERVICES CORPORATION ANNUAL REPORTS, CASES STATISTICS, 1999-2002 (showing that consumer cases constitute the second highest percentage of total case load; family law cases were number one) (on file with author; reports located at DNA-People's Legal Services Office, in Window Rock, Ariz.).

<sup>167</sup> Res. of the Navajo Nation Council, CJY-71-99 (1999).

<sup>168</sup> *See id.* at Exhibit One.

<sup>169</sup> Ted Rushton, *The Navajo Nation—An Overview*, Utah Department of Community and Economic Development, at [http://dced.utah.gov/indian\\_affairs/utah\\_tribes\\_today/dine.html](http://dced.utah.gov/indian_affairs/utah_tribes_today/dine.html) (last visited March 16, 2005).

ment threatens the continued vitality of the Navajo community.<sup>170</sup> Even many tribal members who continue to consider the Navajo Nation to be their primary residence are forced to leave for periods of time to earn enough income to support their families.<sup>171</sup> Like migrant workers, these Navajo lead transient lives that challenge their ability to raise their children and maintain contact with their families and culture. As in the consumer context, inherent tribal authority to subject members and non-members to tribal laws has been integral to Navajo attempts to address employment issues. To respond to the need for Navajo employment protections, the Navajo Nation Tribal Council passed the Navajo Preference in Employment Act.<sup>172</sup> The Act established the Navajo Nation Labor Commission, an administrative body that enforces the Act through the promulgation of regulations and adjudicative hearings.<sup>173</sup> The Act provides substantive and procedural protections for tribal member employees. It also extends some of its protections to non-tribal members employed on the reservation.<sup>174</sup> The attempt to provide economic security by encouraging employment on the reservation serves one of the core functions associated with sovereignty.<sup>175</sup>

The Navajo Nation has also exercised its governmental powers to attempt to provide educational opportunities that simultaneously prepare Navajo children to compete in a non-Indian world and reinforce Navajo language and culture. The history of education in Indian country is profoundly troubled by the pervasive influence of anti-Indian sentiment. During the allotment period and for a long time afterwards, education was primarily a tool to

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<sup>170</sup> See Interview with Claudeen Bates Arthur, Chief Justice of the Navajo Nation Supreme Court, and Lorene Ferguson, Associate Justice of the Navajo Nation Supreme Court, in Window Rock Ariz. (Dec. 9, 2003) (on file with author).

<sup>171</sup> See *id.*

<sup>172</sup> NATION CODE tit. 15, §§ 601-19 (Equity 1990).

<sup>173</sup> *Id.*

<sup>174</sup> The Act provides that non-Navajos legally married to Navajos receive secondary preference. Non-Navajo spouses are treated as "Navajo" employees for other purpose of the Act, including the provisions requiring just cause for termination. *Id.* at § 614.

<sup>175</sup> See HANNUM, *supra* note 24, at 91 (noting that the ability to foster connection to homelands by creating economic opportunities is one of the benefits associated with sovereignty); MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE 145-46 (1995) (discussing economic development as a function of sovereignty).

kill off any vestiges of tribal language and culture.<sup>176</sup> This was as true for Navajo as for other Indian tribes. The Treaty of 1868 promises that the federal government will fund education, but it is an "English education" that is provided, and the treaty language reflects the coercive and paternalistic attitude of that time.<sup>177</sup> When the Navajo returned from Bosque Redondo, the U.S. military built the first schools, and troops were then sent out to round up Navajo children, often forcibly separating them from their families.<sup>178</sup> "English education" meant not only that children would learn the English language, but that they would not be able to wear their hair long, speak their language, or learn about their traditions and cultures.<sup>179</sup> In part, the distance between home and the boarding schools accomplished the assimilation goals. Families often only saw their school-aged children during winter and summer holidays. What distance could not do alone, the teachers themselves ensured, punishing students for speaking to each other in their native languages and even giving the children new English names.<sup>180</sup>

The Navajo Nation thus faces a significant challenge to turn education from a threatening, negative influence into one that can provide positive opportunities.<sup>181</sup> To meet this challenge, the Navajo Tribal Council passed a law requiring all schools on the Navajo Nation to teach Navajo language and culture in all grades.<sup>182</sup> The Diné Division of Education oversees the implementation of the law, assisting the many state public schools on the Navajo Nation to meet the requirement through its Office of Diné Language, Culture & Community.<sup>183</sup> The Navajo literature repeatedly expresses the link between inherent sovereign powers and the ability to take steps to preserve Navajo language and

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<sup>176</sup> See Dussias, *Ghost Dance*, *supra* note 28, at 776-805; Dussias, *Waging War With Words*, *supra* note 28, at 905-21.

<sup>177</sup> Treaty with the Navajo Tribe of Indians, June 1, 1868, art. 6, 15 Stat. 667.

<sup>178</sup> Claudeen Bates Arthur, *The Role of the Tribal Attorney*, 34 ARIZ. ST. L.J. 21, 22 (2002).

<sup>179</sup> See *id.*

<sup>180</sup> See MICHAEL C. COLEMAN, AMERICAN INDIAN CHILDREN AT SCHOOL, 1850-1930 (1993).

<sup>181</sup> See Bates Arthur, *supra* note 178, at 22 (discussing how education as an outside influence created disruptions to Navajo culture, including displacing the Navajo traditional attitude of respect toward children).

<sup>182</sup> NATION CODE tit. 10, § 111 (Equity 1984) (requiring instruction in Navajo language); *id.* § 112 (requiring instruction in Navajo culture).

<sup>183</sup> See Office of Diné Language, Culture & Community, Mission Statement and Statement of Purpose (on file with author).

culture. The preamble to the Diné Office of Language, Culture & Community's programs states: "The Navajo Tribe, as a sovereign nation, has a responsibility to its people to oversee the education in whatever schools or school systems they are being educated."<sup>184</sup>

In addition, the Diné Office of Education asserts the subsequent link between the preservation of language and culture and the survival of the Navajo as a people. With respect to language, "The Navajo Language is an essential element of the life, culture, and identity of the Navajo people. The Navajo Nation recognizes the importance of preserving and perpetuating that language for the survival of the Navajo Nation."<sup>185</sup> And regarding culture:

The survival of the Navajo Nation as a unique group of people growing and developing socially, educationally, economically, and politically within the larger American Nation requires that the Navajo People and those who reside with the Navajo People retain and/or develop an understanding, knowledge and respect for the Navajo culture, history, civics and social studies.<sup>186</sup>

The success of these educational initiatives is not yet known. Some have expressed skepticism about whether Navajo educational bureaucracies can do any better than other bureaucracies at reinforcing culture.<sup>187</sup> The younger generations of Navajo speak the language at far lower rates than the older generations.<sup>188</sup> In 1930, seventy-one percent of Navajos spoke no English, as compared to seventeen percent of the rest of the Indian population.<sup>189</sup> Since that time, the number of Navajo-only speakers has dropped while the number of English-only speakers has risen.<sup>190</sup> The numbers are particularly notable among the young. In the mid-1970s, more than ninety-five percent of students entering school in Rough Rock and Rock Point (two very

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> See Bates Arthur, *supra* note 178, at 24 (lamenting that implementation of programs to restore Navajo language and culture has not matched planning for such programs).

<sup>188</sup> See James Crawford, *Endangered Native American Languages: What Is to Be Done, and Why?* (1994), reprinted in *LANGUAGE AND POLITICS IN THE U.S. AND CANADA: MYTHS AND REALITIES* (Thomas Ricento & Barbara Burnaby eds., 1998), available at <http://ourworld.compuserve.com/homepages/JWCrawford/brj.htm> (last visited Feb. 13, 2005).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

rural and remote communities on the Navajo Nation) spoke Navajo, whereas by 1995 that percentage had dropped to approximately fifty percent.<sup>191</sup> Cable and satellite television are proving to be better assimilators than government and religious boarding schools. Yet without tribal initiatives to preserve language and culture, there would be virtually no chance that language and culture could survive and adapt in the unique Navajo way.

With its inherent power to regulate and adjudicate, the Navajo Nation has taken many significant steps towards: providing for peace and security, through its respected and fair court system; economic opportunities, both by protecting consumers and employees; and furthering Navajo cultural practices, by incorporating Navajo law into judicial decision making, by taking steps to encourage tribal members to stay within the Navajo Nation, and by incorporating Navajo language and culture into education. The Supreme Court's decisions recognizing inherent tribal powers and limiting the reach of state jurisdiction appear, from these examples, to have provided room for a distinctly Navajo political and cultural life to continue.

*b. Responding to Concurrent State Authority to Regulate*

Notwithstanding *Williams v. Lee*, *McClanahan*, and *Fisher v. District Court*, the Supreme Court in the modern era has also decided several Category B cases that recognize state jurisdiction within Indian country. Most of these cases arise in the context of taxing jurisdiction, and therefore are discussed in detail in Part I.C.2.b, below. An overlooked side-effect of these concurrent taxation cases, however, is their implicit recognition of the states' obligation to provide services to tribal members who reside in Indian country.

In *Cotton Petroleum Corp. v. New Mexico*, the Court hinged its decision to allow states to tax non-Indian activity in Indian country in part on the services provided by the state to the tribe and tribal members.<sup>192</sup> The obligation of states to provide certain services is constitutionally based. At the end of the allotment era, Congress passed a statute that declared that all American

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<sup>191</sup> James Crawford, *Seven Hypotheses on Language Loss: Causes and Cures*, in *STABILIZING INDIGENOUS LANGUAGES* (Gina Cantoni ed., 1996), available at <http://www.ncela.gwu.edu/pubs/stabilize/ii-policy/hypotheses.htm>.

<sup>192</sup> 490 U.S. 163, 189-91 (1989).

Indian tribal members would henceforth be U.S. citizens.<sup>193</sup> Pursuant to the Fourteenth Amendment of the United States Constitution, American Indian tribal members are also therefore citizens of the states where they reside. A string of cases in which tribal members have pressed for their rights to equal state services confirm that the Fourteenth Amendment's equal protection guarantees apply to them, notwithstanding the complication of their political membership in an Indian tribe.<sup>194</sup> Navajo tribal members and the Navajo Nation itself have relied on this line of authority in order to obtain benefits for tribal members that allow them to continue living on the Navajo Nation.

The provision of adequate local education is a clear prerequisite to encouraging tribal members to stay in the Diné homeland. Yet the history of education of American Indian children pushes strongly against this goal. The assimilation era forced boarding schools on many tribal member children,<sup>195</sup> and the extremely rural nature of the Navajo Nation exacerbates the tendency to export children in order to educate them. The Indian Self-Determination and Education Assistance Act promoted the development of local tribally run schools.<sup>196</sup> But the majority of Navajo children, like the majority of all American Indian children, today are educated in public schools.<sup>197</sup> The Fourteenth Amendment obligates states to provide equal educational opportunities to tribal member children. Navajo parents and the Navajo Nation have therefore used the state obligation to further the goals of local, adequate, and even culturally and language-appropriate education. In a series of cases beginning in the 1970s and continuing through the 1990s, Navajo parents sued local school districts in New Mexico, Utah, and Arizona in order to force the con-

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<sup>193</sup> Indian Citizenship Act of June 2, 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)(2000)).

<sup>194</sup> See *Sinajini v. Bd. of Educ. of San Juan Sch. Dist.*, 233 F.3d 1236, 1239 (10th Cir. 2000); *Meyers v. Bd. of Educ. of San Juan Sch. Dist.*, 905 F. Supp. 1544, 1578-79 (D. Utah 1995) (citing to many other cases recognizing equal protection rights of American Indians).

<sup>195</sup> Bates Arthur, *supra* note 178, at 22.

<sup>196</sup> Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450(a)-450(n) (2000)).

<sup>197</sup> See Jon Rehyner, *American Indian/Alaska Native Education: An Overview* (2002) (stating that figures from the 1990s indicate that eighty-seven percent of American Indian children are educated in public schools), at [http://jan.ucc.nau.edu/~jar/AIE/Ind\\_Ed.html](http://jan.ucc.nau.edu/~jar/AIE/Ind_Ed.html) (last visited Apr. 11, 2005).

struction of public schools on the reservation,<sup>198</sup> equal funding of existing schools,<sup>199</sup> and provision of appropriate cultural and language curriculum.<sup>200</sup> In two cases, the Navajo Nation joined as a plaintiff.<sup>201</sup> While it might seem anomalous to assert the sovereign right to be free from state authority in some circumstances, and yet to sue the state to provide services in others, the complicated hand that "domestic dependent nations"<sup>202</sup> have been dealt requires flexibility in terms of strategies. State public schools are a staple of American Indian reservation life. The federal government has chosen to meet its obligation to educate American Indian children in part by providing funding to state school districts, both through the ability to tax non-Indian activity in Indian country<sup>203</sup> and more directly through a variety of federal funds that compensate for lost tax revenue and/or provide additional funds for the special needs of American Indian children.<sup>204</sup> States are paid, in other words, to assist them in meeting their constitutional obligations. Thus, while the best long-term solution might be to replace state public schools with tribal schools, for the foreseeable future Navajo children will attend schools run by the states. Requiring states to provide adequate, local, culturally appropriate educational programs is one way of assuring a Navajo future for tribal children.<sup>205</sup>

The Navajo Nation has also recruited the state as an initially unwilling partner in the problem of child support enforcement for tribal members. The federal statute requiring states to provide child support enforcement services for recipients of welfare

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<sup>198</sup> *Sinajini*, 233 F.3d at 1239; *Meyers*, 905 F. Supp. at 1553.

<sup>199</sup> *Natonabah v. Bd. of Educ.*, 355 F. Supp. 716, 718 (D. N.M. 1973); *Yazzie v. Governing Bd. of the Flagstaff Unified Sch. Dist.*, No. CIV94-PCT-2380-SMM (D. Ariz. Dec. 23, 1998) (including the agreement of the parties and order of dismissal).

<sup>200</sup> *Meyers*, 905 F. Supp. at 1553; *Yazzie*, *supra* note 199.

<sup>201</sup> *Sinajini*, 233 F.3d at 1236; *Meyers*, 905 F. Supp. at 1551.

<sup>202</sup> *Cherokee Nation v. Georgia*, 5 U.S. 1, 16-17 (1831).

<sup>203</sup> See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 189-91 (1989).

<sup>204</sup> 20 U.S.C. § 236-39 (repealed 1994) (providing funding to school districts to compensate for lost tax base due to Indian reservation); Johnson-O'Malley Act of 1934, codified at 25 U.S.C. § 456 (2000) (providing funding for supplemental programs for Indian children attending public schools).

<sup>205</sup> See Consent Decree at 8, *Meyers v. Bd. of Educ.*, 905 F. Supp. 1544 (D. Utah 1997) (No. 93-C-1080J) (on file with author). This Consent Decree also acknowledges tribal and federal obligations. The Navajo Nation has entered into cooperative agreements to facilitate the state provision of education. While these agreements are not always easily arrived at, nor flawlessly implemented, they are another example of government-to-government relationships created to address the complications of the legal and factual realities of multiple sovereigns.

omitted any reference to Indian tribes.<sup>206</sup> Tribes therefore had no direct access to the federal funds that accompanied the mandate.<sup>207</sup> The Navajo Nation, spurred on by indigent tribal members who had been denied state enforcement services, negotiated with New Mexico and Arizona and ultimately achieved a solution that brought some child support enforcement services to the reservation.<sup>208</sup>

As the examples of public education and child support demonstrate, the Navajo Nation and Navajo tribal members have responded flexibly to the issue of concurrent state authority in Indian country. While many Navajo officials likely believe that the best long-term solutions are clear territorial boundaries and increased funding and autonomy for the Nation to provide its own services,<sup>209</sup> that day is not at hand. In the meantime, *Cotton*'s legal framework of overlapping authority and responsibility for services has resulted in context-specific tactics that attempt to ensure that the needs of Navajo Nation residents can be met.

These tactics, while legally defensible, are not lacking in political costs. It is difficult for non-Indians to comprehend the complicated web of federal, state, and tribal services that, for better or worse, the federal government has fostered as the means to serve on-reservation Indians. Non-Indian hostility to tribal sovereignty has at times been heightened by tribal efforts to secure the state portions of these services.<sup>210</sup> In the context of educa-

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<sup>206</sup> 42 U.S.C. § 654 (2000); see Nancy Rank, *Beyond Jurisprudential Midrash: Toward a Human Solution to Title IV-D Child Support Enforcement Problems Across Indian Country Borders*, 33 ARIZ. L. REV. 337, 340-43 (1991).

<sup>207</sup> Rank, *supra* note 206, at 340-43.

<sup>208</sup> See U.S. OFFICE OF CHILD SUPPORT ENFORCEMENT, 19TH ANNUAL REPORT, ch. 4 (describing the New Mexico program), at <http://www.acf.dhhs.gov/programs/cse/rpt/ch4a.htm> (last visited March 18, 2005); NAT'L TRIBAL CHILD SUPPORT ASS'N, TRIBAL CHILD SUPPORT PROGRAM INFORMATION AND RESOURCE GUIDE (describing Navajo child support in Arizona and New Mexico), at <http://www.supporttribalchildren.org/TribalIVDandNonIVDProgramInfo.pdf> (last modified July 1, 2004).

<sup>209</sup> See, e.g., Telephone Interview with Raymond C. Etcitty, *supra* note 2 (noting that overlapping governmental authority causes confusion, apprehension, and fear on the part of those who are regulated). "State and Navajo Nation laws don't necessarily complement one another." *Id.*

<sup>210</sup> THOMAS BIOLSI, "DEADLIEST ENEMIES": LAW AND THE MAKING OF RACE RELATIONS ON AND OFF ROSEBUD RESERVATION 120 (2001) (describing non-Indian reactions in South Dakota to unique legal status of tribal members). In this impressive account of how federal Indian law constructs race relations and racializes local conflicts between tribes and non-Indians, Biolsi states, quoting the South Dakota Governor, that "[i]t seemed inevitable that non-Indians would find it difficult

tion litigation, for example, non-Indians have questioned why tribes appear to assert a territorial vision of sovereignty in one breath and yet demand that the state provide on-reservation facilities in another.<sup>211</sup> These reactions are not impossible to overcome, and the gains to Navajo children of, for example, having a local public high school to attend may outweigh the cost of perpetuating some non-Indian misunderstanding. But it is important to consider these reactions and the extent to which they may, in the long run, militate toward solutions in federal law that draw clearer tribal/state boundaries.

c. *Effects of Categorical Limitations on Tribal Inherent Power to Regulate and Adjudicate*

The Supreme Court has gradually moved away from the vision it appeared to endorse in *Williams*, of tribal nations governing the actions of tribal members and non-members (including non-Indians) within tribal boundaries, to one of tribal jurisdiction by consent.<sup>212</sup> Rather than adopt flexible standards for determining whether non-member criminal or civil activity has a sufficient nexus to tribal territory to warrant tribal jurisdiction, the Court has devised categorical rules prohibiting tribal authority over non-members in discrete circumstances.

In the civil context, the Court's categorical rules have emerged in a piecemeal fashion. Indeed, as discussed below, the most recent case depriving tribes of civil jurisdiction is so piecemeal that it arguably undermines the categorical framework entirely.<sup>213</sup> Recall that in *Worcester v. Georgia*, Justice Marshall held that states lacked jurisdiction in Indian country because "the United States of America acknowledge[s] the said Cherokee nation to be a sovereign nation, authori[z]ed to govern themselves, and all

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to stomach the fact 'that Indian persons are not subject to taxation by the state, yet they enjoy other rights of citizenship such as voting for state officials.'" *Id.*

<sup>211</sup> My source for these reactions is my own interactions with public school officials in the course of litigating two "equal access to public education" cases. In addition, several colleagues who read earlier drafts quite understandably were puzzled by the positions asserted by tribes in the state services cases.

<sup>212</sup> See generally L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996) (discussing trend in case law toward jurisdiction by consent, whether through consensual membership in the tribe or individual consent of non-members to jurisdiction).

<sup>213</sup> See *infra* notes 232-39 and accompanying text (discussing *Nevada v. Hicks*, 533 U.S. 553 (2001)).

persons who have settled within their territory.”<sup>214</sup> One legacy of allotment has been to leave geographic holes in tribal territory—patchworks of on-reservation land consisting of some tribal trust land, some Indian trust allotments, and some non-Indian fee land.<sup>215</sup> The Court has translated the holes in land title into jurisdictional holes.

First, in *Montana v. United States*, the Court held that tribes lack regulatory authority over non-Indians residing on non-Indian fee land within reservation boundaries.<sup>216</sup> The case involved a tribe’s attempt to regulate non-Indian hunting and fishing within tribal territorial boundaries. Looking not to any explicit congressional deprivation of tribal powers, but to the Court’s own sense of the limits history had placed on tribal inherent powers, the Court decided that because the non-Indians lived on lands that they owned in fee, they were not subject to tribal regulations unless they had engaged in “consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements,”<sup>217</sup> or if their conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>218</sup> The Court then found that the non-Indians did not have a consensual relationship with the tribe, and that the tribe’s inability to regulate hunting and fishing on islands of fee land within their boundaries would not have a “direct effect” on the tribe.<sup>219</sup>

After *Montana*, there was reason to believe that tribes retained inherent authority to regulate non-Indians for activities occurring on tribal trust lands, whether or not the circumstances outlined in what have become known as the “*Montana* exceptions” were present. *Williams*, after all, held that tribes had *exclusive* judicial authority over disputes between non-Indian plaintiffs and tribal member defendants. *Montana* itself appeared to assume tribal inherent authority over activity on tribal lands, and to exclude such lands from its analysis.<sup>220</sup> Perhaps most persuasively, the first part of the *Montana* opinion ad-

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<sup>214</sup> *Worcester v. Georgia*, 31 U.S. 515, 538 (1832) (emphasis added).

<sup>215</sup> See Royster, *supra* note 27, at 12-13.

<sup>216</sup> 450 U.S. 544, 561-66 (1981).

<sup>217</sup> *Id.* at 565.

<sup>218</sup> *Id.* at 556.

<sup>219</sup> *Id.*

<sup>220</sup> See *id.* at 565 (addressing circumstances in which tribes may assert jurisdiction on fee lands, and not addressing retained powers on trust lands).

dressed the question whether the tribe retained title to the bed of the Big Horn River, access to which was part of the tribe's regulatory scheme.<sup>221</sup> If the *Montana* holding governed tribal authority over non-Indians notwithstanding land status, then all of Part I of the Court's opinion was unnecessary dicta. Two cases following *Montana*, *Brendale*,<sup>222</sup> and *South Dakota v. Bourland*,<sup>223</sup> continued the practice of determining land status as a pre-requisite to addressing tribal jurisdiction. As in *Montana*, there would have been no need to identify lands as fee lands as in *Brendale*, or land appropriated by the U.S. government as in *Bourland*, if the *Montana* rule applied regardless of land status.

There was also the possibility that *Montana* would not apply to tribal powers other than the power to regulate. On one level, distinguishing between the power to regulate and the power to adjudicate or tax seems to slice governmental powers in arbitrary ways. Legal rules are enforced whether through the common law norms produced by adjudication or the clear statements of tribal councils. But Indian law cases had been slicing and dicing up tribal powers (and immunities) in arbitrary ways throughout the modern era. The tribal power to tax appeared to have the strongest support from the Court.<sup>224</sup> And the Supreme Court had also been deferential to the tribal power to adjudicate, even in cases involving non-Indians.<sup>225</sup> Furthermore, striving for coherence on the subject of tribal powers over non-Indians would be at the expense of coherence with significant legal norms. The first of these is the underlying norm of Indian law itself—the norm of not perpetuating, or at least tempering, the colonial relationship with Indian nations.<sup>226</sup> This norm holds that there is little justification in democratic theory for the judicial branch to strip our “dependent nations” of governmental powers when Congress has not clearly done so.<sup>227</sup> Another cluster of norms

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<sup>221</sup> *Id.* at 551 (addressing whether the State of Montana obtained title to the bed of the Big Horn River under the equal footing doctrine).

<sup>222</sup> See *supra* notes 138-39 and accompanying text (discussing *Brendale*).

<sup>223</sup> 508 U.S. 679, 688-689 (1993).

<sup>224</sup> See *infra* notes 324-32 and accompanying text (discussing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) and *Kerr-McGee v. Navajo Tribe*, 471 U.S. 195 (1985)).

<sup>225</sup> See *supra* notes 50-53 and accompanying text (discussing *Williams v. Lee*); see also *supra* notes 132-37 and accompanying text (discussing *National Farmers and Iowa Mutual*).

<sup>226</sup> See Frickey, *supra* note 13, at 13.

<sup>227</sup> See *id.*; Singer, *supra* note 12, at 665-67.

involves our usual presumptions about the kinds of relationships that establish governmental authority. For example, state courts have personal jurisdiction over out-of-state defendants because they have ties to activity in the state and should expect to be sued there.<sup>228</sup> Political membership is irrelevant to the analysis. But instead of opting for normative coherence or horizontal coherence with other fields of law, the Supreme Court has opted for coherence with a narrow reading of *Montana*.

Describing *Montana* as the “pathmarking case,” the Court held, in *Strate v. A-1 Contractors*, that the *Montana* rule applied to determine whether a tribal court had subject matter jurisdiction over a case involving a non-Indian plaintiff and a non-Indian defendant that arose on a state highway running through the tribe’s reservation.<sup>229</sup> Rather than rule that *Montana* applies to all questions of tribal authority over non-Indians, the Court aligned the state highway, which was a right-of-way granted by the tribe, with non-Indian fee land for the purpose of its jurisdictional analysis.<sup>230</sup> *Strate* answered one of the doctrinal questions left open by *Montana*, which was whether *Montana* would apply to forms of tribal governmental authority other than legislative regulation. The Court answered this question in the affirmative, finding no distinction between regulatory and adjudicative authority.<sup>231</sup> By aligning the right-of-way with non-Indian fee land, the Court avoided another question, however, which is whether *Montana* applies to all non-Indian activity in Indian country regardless of land status.

*Nevada v. Hicks* appears to address this question head-on.<sup>232</sup> In *Hicks*, Floyd Hicks, a member of the Fallon Paiute-Shoshone Indian Tribe, filed suit against state officials in tribal court, alleging violations of federal and tribal law arising from state officials’ search of Hicks’s home, which was located on tribal trust land.<sup>233</sup> The Court refused to apply a presumption that tribal land status conferred jurisdiction on the tribe. Rather, the Court stated that “ownership status . . . is only one factor to consider in determin-

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<sup>228</sup> See Krakoff, *supra* note 11, at 1260 (suggesting that *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), could have turned on considerations relevant in the personal jurisdiction context rather than on the defendant’s status).

<sup>229</sup> 520 U.S. 438, 445, 456 (1997).

<sup>230</sup> *Id.* at 456.

<sup>231</sup> *Id.* at 453.

<sup>232</sup> 533 U.S. 353, 359 (2001).

<sup>233</sup> *Id.* at 356.

ing whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.'"<sup>234</sup> The majority opinion, authored by Justice Scalia, never said in so many words that *Montana* now applies to all questions of tribal civil jurisdiction over non-Indians.<sup>235</sup> But in a separate concurrence, joined by Kennedy and Thomas, Justice Souter urged that the opinion be read that way.<sup>236</sup> In addition, Justice O'Connor concurred to state that *Montana* controls, but then went on to disagree with the majority's analysis of whether either of the *Montana* exceptions apply. She, along with Justice Stevens, would have remanded the case for further consideration of whether, pursuant to *Montana*, the tribe had jurisdiction.<sup>237</sup> Thus while the majority opinion is somewhat muddy and laden with dicta concerning the Court's overwhelming concern for the state defendants,<sup>238</sup> the case stands for the imposition of some form of *Montana* analysis onto all questions of tribal jurisdiction over non-Indians.<sup>239</sup>

The Supreme Court's decisions in *Montana*, *Strate*, and *Hicks* limiting tribal civil jurisdiction over non-Indians have had a range of impacts on the Navajo Nation. First, in the expressive category, Navajo tribal officials and other tribal members have reacted strongly to what they perceive to be an attack on their separate existence. Second, litigants seeking relief in tribal court must often wade through several layers of jurisdictional proceedings in tribal and federal court before obtaining a final answer to the question of whether the tribal court can hear their claims. Third, the transactional environment for the Navajo Nation has been negatively affected by the apparent flip in presumptions concerning tribal jurisdiction over non-Indian activity. And related to these impacts, non-Indian resistance to tribal substantive

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<sup>234</sup> *Id.* at 360 (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)).

<sup>235</sup> See *Hicks*, 533 U.S. at 360; see also Krakoff, *supra* note 11, at 1235-36 (describing how *Hicks* might be read as adopting a balancing test for all questions of tribal civil jurisdiction).

<sup>236</sup> *Hicks*, 533 U.S. at 375 (Souter, J., concurring).

<sup>237</sup> *Id.* at 401 (O'Connor, J., concurring).

<sup>238</sup> See, e.g., *id.* at 361 (discussing needs of state law enforcement officials and stating, gratuitously, that "[s]tate sovereignty does not end at a reservation's border").

<sup>239</sup> At least one circuit court, however, has found that *Hicks* does not apply to all cases arising on Indian trust land. *McDonald v. Means*, 309 F.3d 530, 540 (9th Cir. 2002) (finding that *Hicks* is limited to its facts and that the *Montana* rule therefore only applies on non-Indian fee land).

law affects the Navajo Nation's ability to safeguard, through employment and tort law, the economic and physical security of Navajo tribal members.

Navajo tribal officials, in both formal and informal statements, have condemned the Supreme Court's decisions limiting tribal inherent powers. In various ways, these officials express the link that they see between sovereignty and survival of the Navajo people. As noted in this Article's introduction, former Chief Justice of the Navajo Nation Robert Yazzie describes the Court's decisions as creating the "threat of cultural, economic, and political genocide."<sup>240</sup> These are strong words, and yet they are not the isolated perceptions of one Navajo Justice. Navajo Nation Legislative Counsel Raymond Etcitty concludes that the federal courts "are trying to do what the federal, executive, [and legislative] branch[es] have learned they cannot do—eliminate tribes."<sup>241</sup> Mr. Etcitty also describes what he sees as hypocrisy in the Supreme Court's decisions on at least two fronts. First, the Court's solicitude for federalism illogically stops at respect for the separate political approaches of Indian nations. "What about the concept of laboratories for democracy?" Etcitty wonders, paraphrasing the famous quote by Justice Brandeis.<sup>242</sup> Second, Etcitty asks with evident frustration and anger, "How does the U.S. government have the audacity to tell other governments what to do with their indigenous people when it doesn't deal appropriately with its own?"<sup>243</sup>

Some Navajo Nation officials also express anger at the very notion that they must now, as they describe it, go begging to Congress to restore their *inherent* powers.<sup>244</sup> The paradox of tribal sovereignty is not lost on these tribal officials, and to them it is more than merely an academic problem. Every day they seek to enforce the laws of what is, in every significant sense to them, a separate political nation with a legal system and culture stretching back over the millennia. And then pieces of paper arrive from Washington telling them, in effect, that their nation does

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<sup>240</sup> Testimony of Chief Justice Yazzie, *supra* note 10.

<sup>241</sup> Telephone Interview with Raymond C. Etcitty, *supra* note 2.

<sup>242</sup> *Id.* (referring to *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

<sup>243</sup> Telephone Interview with Raymond C. Etcitty, *supra* note 2.

<sup>244</sup> Interview with Justices Claudeen Bates Arthur and Lorene Ferguson, *supra* note 170.

not exist.<sup>245</sup> Chief Justice Claudeen Bates Arthur put it this way: “[A]ny time you [have to] ask the [federal government] to take action on something that you consider to be an inherent power, it is like being a child asking for the blessings of the father.”<sup>246</sup> Raymond Etcitty voices similar sentiments. As he sees it, the source of Navajo Nation sovereignty is the Navajo people; the federal government did not grant sovereignty and the federal government cannot take it away.<sup>247</sup>

Another recurring theme in the responses of Navajo Nation officials is that the Court’s decisions are based, at least in part, on ignorance. Etcitty does not mince words: “Ignorance drives the Court’s decisions.”<sup>248</sup> In particular, Etcitty cites to the Court’s lack of knowledge about Navajo concepts of due process, which he believes contributes to the Court’s reluctance to submit non-Indians to tribal jurisdiction.<sup>249</sup> “Our concept of ‘Nalyeeh,’ is more generous than due process,” Etcitty asserts, referring to a Navajo common-law concept that embodies principles of fair treatment and restitution.<sup>250</sup> Navajo Nation Supreme Court Justice Lorene Ferguson comments that there was a time when the federal government understood Indian issues. She believes that time has passed, and that today the Court and Executive Branch appear alternately ignorant and hostile.<sup>251</sup> Navajo Nation District Court Judge Allen Sloan believes that part of the challenge for the Navajo Nation is countering the notion that all Indian nations and tribal courts are the same.<sup>252</sup> Smaller tribes with fragmented land bases create an image in the minds of the members of the U.S. Supreme Court,<sup>253</sup> and the Navajo Nation is challenged to supplant that image. As Judge Sloan puts it:

The problem for the Navajo is that there is no chart in front of the nine justices which shows the extent of Navajo country. In every Indian case where subject matter jurisdiction has been considered, there is the idea that [the tribes] have unwritten

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<sup>245</sup> See *id.*

<sup>246</sup> *Id.*

<sup>247</sup> Telephone Interview with Raymond C. Etcitty, *supra* note 2.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*; see also Robert Yazzie, ‘Life Comes From It’: Navajo Justice Concepts, 24 N.M. L. REV. 175, 184-85 (1994) (explaining Navajo concept of Nalyeeh).

<sup>251</sup> Interview with Justices Claudeen Bates Arthur and Lorene Ferguson, *supra* note 170.

<sup>252</sup> Interview with Allen Sloan, Navajo Nation Dist. Ct. Judge, Window Rock, Ariz. (July 9, 2003) (notes on file with author).

<sup>253</sup> See *id.*

laws, or make up laws as they go along, and [non-Indians] shouldn't be subject to their "tee-pee justice." The Supreme Court decisions are assumptions building upon assumptions, which then become reality.<sup>254</sup>

The comments of these Navajo Nation officials, in both tenor and substance, indicate the extent to which Navajo tribal members perceive their distinctness as a people to be bound up with their political existence as a sovereign. This is so notwithstanding the fact that, on an intellectual level, many tribal members recognize that the legal doctrine of American Indian tribal sovereignty places tribes perpetually at risk of unilateral extinguishment by Congress.<sup>255</sup> There seems to be something particularly troublesome to the Navajo officials about *the Court* attempting to do what they know full well could happen, at least theoretically, in the legislative branch.<sup>256</sup> These sentiments are grounded in political reality. Since the late 1960s, the federal executive and legislative branches have generally supported tribal sovereignty,<sup>257</sup> and tribal lobbying efforts have become a mainstay of American Indian politics.<sup>258</sup> Tribal officials are therefore sensible to perceive that the representative branches of government are not the greater threat to tribal survival at this historical moment. And, interestingly, Navajo expressions of sovereignty resonate with similar expressions of concern raised in the federalism context.<sup>259</sup> While proponents of states' rights may assert that at least their claims to sovereignty are grounded in the structure of the Constitution, it is unclear whether this makes their states' rights claims stronger or weaker than those of tribes.<sup>260</sup> Claims of Indian tri-

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<sup>254</sup> *Id.*

<sup>255</sup> Telephone Interview with Raymond C. Etcitty, *supra* note 2.

<sup>256</sup> *See id.*; Interview with Justices Claudene Bates Arthur and Lorene Ferguson, *supra* note 170.

<sup>257</sup> *See* Krakoff, *supra* note 11, at 1204-05.

<sup>258</sup> *See generally* ROBERT L. BEE, *THE POLITICS OF AMERICAN INDIAN POLICY* (1982) (analyzing the "Washington connection," described as the inevitable interface between tribal governments and policy makers in Congress and the executive branch).

<sup>259</sup> *See generally, e.g.,* ROBERT F. NAGEL, *THE IMPLOSION OF AMERICAN FEDERALISM* (2001) (providing a vigorous defense of state sovereignty and criticizing the Court's recent federalism decisions for not going far enough to protect states' rights).

<sup>260</sup> In the federalism context, the Supreme Court's recent stance with respect to sovereignty is the opposite of that in the Indian law context; the Court has engaged in judicial review in order to strike down federal laws that interfere with state sovereignty. *See generally* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000). Even commentators

bal sovereignty do not depend on any document of positive law internal to the United States.<sup>261</sup> While American domestic law has nonetheless proceeded unilaterally to define the legal status of tribes, it is at least arguable that the origin of tribal sovereignty is more consistent with some philosophical notions of a "sovereign" than the already-compromised sovereignty of states that emerges from the Constitution.<sup>262</sup> Even staunch federalists have to concede that states originally consented to cede some of their sovereignty to form the government of the United States.<sup>263</sup> The staunchest proponents of American Indian tribal sovereignty need not do so.<sup>264</sup>

In terms of impacts on practical governance, there is evidence to suggest that the concerns of Navajo officials are warranted. Navajo consumer protection and employment laws, in which the Navajo Nation has exercised its sovereign powers to serve the functions of providing economic security as discussed above in Part I.C.1.a., face uncertainty as a result of the Supreme Court's cases. Tort cases filed in Navajo courts are also vulnerable. Non-Indian litigants are more prone to challenge the tribe's jurisdiction over them in these cases, which creates prolonged uncertainty regarding the application of Navajo law. Such challenges may ultimately result in federal decisions that non-Indians, even when they engage in substantial activity in Indian country that depends upon Navajo labor and services of various kinds, are not subject to Navajo law at all.

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sympathetic to federalist arguments about the functions of state government have criticized the Court's approach as lacking in both historical justification and any reasonable doctrinal limitations. *See id.* at 291-93. In other words, the Constitution protects state sovereignty by providing for state representation in Congress, not by assigning to federal courts the role of preserving platonic notions of state sovereignty. *See id.*

<sup>261</sup> *See, e.g.*, Telephone Interview with Raymond C. Etcitty, *supra* note 2.

<sup>262</sup> Some conceptions of sovereignty would rule out both state sovereignty in a federal system and American Indian tribal sovereignty. *See, e.g.*, JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 8 (2d ed. 1980) (describing John Austin's four characteristics of sovereignty, which include that it is not subordinate, and that it is illimitable, unique, and united in one person or body). Others, however, define sovereignty more flexibly, centering on either consensual and/or cultural ties that bind a community within a given territory to a form of government. *See, e.g.*, David Luban, *The Romance of the Nation State*, in *INTERNATIONAL ETHICS* 238, 239 (Charles Beitz et al. eds., 1985).

<sup>263</sup> *See* U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

<sup>264</sup> *See* Clinton, *supra* note 44, at 115-16 ("[U]nlike the legal primacy the federal government enjoys over states by virtue of the Supremacy Clause . . . the federal government has no legitimate claim to legal supremacy over Indian tribes.").

With respect to all civil cases involving non-Indian defendants, Navajo Nation district court judges report that jurisdictional challenges have risen since *Strate* was decided.<sup>265</sup> Thus, even though the *Strate* decision presented itself as a straightforward application of *Montana*, it was *Strate* and not *Montana* that changed the litigation environment dramatically. As Luralene Tapahe, an attorney in the Navajo Nation Department of Justice, describes it, "It started to go downhill when *Strate* was decided. Before that, *Merrion* seemed to be the rule."<sup>266</sup> In other words, as Ms. Tapahe explains, until *Strate*, non-Indians for the most part assumed that they were subject to Navajo civil laws when they were on the Navajo Nation; *Strate* changed that.<sup>267</sup> Furthermore, lawyers who represent tribal members report that the post-*Strate* environment makes Navajo judges more tentative about their rulings on jurisdictional issues.<sup>268</sup> At least one district court judge, T.J. Holgate, denied that this is the case. Asked whether Navajo judges were inclined to be wary of asserting tribal jurisdiction, Judge Holgate responded, "Why worry about it? . . . Why deplete my energy for that? . . . [I] don't worry about whether my decision is going to be overturned in the next venue, [and I'm] not going to be conservative if it's not proper [under the law]."<sup>269</sup> Chief Justice Arthur expressed a slightly different view, stating that the specter of the next Supreme Court case on tribal jurisdiction has made Navajo judges extremely conscious of non-Indian perceptions of fairness.<sup>270</sup>

Whether the federal law makes Navajo judges unduly cautious or not, the jurisdictional challenges clearly delay resolution on the merits of many cases. Judges Holgate and Sloan attest to the consumption of time and resources on jurisdictional matters.<sup>271</sup> A review of federal cases addressing Navajo tribal court jurisdiction confirms this perception. In the employment context, since

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<sup>265</sup> Interview with Judges Holgate and Sloan, *supra* note 166.

<sup>266</sup> Interview with Luralene Tapahe, Staff Attorney, Navajo Nation Department of Justice, in Window Rock, Ariz. (Dec. 11, 2003) (on file with author) (referring to *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982)).

<sup>267</sup> *See id.*

<sup>268</sup> Telephone Interview with Veronika Fabian, Attorney and Former Consumer Law Project Director for DNA-Peoples Legal Services (June 7, 2003) (on file with author).

<sup>269</sup> Interview with Judges Holgate and Sloan, *supra* note 166.

<sup>270</sup> Interview with Justices Claudeen Bates Arthur and Lorene Ferguson, *supra* note 170.

<sup>271</sup> *Id.*; Interview with Judges Holgate and Sloan, *supra* note 166.

*Strate* was decided, three cases have reached the federal courts regarding whether employers are subject to the Navajo Nation Preference in Employment Act.<sup>272</sup> One of the cases, *Wide Ruins Community School, Inc. v. Stago*, involved a tribal member plaintiff who had sued a tribal school located on tribal lands.<sup>273</sup> Even after *Strate* and *Hicks*, those facts clearly support tribal court jurisdiction, and indeed the federal district court dismissed the defendants' challenge.<sup>274</sup> That the defendants resisted tribal court jurisdiction even in such a clear case provides some indication of the post-*Strate* litigation climate. In another employment case, *Atkinson Trading Company* ("Atkinson"), owner of the Cameron Trading Post,<sup>275</sup> challenged the application of the Navajo Nation Preference in Employment Act to a claim filed by a Navajo employee.<sup>276</sup> The employee alleged that Atkinson terminated her without providing her the procedural protections of the Act.<sup>277</sup> Her claim stemmed from her employment contract with Atkinson. The tribal member's employment claim against Atkinson appears to fall squarely within the first *Montana* exception, which allows for tribal jurisdiction over contracts with tribal members, even in the post-*Strate* world of extremely narrow readings of this exception.<sup>278</sup> Yet, unlike in *Wide Ruins*,<sup>279</sup> the federal district court nonetheless found that the Navajo Nation lacked jurisdiction.<sup>280</sup>

Consumer protection and tort cases are similarly subject to jurisdictional attack. In the consumer category, Navajo plaintiffs face increased resistance to the application of the Navajo repossession and consumer protection statutes, even when non-Indians enter into consensual relationships with tribal members residing

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<sup>272</sup> *Wide Ruins Cmty. Sch., Inc. v. Stago*, 281 F. Supp. 2d 1086 (D. Ariz. 2003); *MacArthur v. San Juan County*, 309 F.3d 1216 (10th Cir. 2002); *Atkinson Trading Co. v. Manygoats*, No. 3:02-CV-01566 (2004) (challenging the decision in *Manygoats v. Atkinson Trading Co.*, SC-CV-62-2000 (Navajo 2003)).

<sup>273</sup> 281 F. Supp. 2d at 1087 (D. Ariz. 2003).

<sup>274</sup> *Id.* at 1088.

<sup>275</sup> See *infra* notes 399-400 and accompanying text (discussing the defendant).

<sup>276</sup> See *Atkinson Trading Co.*, No. 3:02-CV-01566.

<sup>277</sup> *Id.*

<sup>278</sup> See *supra* notes 230-31 and accompanying text (discussing *Strate*'s narrow interpretations of *Montana* exceptions).

<sup>279</sup> 281 F. Supp. 2d at 1086.

<sup>280</sup> See Native Am. Rights Fund, Cases Being Monitored: *Atkinson Trading Co. v. Manygoats* (reporting that the U.S. District Court granted summary judgment in favor of Atkinson, and that the case has been appealed and has been referred to mediation), at <http://www.narf.org/cases/index.html> (last visited March 29, 2005).

within the Navajo Nation.<sup>281</sup> The case of *Halwood v. Cowboy Auto Sales, Inc.* is representative.<sup>282</sup> In *Halwood*, Navajo plaintiffs sought to enforce a tribal court default judgment granting them compensatory, statutory, and punitive damages for the non-Indian defendants' wrongful repossession of an automobile on the Navajo Nation.<sup>283</sup> The non-Indian defendants, who initially failed to appear in tribal court at all, challenged the tribal court decision on jurisdictional grounds.<sup>284</sup> Ultimately the Navajo plaintiffs prevailed, but only after one round of tribal proceedings and two in the New Mexico state courts.<sup>285</sup>

With respect to tort cases, *Ford Motor Co. v. Todecheene*<sup>286</sup> is illustrative. Navajo plaintiffs, whose daughter was killed in a roll-over accident while driving a Ford Expedition, sued Ford Motor Company in tribal court alleging products liability claims.<sup>287</sup> Esther Todecheene, the decedent, was driving on a reservation road maintained by the Navajo Nation in the course of her employment as a Navajo police officer when her vehicle rolled over in a single-car accident, ejecting her from her seat.<sup>288</sup> The plaintiffs claimed that the Ford Expedition was defective, and in particular that the seatbelt malfunctioned.<sup>289</sup> Ford filed an action in federal district court challenging tribal court jurisdiction, and the district court granted Ford's motion to enjoin the tribal court proceeding.<sup>290</sup> The Ninth Circuit affirmed the district court, further narrowing the arguments available to tribal member plaintiffs under the *Montana* exceptions.

The *Ford* majority found no consensual relationship to the tribe or tribal members, notwithstanding a contract between Ford Motor Credit Company, a wholly owned subsidiary of Ford Motor Company, and the Navajo Nation for bulk purchase of Ford Expeditions.<sup>291</sup> The contract between Ford Credit and the Nation also included a forum selection clause stating that "[a]ll ac-

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281 See Telephone Interview with Veronika Fabian, *supra* note 268.

282 946 P.2d 1088 (N.M. Ct. App. 1997).

283 *Id.* at 1089-90.

284 *Id.* at 1090-91.

285 See *id.* at 1094 (upholding tribal court jurisdiction, including imposition of punitive damages on non-Indian defendants).

286 394 F.3d 1170 (9th Cir. 2005).

287 *Id.* at 1172.

288 *Id.*

289 *Id.*

290 *Id.* at 1173.

291 *Id.* at 1179-81.

tions which arise out of this Lease or out of the transactions it represents shall be brought in the courts of the Navajo Nation.’”<sup>292</sup> The court recognized that “[t]ort law does constitute a form of regulation,”<sup>293</sup> but nonetheless found that a tort claim by a tribal member was too distant from the consensual lease agreement to fall within the ambit of the consensual relationship exception.<sup>294</sup>

The *Ford* majority also rejected the argument that the Navajo Nation’s inability to impose standards of care on a tribal road in the context of protecting the health and safety of tribal police officers met the second *Montana* exception, which allows for jurisdiction over nonmembers when their conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>295</sup> Rather than look to the Navajo Nation’s larger regulatory interest, the court looked rather myopically to the single incident of the roll-over accident in this case.<sup>296</sup>

The *Ford Motor* decision exemplifies the dilemma for tribes in the wake of *Strate* and *Hicks* with respect to enforcing their own laws to address serious, reservation-wide problems. As Judge Fletcher states in his dissenting opinion in *Ford*,

Not only is this a case about the safety of the tribe’s roads. Not only is this a case about the safety of products sold to tribal members. This is also a case about the ability of a tribe to ensure the safety of its police officers as those officers drive on tribal roads, protecting tribal members and enforcing tribal law.<sup>297</sup>

It may be true that no single accident threatens the health or welfare of the Navajo Nation. Taken as a whole, however, auto accidents are among the leading causes of death on the Navajo Nation.<sup>298</sup> These everyday tragedies are familiar to anyone who has spent time in Indian country. Everyone knows someone who has been killed in or by a car, leading to the depressing sense that life is particularly fragile and expendable for Native people.<sup>299</sup>

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<sup>292</sup> *Id.* at 1173 (quoting the lease agreement).

<sup>293</sup> *Id.* at 1180.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 1181 (quoting *Montana v. United States*, 450 U.S. 544, 566 (1981)).

<sup>296</sup> See *Ford Motor Co.*, 394 F.3d at 1182-83.

<sup>297</sup> *Id.* at 1188 (Fletcher, J., dissenting).

<sup>298</sup> IAN FRAZIER, *ON THE REZ* 8 (2000) (“Among the Navajo . . . car accidents are the leading cause of death.”)

<sup>299</sup> See generally *id.* Frazier’s book is a vivid and moving depiction of the every-

The inability to impose standards of care on those who knowingly engage in relevant behavior within the Navajo Nation prohibits the tribe from addressing one of the more serious public health issues within its boundaries.

Finally, the Supreme Court's cases that divest Indian tribes of categories of civil jurisdiction have compromised the transactional environment for tribes. As a result of *Strate* and *Hicks*, the Navajo Nation has adopted a policy of requiring consent to tribal jurisdiction in every lease, contract, or other consensual agreement.<sup>300</sup> But every negotiation with a non-Indian business is now conducted in a context in which non-Indian perceptions of the uncertainty and strangeness of tribal law are bolstered by their sense that these laws need not apply to them.<sup>301</sup> Obtaining consent to tribal law and jurisdiction in these circumstances is awkward if not impossible.<sup>302</sup> Luralene Tapahe reports that the Supreme Court's decisions are interfering with the Navajo Nation's ability to enter into agreements concerning rights of way for electric utilities, pipelines, and business site leases.<sup>303</sup> Before *Strate*, consent to tribal jurisdiction did not raise nearly as much opposition or concern.<sup>304</sup> Post-*Strate*, the Navajo Nation will not give up on the consent term, and increasingly the non-Indian businesses refuse to include it.<sup>305</sup> The Court's jurisprudence has altered jurisdictional expectations in a way that creates barriers to transactions, and therefore potentially interferes with tribal economic development.<sup>306</sup>

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day tragedies in Indian country. See, e.g., *id.* at 32-33, 37, 43, 46, 56-57, 130, 246-47, 254-56, 258. My own experience on the Navajo Nation supports this point as well. While I was working in Tuba City, the following Navajo friends and acquaintances lost relatives in car accidents: the receptionist at DNA; a girl whom I coached on the Tuba City cross-country team; and several clients. Some doctors at the Indian Health Services hospital in Tuba City began sporting the bumper sticker "Pray for me and mine. I drive Highway 89," referring to a state highway that runs through the western portion of the Navajo Nation between Flagstaff and Page, Arizona.

<sup>300</sup> See Interview with Luralene Tapahe, *supra* note 266; Telephone Interview with Raymond C. Etcitty, *supra* note 2.

<sup>301</sup> See Interview with Luralene Tapahe, *supra* note 266.

<sup>302</sup> See *id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> See *id.*

<sup>306</sup> Cf. Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 815-19 (1998). Hills' article demonstrates that anti-commandeering, a federalism doctrine that protects states from federal overreaching, is irrelevant to determining how a governing body will act in the context of reaching efficient deals with

The Supreme Court's cases divesting tribes of categories of civil jurisdiction have dramatically changed the environment for the enforcement of Navajo Nation laws. Most pertinent to this study, the Navajo Nation's ability to provide employment opportunities through enforcement of the Navajo Nation Preference in Employment Act appears vulnerable. Providing economic security through employment is a key function of sovereignty. Researchers at the Udall Center for Studies in Public Policy and the Harvard Project on American Indian Economic Development have determined that "tribal control over tribal affairs is the *only* policy that works for economic development."<sup>307</sup> If providing services and a secure business environment to non-Indian businesses on the Navajo Nation does not result in the potential to increase Navajo employment, a significant benefit of economic development is lost, and that functional aspect of sovereignty is impaired. Likewise, the sovereign interest in protecting citizens from unscrupulous and/or harmful behavior through consumer protection and tort law is at risk due to the instability of tribal legal jurisdiction.

One positive result from these otherwise negative impacts on the Navajo Nation is the inter-tribal effort to redress the Supreme Court decisions in Congress.<sup>308</sup> A document entitled *Navajo Nation Policy Position Response to U.S. Supreme Court Diminishment of Sovereignty* declares, "The Navajo Nation encourages all Indian Nations to unite as one, to speak with one voice, to advocate for true recognition of our inherent sovereignty by the United States Congress."<sup>309</sup> The Navajo Nation's sense of itself as a sovereign appears, in many ways, to be strengthened as a result of this effort.<sup>310</sup> The *Policy Position* also articulates a clear, comprehensible vision about how to restore

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another governing body. *Id.* Relating to the Navajo context is the point that judicial doctrines that alter the boundaries of sovereignty are troublesome when they interfere with economic efficiency. Here, in contrast to the anti-commandeering context, it is the abandonment of dual sovereignty that creates market interference.

<sup>307</sup> Stephen Cornell & Jonathan Taylor, *Sovereignty, Devolution, and the Future of Tribal-state Relations*, Nat'l Cong. Of Am. Indians Mid-Year Session 4 (June 26, 2000), available at [www.udallcenter.arizona.edu/nativenations/pubs/tribal%20state%20relations.pdf](http://www.udallcenter.arizona.edu/nativenations/pubs/tribal%20state%20relations.pdf).

<sup>308</sup> See Interview with Levon Henry, *supra* note 166; Res. of the Navajo Nation Council, CAU-73-01 (2001) (calling for restoration of tribal inherent powers that have been divested by Supreme Court decisions).

<sup>309</sup> Res. of the Navajo Nation Council, CAU-73-01, Exhibit A at 1 (2001).

<sup>310</sup> See Interview with Levon Henry, *supra* note 166; Res. of the Navajo Nation Council, CAU-73-01 (2001).

inherent tribal powers, and includes flexibility in terms of considering federal judicial review and enabling tribes to opt in or out, depending on their willingness to accept that trade-off.<sup>311</sup>

Another hopeful sign is the defiant certitude voiced by some tribal officials regarding the future of the Navajo Nation in the wake of the Supreme Court's activity. Raymond Etcitty put it this way:

The Navajo Nation is not going away. We have our own courts, 300,000 members, and a government that nearly 200,000 people abide by. The fundamental principle is that the government comes from the people. The government can't be done away with [by the Supreme Court or any other federal branch] because the people have formed it. The Constitution never took away Indian self-governance; that governance flows from the people. Tribes aren't going to go away.<sup>312</sup>

## 2. Taxation

### a. Acting on the Inherent Power to Tax

"The right to tax is an inherent right of the Navajo Nation and one aspect of its sovereignty."<sup>313</sup> This quotation does not come from a federal case. These are the words of the Navajo Nation Tribal Council in its 1974 resolution establishing the Navajo Tax Commission.<sup>314</sup> Emboldened by the new era of self-determination and committed to creating a homeland that could nurture its people in ways the federal government had repeatedly failed to do, the Navajo Nation set out to collect revenue to fund programs. As the Council resolution also stated, "Various studies and surveys made by and on behalf of the Navajo Tribe have shown that taxation within a comprehensive taxation program would be in the best interests of the Navajo people."<sup>315</sup>

In the four years following the establishment of the Navajo Tax Commission, the Commission continued to study the question of whether and how much to tax.<sup>316</sup> In 1978, the first Navajo

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<sup>311</sup> Res. of the Navajo Nation Council, CAU-73-01, Exhibit A at 3-4 (2001).

<sup>312</sup> Telephone Interview with Raymond C. Etcitty, *supra* note 2.

<sup>313</sup> Res. of the Navajo Nation Council, CJA-6-74 (1974) (on file with author).

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> See THE NAVAJO NATION OFFICE OF THE NAVAJO TAX COMM'N, HISTORY OF THE NAVAJO TAX COMMISSION AND OFFICE OF THE NAVAJO TAX COMMISSION, at [http://www.navajotax.org/new\\_page\\_1.htm](http://www.navajotax.org/new_page_1.htm) (last visited Feb. 13, 2005) [hereinafter HISTORY OF THE NTC].

taxes—a possessory interest tax<sup>317</sup> (hereafter PIT, which is a type of ad valorem tax) and a business activity tax<sup>318</sup> (hereafter BAT, which is a type of gross receipts tax)—were enacted by the Tribal Council. In enacting both of these taxes, the Tribal Council again declared that “[t]he right to tax is part of the inherent sovereignty of any Nation.”<sup>319</sup> In addition, the economic need for the taxes was articulated: “Navajo population and Navajo needs are increasing, with the increase in the need for services partly a result of increased employment and development within the Navajo Nation.”<sup>320</sup> In these pronouncements, the Council makes clear the direct link between sovereign authority and revival and protection of the Navajo people.

Almost as soon as the Navajo Nation BAT and PIT were passed, non-Indian businesses extracting coal within the Navajo Nation filed suit, objecting to the taxes on jurisdictional and other grounds.<sup>321</sup> While these cases were winding their way through the federal courts, the Supreme Court heard two other challenges to tribal taxes, and in both affirmed the inherent tribal power to tax.<sup>322</sup> First, in *Washington v. Confederated Tribes of Colville Indian Reservation*, the Court found that the power to tax Indians and non-Indians was “a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.”<sup>323</sup> In *Merrion v. Jicarilla Apache Tribe*, the Court found the taxing power to be “an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.”<sup>324</sup> *Merrion* upheld a tax that the Jicarilla Apache Tribe imposed on non-Indian lessees who were extracting oil and gas from tribal trust lands. The non-Indian taxpayers raised several arguments, including that the Tribe’s tax resulted in multiple taxation in violation of the Commerce Clause, and that the tribal power to tax is only coextensive with the tribal power to exclude

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<sup>317</sup> Res. of the Navajo Nation Council, CJA-13-78 (1978).

<sup>318</sup> Res. of the Navajo Tribal Council, CM-36-78 (1978).

<sup>319</sup> *Id.*; Res. of the Navajo Tribal Council, CJA-13-78.

<sup>320</sup> Res. of the Navajo Tribal Council, CM-36-78; Res. of the Navajo Tribal Council, CJA-13-78.

<sup>321</sup> See *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985); *Southland Royalty Co. v. Navajo Tribe of Indians*, 715 F.2d 486 (10th Cir. 1983).

<sup>322</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-40 (1982); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-53 (1980).

<sup>323</sup> 447 U.S. at 152.

<sup>324</sup> 455 U.S. at 137.

non-Indians from the reservation.<sup>325</sup> The Court rejected each of these arguments, and repeatedly stressed the inherent authority of Indian tribes to tax, as well as the crucial role that taxation plays for any government to finance governmental services and activities.<sup>326</sup> *Merrion*, like *Williams v. Lee*,<sup>327</sup> is a high-water mark for judicial acknowledgment of tribal powers. It does not limit the taxing power to tribal members, and it does not follow the framework laid out in *Montana*,<sup>328</sup> decided two years before *Merrion*, for assessing whether tribes have regulatory authority over non-Indians. Moreover, it seems to embrace a framework for assessing tribal inherent powers that is specific to the governmental action at issue. The governmental act in *Merrion*—taxation—was held to be at the top of the list of powers of self-government: the tribal power to tax “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.”<sup>329</sup>

The Court decided *Kerr-McGee Corp. v. Navajo Tribe of Indians*,<sup>330</sup> one of the cases challenging the Navajo taxes, three years after *Merrion*. As in *Merrion*, the non-Indian mineral lessees subject to the tribal taxes were leasing tribal lands. Unlike *Merrion*, the Secretary of the Interior had not expressly approved the tribal taxes at issue in *Kerr-McGee*. The non-Indian lessee challenged the taxes’ validity based on the absence of Secretarial approval. The Court rejected this argument, finding that Secretarial approval was not required by any statute, and furthermore that no statute authorizing approval was necessary because the power to tax is “an essential attribute of self-government.”<sup>331</sup> Of particular relevance to the Navajo Nation and its perception of the strength of future arguments regarding its sovereignty, the Court concluded by stating that

[t]he Navajo Government has been called “probably the most elaborate” among tribes. The legitimacy of the Navajo Tribal

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<sup>325</sup> 455 U.S. at 130.

<sup>326</sup> *Id.*

<sup>327</sup> 358 U.S. 217 (1959); see *supra* notes 50-53 and accompanying text (discussing *Williams*).

<sup>328</sup> 450 U.S. 544 (1981); see *supra* notes 216-19.

<sup>329</sup> 455 U.S. at 137.

<sup>330</sup> 471 U.S. 195 (1985).

<sup>331</sup> *Id.* at 201.

Council, the freely elected governing body of the Navajos, is beyond question. We agree with the Court of Appeals that neither Congress nor the Navajos have found it necessary to subject the Tribal Council's tax laws to review by the Secretary of the Interior.<sup>332</sup>

Given the green light to pass taxes in order to raise revenue and fund essential governmental programs, many tribes passed a variety of tax provisions. Some of these taxes raised issues that would later result in de facto and de jure limitations on the tribal power to tax, as discussed in Part I.C.2.c., below. But the Court's unambiguous recognition of the tribal power to tax affirmed the notion of modern tribal sovereignty, in the context of one of the most important powers possessed by any government. The Navajo Nation has seized on this power, in both expressive and practical ways.

In the expressive category, the Navajo Tribal Council, immediately upon receipt of the *Kerr-McGee* decision, declared the date to be a Navajo holiday known as "Navajo Nation Sovereignty Day."<sup>333</sup> The Council announced with evident pride:

The Supreme Court by a vote of 8 to 0, stated that the Navajo Tribal Government as a Sovereign Nation has the inherent right to impose taxes without review and approval of the Secretary of the Interior; and . . . said that the Navajo Government, "probably the most elaborate among Tribes," is legitimate and that as a Sovereign Nation has the absolute right to Self-Government.<sup>334</sup>

While recognizing and lauding the decision of the Justices in Washington, D.C., the Tribal Council was also clear to give credit to the Navajo people themselves: "This landmark decision on behalf of the Navajo people, as well as all Native American Indian Nations, reaffirms and conforms [sic] that the Navajo Nation is a Sovereign Nation; and [this] landmark decision is also a direct result of the Navajo Nation utilizing its own in-house expertise."<sup>335</sup> It might be surprising, in this era of "no new taxes," to hear that the power to tax is celebrated in an annual holiday. The Navajo reaction indicates the strong link that the Navajo perceive exists between their sovereign powers as a government and their continued existence as a people.

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<sup>332</sup> *Id.* (citations omitted).

<sup>333</sup> See Res. of the Navajo Tribal Council, CMY-35-85 (1985).

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

*Kerr-McGee* also had more concrete effects. Subsequent taxes enacted by the Navajo Nation include the Oil and Gas Severance Tax, passed in 1985,<sup>336</sup> the Hotel Occupancy Tax, passed in 1992,<sup>337</sup> the Tobacco Products Tax,<sup>338</sup> the Fuel Excise Tax,<sup>339</sup> and the Sales Tax.<sup>340</sup> The revenue from these taxes constitutes an increasingly significant percentage of the Navajo Nation budget. A certain percentage of the revenue is earmarked for distribution to particular funds. These include five percent to the Tax Administration Suspense Fund, two percent to the Land Acquisition Fund, two percent to the Chapter Development Fund, and twelve percent to the Permanent Trust Fund.<sup>341</sup> In addition, portions of particular taxes are earmarked for specific uses. For example, the net revenue from fuel taxes goes to road maintenance and construction, and the net revenue from the hotel tax goes to a tourism fund.<sup>342</sup> Each of these funds, in particular the Land Acquisition Fund and the Permanent Trust Fund, plays a significant role in furthering the core aspects of sovereignty. The Land Acquisition Fund enables the Navajo Nation to purchase non-Indian fee lands, and thereby restore the land base as well as address some of the jurisdictional problems raised by checkerboard patterns of ownership.<sup>343</sup> The Permanent Trust Fund, which was established by former Navajo Nation President Peterson Zah in 1985, is intended to provide a replacement revenue stream for oil and gas royalties.<sup>344</sup> Revenue from the Fund is not available until 2005. The Navajo Nation needs long-term financial security for the day when income from fossil fuels ceases, or at least diminishes greatly, due to depletion of the resource.<sup>345</sup> Using tax revenues in this way is a creative solution to the serious gaps in economic development opportunities in Indian country.<sup>346</sup>

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<sup>336</sup> Res. of the Navajo Tribal Council, CO-79-85 (1985).

<sup>337</sup> Res. of the Navajo Tribal Council, CJY-27-92 (1992).

<sup>338</sup> Res. of the Navajo Tribal Council, CO-107-95 (1995).

<sup>339</sup> Res. of the Navajo Tribal Council, CAU-85-99 (1999).

<sup>340</sup> Res. of the Navajo Nation Council, CO-84-01 (2001). The sales tax went into effect on April 1, 2002. *See id.*

<sup>341</sup> Interview with Amy Alderman, Legal Department, Navajo Nation Tax Commission, in Window Rock, Ariz. (Dec. 10, 2003) (on file with author).

<sup>342</sup> *Id.*

<sup>343</sup> *See supra* Part I.C.1.c. (discussing the complications posed by non-Indian land within Navajo Nation boundaries).

<sup>344</sup> Res. of the Navajo Tribal Council, CJY-53-85 (1985).

<sup>345</sup> *See id.*

<sup>346</sup> *See* Robert L. Gips, *Current Trends in Tribal Economic Development*, 37 *NEW*

After the earmarked funds are subtracted from the tax revenue, the remainder goes in the Navajo Nation General Fund. This Fund includes revenue from all sources, including other tribally generated revenue, such as royalties from mineral production, as well as federal and state grants. From 1990-2002, tribal taxes accounted for a low of seven percent of the fund to a high of fifteen percent of the fund.<sup>347</sup>

Tax revenue thus supports a variety of programs that ensure the health, security, and long-term viability of the Navajo Nation and its people. The money goes to basic infrastructure, which is essential to further other forms of economic development, as well as long-term investment in the Permanent Trust Fund. Moreover, taxes are becoming an increasingly significant aspect of the Navajo governmental budget. The Court's affirmation of the inherent power to tax has enabled the Navajo Nation to fund essential governmental programs today as well as plan for a more secure economic future.

*b. Responding to Concurrent State Jurisdiction to Tax*

At the same time that the Supreme Court was affirming tribal inherent power to tax non-Indians, it was expanding concurrent state taxation of non-Indians in Indian country. Non-Indians in Indian country as a general matter now have three potential layers of taxes to pay—tribal, state, and federal. Other than the federal income tax, taxation is typically a local matter, and so the paradigmatic contest created by the Court's cases is between states and tribes for tax revenue.

The roots of the doctrine recognizing concurrent state jurisdiction over non-Indians in Indian country took hold during the allotment period at the end of the nineteenth century, when the federal government encouraged non-Indian settlement on lands that were within the boundaries of tribal reservations.<sup>348</sup> The influx of non-Indians into Indian country presented a challenge to

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ENG. L. REV. 517, 517-18 (2003) (describing obstacles to economic development in Indian country).

<sup>347</sup> Summary of Navajo Nation Audited Tax Revenues, 1994-2002 (on file with author).

<sup>348</sup> See 25 U.S.C. § 331 (repealed 2000); see also DELORIA & LYTLE, *supra* note 47, at 8-12. The typical scenario was to carve up an Indian reservation into allotments of 160 acres, issue those allotments to each individual Indian head of household, and then to declare that any remaining, unallotted lands were open to non-Indian homesteading, mining, or other means of disposition. In most cases, however, reservation boundaries were kept intact, thus laying the groundwork for juris-

the vision of the intact Indian nation assumed in *Worcester v. Georgia*.<sup>349</sup> Courts responded by recognizing state jurisdiction over white-on-white crimes,<sup>350</sup> and in some circumstances allowing state taxation of non-Indian activity.<sup>351</sup>

At the beginning of the modern era, the Court initially sent some conflicting messages concerning state concurrent civil authority over non-Indians. In two cigarette tax cases, *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*,<sup>352</sup> and *Washington v. Confederated Tribes of Colville Indian Reservation*,<sup>353</sup> the Court upheld state taxation of on-reservation cigarette sales to non-Indians. Foremost in the *Colville* Court's reasoning was the tribe's economic behavior. The Court disapproved of the tribe's attempt to "market a state tax exemption,"<sup>354</sup> notwithstanding the fact that similar market behavior often drives state decisions about tax rates.<sup>355</sup> In addition, the Court seemed to latch on to the fact that the cigarettes were not produced on the reservation, and thus the state tax did not affect reservation-generated value.<sup>356</sup> Yet during the same time period, the Court decided three cases in which state taxes were pre-

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dictional contests between the non-Indian settlers and Indian nations, as well as claims to concurrent jurisdiction by states. See Royster, *supra* note 27, at 37.

<sup>349</sup> See WILKINSON, *supra* note 36, at 35 (describing how courts accepted "a gradual breakdown of reservation boundaries at a time when assimilationist sentiments were building in Congress and increasing numbers of non-Indians were beginning to enter Indian country").

<sup>350</sup> See *United States v. McBratney*, 104 U.S. 621, 624 (1881); see also *New York ex rel. Ray v. Martin*, 326 U.S. 496, 500 (1946).

<sup>351</sup> See generally *Wagoner v. Evans*, 170 U.S. 588 (1898) (upholding county taxes on non-tribal member cattle grazed in Indian country); *Thomas v. Gay*, 169 U.S. 264 (1898) (upholding state taxes on non-Indian owned cattle grazed in Indian country); *Maricopa & P. R. Co. v. Arizona*, 156 U.S. 347 (1895) (holding that territory of Arizona could tax railroad running through Indian country); *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28 (1885) (upholding taxation of railroad rights-of-way through reservations).

<sup>352</sup> 425 U.S. 463 (1976).

<sup>353</sup> 447 U.S. 134 (1980).

<sup>354</sup> *Id.* at 155 ("[P]rinciples of federal Indian law . . . [do not] authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.").

<sup>355</sup> Steven R. Little, *Corporate Welfare Wars: The Insufficiency of Current Constraints on State Action and the Desirability of a Federal Legislative Response*, 22 HAMLINE L. REV. 849, 866 (1999) (noting that different state tax incentives to attract business include "state income tax credit . . . . Property tax exemptions or abatements, sales tax exemptions, credits for employee training, and acceleration of depreciation deductions").

<sup>356</sup> See *Colville*, 447 U.S. at 157.

empted: *White Mountain Apache Tribe v. Bracker*,<sup>357</sup> *Central Machinery Co. v. Arizona State Tax Commission*,<sup>358</sup> and *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*.<sup>359</sup> All three of these cases involved a state's attempt to impose taxes on non-Indians doing business with a tribe. In none of the three cases were the state taxes expressly prohibited by any legislation. Yet in these non-cigarette cases, the Court rejected the states' attempt to tax.

*Cotton Petroleum Corp. v. New Mexico* was the first modern era non-cigarette case in which the Court upheld concurrent state taxation of non-Indians in Indian country.<sup>360</sup> *Cotton* involved New Mexico's attempt to impose oil and gas severance taxes on non-Indian companies extracting oil and gas from leases on Indian trust land.<sup>361</sup> The Court addressed the conflicting messages from *Moe*, *Colville*, *White Mountain*, *Central Machinery*, and *Ramah* by stating that the Court applies a "flexible pre-emption analysis sensitive to the particular facts and legislation involved."<sup>362</sup> As part of this analysis, the Court undertakes a "particularized examination of the relevant state, federal, and tribal interests."<sup>363</sup> The Court considers the "history of tribal independence in the field at issue," as well as the broad policies that underlie the legislation.<sup>364</sup> Finally, "although state interests must be given weight and courts should be careful not to make legislative decisions in the absence of congressional action, ambiguities in federal law are, as a rule, resolved in favor of tribal independence."<sup>365</sup>

As applied to the state taxes in *Cotton*, the Court found no preemption. The relevant legislation did not prohibit state taxation of non-Indians.<sup>366</sup> The Court found that the general legislative intent to provide for the maximum profitability for Indian

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<sup>357</sup> 448 U.S. 136 (1980) (rejecting state fuel taxes on non-Indians in Indian country because the taxes were preempted by comprehensive federal regulation of tribal logging operation).

<sup>358</sup> 448 U.S. 160 (1980) (upholding no state taxation of non-Indian sales of equipment to Indian tribe).

<sup>359</sup> 458 U.S. 832 (1982) (finding that state taxation of a non-Indian construction company was preempted by extensive federal regulation of tribal schools).

<sup>360</sup> 490 U.S. 163 (1989).

<sup>361</sup> *Id.* at 167-69.

<sup>362</sup> *Id.* at 176.

<sup>363</sup> *Id.* (quoting *Ramah*, 458 U.S. at 838).

<sup>364</sup> *Cotton*, 490 U.S. at 176.

<sup>365</sup> *Id.* at 177.

<sup>366</sup> *Id.*

tribes was directed at tribal royalties, not indirect effects on tribal taxes from concurrent state taxes.<sup>367</sup> The Court distinguished *White Mountain* and *Ramah*, finding that in both of those cases there was a “comprehensive federal [regulatory] scheme,” the state’s tax burden ultimately fell on the tribe, and in neither case did the state provide any relevant services.<sup>368</sup> In particular, the Court stressed that, unlike in *White Mountain* and *Ramah*, the state in *Cotton* provided “substantial services” to both the tribe and the taxpayer, “costing the state approximately \$3 million per year.”<sup>369</sup> The Court also relied on findings by the district court that indicated that the tribe still had room to increase its taxes and royalties, notwithstanding the state taxes.<sup>370</sup>

Lower court cases applying *Cotton* continue to follow the “flexible preemption analysis,” but the trend is increasingly to marginalize *White Mountain*, *Central Machinery*, and *Ramah* as anomalies and to allow state taxation of non-Indians in Indian country.<sup>371</sup> There are exceptions. For example, in *Crow Tribe of Indians v. Montana* a circuit court struck down a state tax on non-Indian activity on Crow tribal lands because the tax was so high it rendered all coal produced in Montana unmarketable.<sup>372</sup> A handful of other cases resulted in rejection of state taxes or regulations in circumstances where virtually all of the preemption factors tipped heavily in the tribe’s favor.<sup>373</sup> But the Supreme Court has continued to approve state taxes, and to affirm the imposition of burdens on tribes and tribal entities for the collection of these taxes.<sup>374</sup> Continuing the Court’s theme from

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<sup>367</sup> *Id.* at 179-80.

<sup>368</sup> *Id.* at 184-85.

<sup>369</sup> *Id.* at 185.

<sup>370</sup> *Id.* (“[T]he District Court found that ‘[n]o economic burden falls on the tribe by virtue of the state taxes,’ . . . and that the Tribe could, in fact, increase its taxes without adversely affecting on-reservation oil and gas development.”).

<sup>371</sup> See, e.g., *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997) (affirming state right to tax non-Indian business transactions and privileges within Indian country); *Pimalco, Inc. v. Maricopa County*, 937 P.2d 1198 (Ariz. Ct. App. 1997) (finding state may tax non-Indian leasehold interest in Indian country); *Texaco, Inc. v. San Juan County*, 869 P.2d 942 (Utah 1994) (upholding state taxes on non-Indians engaged in oil and gas production in Indian country).

<sup>372</sup> 819 F.2d 895, 899-900 (9th Cir. 1981).

<sup>373</sup> See, e.g., *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989) (finding that federal law preempted state timber taxes assessed against non-Indian purchaser of tribal timber); *Marty Indian Sch. Bd., Inc. v. South Dakota*, 824 F.2d 684 (8th Cir. 1987) (rejecting application of state motor fuels tax to fuels purchased by on-reservation boarding school).

<sup>374</sup> See *Dep’t of Taxation and Fin. of New York v. Milhelm Attea & Bros., Inc.*,

*Moe* and *Colville* of hostility to tribal cigarette taxes,<sup>375</sup> the most substantial collection burdens involve cigarette sales to non-Indians.

The cases, such as *Moe*, *Colville*, and in particular *Cotton*, in which the Supreme Court has affirmed concurrent state taxation of non-Indians in Indian country, have impacted the Navajo Nation in two ways. On one hand, it is clear that tribal revenue is less than it could be in the absence of multiple taxation. Unlike states, tribes cannot market tax exemptions in order to lure customers into their jurisdictions.<sup>376</sup> The tax rate in Indian country for non-Indians will therefore always be set at a floor of the state tax rate. On the other hand, the Navajo Nation has approached state governments in order to address the problem of multiple taxation on a government-to-government level. Through tribal and state legislation as well as intergovernmental agreements, the Navajo Nation has been able to mitigate some of the harsher effects of the Supreme Court's multiple taxation cases.

The revenue impacts of the *Cotton* rule are apparent in the context of the Navajo Nation Sales Tax. The sales tax is currently set at three percent of the gross receipts of any sale.<sup>377</sup> The range set by the statute is between two percent and six percent,<sup>378</sup> but in an environment of dual taxation for non-Indian visitors to the reservation, it is not practical to set the tax any higher than three percent.<sup>379</sup> In 2003, the revenue from the sales tax exceeded \$4 million.<sup>380</sup> If that revenue doubled, there would obviously be more money and more flexibility. According to Amy Alderman, legal counsel for the Navajo Nation Tax Commission, one option would be to earmark some of a larger pool of sales tax revenues

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512 U.S. 61, 75-76 (1994) (upholding substantial regulatory burdens imposed on tribal retailers in order to assist in the collection of state cigarette taxes on non-Indians); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 160-61 (1980); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 466 (1976).

<sup>375</sup> See *Milhelm Attea*, 512 U.S. at 75-76.

<sup>376</sup> See *Colville*, 447 U.S. at 155 (holding that principles of federal Indian law do not authorize tribes to market state tax exemption.)

<sup>377</sup> NATION CODE tit. 24, § 605 (Equity 2001), available at [http://navajotax.org/sales\\_tax.htm](http://navajotax.org/sales_tax.htm).

<sup>378</sup> *Id.*

<sup>379</sup> See Interview with Amy Alderman, *supra* note 341.

<sup>380</sup> Office of the Navajo Tax Commission, FY 1998 thru FY 2003 Actual Tax Revenues, FY 2004 Projected Revenues, [http://www.navajotax.org/new\\_page\\_7.htm](http://www.navajotax.org/new_page_7.htm) [Hereinafter NTC FY 2004 Revenue Projection].

for sorely needed social programs.<sup>381</sup> And with respect to all tribal taxes, *Colville* stands for the proposition that it is unacceptable for tribes to generate revenue by attracting non-Indian customers into Indian country by competitively pricing goods and services through the mechanism of tribal taxes that are lower than state taxes.<sup>382</sup> The potential revenue from this type of competitive taxation is therefore completely lost to tribes.

Within this framework of constraints, the Navajo Nation has found room to maneuver. Neither the surrounding states nor the Navajo Nation want the multiple tax burden to inhibit non-Indian business altogether. In such circumstances, both governments lose out on the potential revenue stream because there is no business to tax at all. As a result, the Navajo Nation has approached New Mexico, Arizona, and Utah and achieved agreements that, for the most part, mitigate the harshest effects of multiple taxation on non-Indians.

New Mexico in particular has proved to be an important partner in addressing multiple taxation. In 2001, the Office of the Navajo Tax Commission worked with members of the New Mexico legislature to reduce the dual taxation effects on coal extracted from the New Mexico portion of the Navajo Nation.<sup>383</sup> The negotiations resulted in mutual legislation to address the problem. New Mexico passed laws providing for severance and gross receipts tax credits to offset the Navajo taxes, and also authorized entry into cooperative agreements with the Navajo Nation.<sup>384</sup> The Navajo Nation likewise approved amendments to the BAT.<sup>385</sup> The result is that businesses extracting coal from the New Mexico portion of the reservation pay a comparable tax rate to businesses extracting coal from non-Indian country lands in New Mexico.

Similar legislation and intergovernmental agreements have been reached regarding other taxes. There is an intergovernmental agreement with Arizona related to tobacco tax revenue shar-

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<sup>381</sup> Interview with Amy Alderman, *supra* note 341.

<sup>382</sup> 447 U.S. at 155.

<sup>383</sup> See Interview with Amy Alderman, *supra* note 341; HISTORY OF THE NTC, *supra* note 316.

<sup>384</sup> H.R. 293, 45th Leg., 1st Reg. Sess. (N.M. 2001) (codified at N.M. STAT. ANN. §§ 7-9-88.2, 7-29C-2, 9-11-12.2 (Michie 2001)).

<sup>385</sup> Res. of the Navajo Nation Council, CAU-67-01 (2001) (approving amendments to the BAT to offset dual taxation of coal extraction activities in New Mexico portion of Navajo Nation, and acknowledging parallel state laws passed by New Mexico).

ing and enforcement,<sup>386</sup> and Arizona has passed legislation that essentially caps the cumulative tobacco tax on the reservation at the state tax rate.<sup>387</sup> Arizona and the Navajo Nation have also entered into intergovernmental agreements with respect to enforcement of the Navajo Nation BAT and the Hotel Occupancy tax.<sup>388</sup> In Utah, the Tax Commission worked with state legislators to reduce the effects of concurrent state and tribal taxes in the context of hotel occupancy and fuel excise taxes. Utah passed laws mitigating the dual taxation effects, and an intergovernmental agreement was finalized.<sup>389</sup> Also regarding fuel excise taxes, intergovernmental agreements exist with Arizona, New Mexico, Texas, and California.<sup>390</sup>

This complex of Navajo and state legislation and intergovernmental agreements has, in many significant respects, eliminated concurrent taxation. The Navajo Nation has thus been able to counteract the effects of the Supreme Court's concurrent taxation jurisprudence, to the advantage of taxpayers as well as tribal and state governments. By approaching other governments to achieve a taxing environment that does not discourage economic investment and development, the Navajo Nation exercises its sovereignty against the backdrop of federal decisional law in a positive, and mutually beneficial, way. The Navajo Nation's response can only go so far, however. The Court's concurrent taxation cases have virtually eliminated the possibility that tribes could use competitive tax policies to attract non-Indian businesses onto the reservation.<sup>391</sup> And new tribal taxes, such as the Navajo Nation Sales Tax, are lower than they could be in the absence of dual taxation. Yet within these very real constraints imposed by the Court's legal definition of sovereignty, the Navajo Nation nonetheless is enacting sovereignty on the ground in creative and powerful ways.

*c. Effects of Categorical Limitations on the Inherent Power to Tax*

In *Atkinson Trading Co. v. Shirley*, the Supreme Court in 2001 addressed the question of whether the Navajo Nation could col-

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<sup>386</sup> HISTORY OF THE NTC, *supra* note 316.

<sup>387</sup> ARIZ. REV. STAT. § 42-3302 (Supp. 2004) (tobacco tax credit provisions).

<sup>388</sup> See HISTORY OF THE NTC, *supra* note 316.

<sup>389</sup> *Id.*; see also UTAH CODE ANN. §§ 59-13-201, 59-13-204, 59-13-301.5 (2004).

<sup>390</sup> HISTORY OF THE NTC, *supra* note 316.

<sup>391</sup> See *supra* notes 323-39 and accompanying text (discussing *Colville*).

lect a hotel occupancy tax from the non-Indian owner of a hotel located on non-Indian fee land within the Navajo Nation's boundaries.<sup>392</sup> Until *Atkinson*, the Court's treatment of tribal inherent powers to tax appeared to differ from that of other tribal governmental powers. In 1982, two years after the *Montana* decision, the Supreme Court declined to follow *Montana*'s framework in *Merrion v. Jicarilla Apache Tribe*.<sup>393</sup> In *Merrion*, the Court affirmed the tribe's power to tax non-Indians, and found that the tribal power to tax was not merely an extension of the tribal power to exclude non-Indians from the reservation.<sup>394</sup> As noted in *Merrion*, it had long been the understanding of the executive branch that tribes retained the power to tax activities on lands in which they had a significant interest, irrespective of land title.<sup>395</sup> That understanding was bolstered by an early circuit court opinion affirming tribal taxes on non-Indian businesses located on non-Indian lands within a reservation.<sup>396</sup>

The argument that the taxing power is different, and should not be measured by land title, is also supported by the justification for the power to tax. Governments provide services to areas within their geographical region, irrespective of land title. The power to raise revenue to fund those services is a necessary and indispensable attribute of government.<sup>397</sup> In *Atkinson*, however, the Court concluded that neither *Merrion* nor the governmental services argument were sufficient to distinguish the taxing power from other forms of jurisdiction over non-Indians.<sup>398</sup> *Atkinson* arose on the Navajo Nation, and a brief examination of its facts shed light on some of the dignitary and economic consequences of the case.

The *Atkinson* Trading Company ("Atkinson"), the plaintiff in the case, owned a very small island of fee land in Cameron, an area that is within the Navajo Nation's boundaries and is otherwise predominantly composed of tribal trust land.<sup>399</sup> *Atkinson* owns and operates the Cameron Trading Post, located on Atkin-

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<sup>392</sup> 532 U.S. 645, 645 (2001).

<sup>393</sup> 455 U.S. 130, 137 (1982); *see also supra* notes 324-30 and accompanying text (discussing *Merrion*).

<sup>394</sup> *Merrion*, 455 U.S. at 137.

<sup>395</sup> *Id.* at 139.

<sup>396</sup> *See* *Buster v. Wright*, 135 F. 947, 957 (8th Cir. 1905).

<sup>397</sup> *See* *Merrion*, 455 U.S. at 137.

<sup>398</sup> *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654 (2001).

<sup>399</sup> *See* Brief for Respondents at 2, 13-14, *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (No. 00-454).

son's patch of fee land. As the Navajo Nation noted in its briefs before the Supreme Court, the Navajo Nation provides fire and police protection, emergency medical services, and health inspection services to the Cameron area.<sup>400</sup> The Navajo Nation is thus the primary governmental authority ensuring health, safety, and security for Atkinson and its customers.<sup>401</sup> In addition, Atkinson draws customers to its business by advertising itself as a gateway to Indian culture. The website shows photographs of Navajo waitresses, walls adorned with Navajo rugs, and includes the following marketing blurb:

Time was when it would take days, sometimes months, to travel across the reservation and trade for the fine Native American Indian arts and curios at Cameron Trading Post . . . . The Cameron Trading Post today is a center for local trade as well as a source for Native American Indina [sic] art . . . representing many Native American Indian cultures throughout the American Southwest. In traditional patterns passed down through generations, this selection of hand crafted Navajo rugs and textiles, baskets, pueblo pottery, Native American Indian jewelry, carvings, & Southwestern art are mementos to be treasured, found in a variety to suit any vacation budget.<sup>402</sup>

Atkinson thus benefits from being located on the Navajo Nation both because of the governmental services provided and the cultural milieu, which Atkinson deliberately markets. Nonetheless, the Court declined to follow *Merrion* and instead applied "*Montana* straight up,"<sup>403</sup> and found that neither the consensual relationship exception nor the "direct effects" exception applied.<sup>404</sup> As to the former, the Court interpreted the exception narrowly, requiring nothing short of an express agreement with the tribe or its members, whereas the lower court had found a consensual relationship by virtue of the hotel customers' knowing entry into Navajo territory.<sup>405</sup> Regarding the "direct effects" exception, the Navajo Nation argued that the Cameron Trading Post had direct effects upon the Navajo Nation in that it employs up to one hundred tribal members, derives business from tourists attracted to the Navajo Nation, and is located in an area that has

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<sup>400</sup> *Id.* at 3-4.

<sup>401</sup> *Id.* at 6-7 (citing *Merrion*, 455 U.S. at 137-38).

<sup>402</sup> Historic Cameron Trading Post Gift Shop, at <http://www.camerontradingpost.com/giftshop.html> (last visited Feb. 9, 2005).

<sup>403</sup> *Atkinson*, 532 U.S. at 654.

<sup>404</sup> *Id.* at 657.

<sup>405</sup> *Id.* at 654-55.

overwhelming Navajo character.<sup>406</sup> The Court again was not persuaded, finding that the inability to tax customers at the Trading Post would not “imperil” the political integrity of the tribe.<sup>407</sup> *Atkinson* thus stands for the proposition that non-Indians on non-Indian fee lands within tribal nation boundaries exist in tribal tax-free zones. The Navajo Nation’s authority to tax non-Indians is, as a practical matter, limited to circumstances in which the Navajo Nation can require consent to tribal taxation. In instances of tribal taxes imposed for non-Indian activities on tribal trust lands, *Atkinson* itself does not impose a significant barrier.<sup>408</sup> But when non-Indian business occurs on non-Indian fee land, or its equivalent,<sup>409</sup> within Navajo Nation boundaries, it may be difficult for the tribe to induce the non-Indian to consent to tribal taxation.

*Atkinson* has clear, if not deep, revenue effects on the Navajo Nation. The Navajo Nation Hotel Occupancy Tax (“HOT”) was passed by the Navajo Nation Tribal Council in 1992.<sup>410</sup> Prior to the *Atkinson* decision, the tax was imposed on non-Indian guests at fourteen hotels located within Navajo Nation boundaries, as well as a small number of “bed and breakfast” establishments.<sup>411</sup> Since *Atkinson*, the Navajo Nation has ceased collecting the tax from two hotels on non-Indian fee land.<sup>412</sup> The Navajo Nation has also stopped collecting the Navajo Nation Sales Tax for any transactions between non-Indians on non-Indian fee land.<sup>413</sup>

The revenue impacts of *Atkinson* are evident in the context of the Hotel Occupancy Tax. In the three years preceding the *Atkinson* decision, when the two hotels located on non-Indian fee

<sup>406</sup> *Id.* at 657.

<sup>407</sup> *Id.* at 657 n.12.

<sup>408</sup> While it is uncertain the extent to which *Atkinson* applies with equal force on tribal trust land, in the taxing context the lack of clarity regarding the significance of land status injected by *Nevada v. Hicks*, 533 U.S. 353 (2001), discussed at *supra* notes 232-39 and accompanying text, is largely irrelevant. Any non-Indian business activity on tribal trust lands requires consent of the Indian tribe, and the tribe can therefore always condition consent on the requirement of paying tribal taxes.

<sup>409</sup> See *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (finding a right-of-way across trust land to be the equivalent of non-Indian fee land for purposes of jurisdictional analysis).

<sup>410</sup> NATION CODE tit. 24, §§ 101-42 (Equity 1995).

<sup>411</sup> See Interview with Amy Alderman, *supra* note 341.

<sup>412</sup> See *id.*

<sup>413</sup> See *id.*

° land were collecting the HOT from non-Indian customers,<sup>414</sup> revenue from the HOT ranged from \$1,167,353 to \$1,169,686.<sup>415</sup> In 2001, the year *Atkinson* was decided, the revenue from the HOT dipped to \$881,533.<sup>416</sup> In 2002, HOT revenue totaled \$948,291, and HOT revenue for 2003 was \$624,000.<sup>417</sup> The amount of revenue lost is not enormous. Although both of the hotels on non-Indian fee land are significant tourist establishments on the Navajo Nation, they still only constitute two out of fourteen hotels within reservation boundaries. But the lost revenue is also not likely to be recouped. Some Navajo Nation officials have suggested creative ways to induce a consensual agreement with the non-Indian owners of the hotels. For example, Navajo Nation District Court Judge Allen Sloan speculates whether the Navajo Nation's withdrawal of the provision of police and other emergency services from the Cameron area would cause *Atkinson* to consent to pass on the tax in exchange for these services' being restored.<sup>418</sup> But whether the Navajo Nation would adopt this somewhat confrontational strategy is at best uncertain. Furthermore, whether *Atkinson* would consent even under such circumstances is highly speculative. It seems likely that *Atkinson*'s resistance to the Navajo HOT was largely ideological, given that the tax was passed on to transient, non-repeating customers, and therefore not a factor in hotel profits.<sup>419</sup> The tax revenue that is lost due to the direct effects of the *Atkinson* decision is therefore likely lost for good. The Navajo HOT funds tourism-related services provided by the Navajo Nation government. The loss of this income therefore hurts the Navajo Nation's ability to engage further in this relatively non-exploitative<sup>420</sup> form of economic development. Extrapolating from the Navajo experience, it is likely

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<sup>414</sup> *Atkinson* Trading Company was collecting the tax under protest and paying it into an escrow fund.

<sup>415</sup> NTC FY 2004 Revenue Projection, *supra* note 380.

<sup>416</sup> *Id.*

<sup>417</sup> *See id.*

<sup>418</sup> Interview with Allen Sloan, *supra* note 252.

<sup>419</sup> *See* Interview with Marcelino Gomez, Staff Attorney, Navajo Nation Department of Justice, in Window Rock, Ariz. (Dec. 11, 2003) (on file with author).

<sup>420</sup> Unlike natural resource extraction, a tourist-based economy has no natural limitation. Tourism is therefore a renewable source of income, as well as one that can be practiced in ways that do not harm the natural or cultural environment, particularly if the Navajo Nation itself is in control of the enterprise. *But see* Hal K. Rothman, *Pokey's Paradox: Tourism and Transformation on the Western Navajo Reservation*, in *REOPENING THE AMERICAN WEST* 90-121 (Hal K. Rothman ed., 1998) (exploring cultural challenges presented by fostering a tourism economy).

that this fairly non-negotiable outcome has more significant revenue impacts on other tribes, almost all of which have far more non-Indian fee land within their boundaries than the Navajo Nation.

Another effect from *Atkinson* in the taxing context is the negotiation posture that the Navajo Nation now takes with respect to consent to rights of way and other limited interests in land across Navajo Indian country. *Strate* held that for the purposes of tribal civil jurisdiction, non-Indian rights of way across tribal trust land are the equivalent of non-Indian fee land.<sup>421</sup> Therefore, to preserve the authority to tax the use of such rights of way and similar interests in land, the Navajo Nation Department of Justice now includes consent-to-taxation clauses in all of its right-of-way agreements.<sup>422</sup> While this appears to be a responsive solution, there is some question as to whether it creates barriers to negotiating with non-Indian businesses that did not exist prior to *Strate* and *Atkinson*.<sup>423</sup> As discussed above in Part I.C.1.c., non-Indian businesses are more likely to object to these clauses because they may believe that non-Indians can successfully resist tribal jurisdiction.<sup>424</sup>

For the Navajo Nation, Supreme Court decisions imposing categorical limitations on the authority to tax non-Indians have small, but nonetheless significant, revenue effects. Moreover, the Navajo Nation is challenged more than in the concurrent taxation context to exercise its sovereignty in responsive and creative ways. *Atkinson* is thus a significant legal setback for the Navajo Nation. The case presents a virtually non-negotiable barrier to the ability to collect income from non-Indians doing business on non-Indian fee land within reservation boundaries. This is so regardless of whether the Navajo Nation provides the benefits of governmental services to the area, and regardless of whether the cultural and aesthetic benefits of the Navajo Nation are the primary reasons for the non-Indian presence. The lost revenue, although limited in amount, is also highly unlikely to be recovered. Moreover, *Atkinson* and the related cases limiting tribal civil jurisdiction of all kinds create a climate of awkward business negotiations with non-Indians.

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<sup>421</sup> See *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); see also *supra* notes 229-31 and accompanying text.

<sup>422</sup> See Interview with Amy Alderman, *supra* note 341.

<sup>423</sup> See Interview with Luralene Tapahe, *supra* note 266.

<sup>424</sup> See *id.*

In *Merrion* and *Kerr-McGee*, the Supreme Court recognized that the power to tax is foremost among the powers of any government.<sup>425</sup> Without the power to raise revenue, there is no ability to fund infrastructure or services; in short, without money there is no ability to govern. The Navajo Nation has taken full advantage of this power, and has also responded in creative and flexible ways to the Supreme Court's decisions permitting concurrent state taxation of non-Indians. Yet the story of Navajo Nation taxation also reveals the ways in which the Court has limited economic growth and development on the Navajo Nation. Notwithstanding compacts and agreements with states, concurrent state taxation places outer limits on the level at which the Navajo Nation can impose taxes. Even more significantly, in its decisions categorically limiting tribal jurisdiction to tax, the Court has created common-law barriers to transactions with non-Indians.

### 3. Criminal Power

#### a. Acting on the Inherent Power to Punish Crimes

The Navajo Nation passed the precursors to its current criminal provisions in 1958 and 1959,<sup>426</sup> when the Tribal Council abolished the Courts of Indian Offenses and assumed control over the Navajo legal system.<sup>427</sup> The Council passed many amendments to the criminal code in 1977, when it adopted its first comprehensive tribal code.<sup>428</sup> In addition, in 1967, even before Congress passed the Indian Civil Rights Act,<sup>429</sup> the Navajo Nation passed its Bill of Rights, thereby providing due process and equal protection guarantees to criminal defendants.<sup>430</sup>

Tribal inherent power to punish crimes committed by tribal members was affirmed in 1978 in *United States v. Wheeler*,<sup>431</sup> in yet another Supreme Court case arising from within the Navajo

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<sup>425</sup> See *supra* notes 324-32 and accompanying text (discussing *Merrion* and *Kerr-McGee*).

<sup>426</sup> See, e.g. NATION CODE tit. 17, § 1801 (Equity 1995) (criminal complaints); NATION CODE tit. 17, § 1803 (Equity 1995) (warrants); NATION CODE tit. 17, § 1804 (Equity 1995) (arrests); NATION CODE tit. 17, § 1805 (detentions).

<sup>427</sup> See Wallingford, *supra* note 153, at 145; Res. of the Navajo Tribal Council, CO-69-58 (1958) (on file with author).

<sup>428</sup> See generally NATION CODE tit. 17 (most provisions originally adopted in 1977); Lowery, *supra* note 153, at 383.

<sup>429</sup> Pub. L. No. 90-284, 82 Stat. 77 (codified at 25 U.S.C. § 1302 (2000)).

<sup>430</sup> Res. of Navajo Tribal Council CO-63-67 (1967) (on file with author).

<sup>431</sup> 435 U.S. 313 (1978).

Nation. In *Wheeler*, the defendant, a Navajo tribal member, pled guilty to the Navajo crime of contributing to the delinquency of a minor, and then was charged with the federal crime of statutory rape arising out of the same incident.<sup>432</sup> The defendant raised the defense of double jeopardy in the federal prosecution, arguing that the Navajo tribe acted pursuant to a delegation of federal power and therefore was the same sovereign as the United States.<sup>433</sup> The Court disagreed, first stating that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."<sup>434</sup> The Court then examined the relevant treaty language, and determined that nothing therein "deprived the Tribe of its *own* jurisdiction to charge, try, and punish members of the Tribe for violations of tribal law."<sup>435</sup> Finally, the Court found that no grant of federal law expressly gave such power to the Navajo Nation, nor had any federal law taken criminal authority away.<sup>436</sup> Congress had therefore left untouched the retained sovereignty of the Navajo Nation to prosecute the crimes of its members.

The Navajo Nation has attempted to address the variety of criminal behavior that occurs within its borders. The crimes, as indicated by records from judicial districts throughout the Navajo Nation, range from transport of livestock without permission to aggravated battery and sexual assault.<sup>437</sup> In most of the districts, battery and endangering the welfare of a minor are among the leading cases filed.<sup>438</sup> In some, illegal possession and manufacture of liquor are evidently persistent problems.<sup>439</sup> Without the inherent power to address the wide range of criminal activity engaged in by tribal members, the Navajo Nation would be left open to recurrent challenges to its peace and security. The Navajo Nation has acknowledged that much remains to be done to

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<sup>432</sup> *Id.* at 314-16.

<sup>433</sup> *Id.* at 316.

<sup>434</sup> *Id.* at 323.

<sup>435</sup> *Id.* at 324.

<sup>436</sup> *Id.* at 326-28.

<sup>437</sup> See CRIMINAL CASE REPORT, ANNUAL REPORTS FROM WINDOW ROCK, SHIPROCK, CROWNPOINT, RAMAH, ALAMO, TOHAJILEE, TUBA CITY, KAYENTA, AND CHINLE DISTRICTS (2003) (on file with author).

<sup>438</sup> *Id.*

<sup>439</sup> See, e.g., *id.* (showing high rates of these crimes in the Tuba City, Chinle, and Window Rock Districts).

strengthen tribal law enforcement.<sup>440</sup> But it is clear that the solutions lie in strengthening tribal justice systems, rather than looking to other sovereigns to step in.<sup>441</sup>

*b. Effects of Overlapping Jurisdiction and Categorical Limitations on the Tribal Power to Punish Crimes*

In the criminal context, there are no modern Supreme Court cases that recognize concurrent state criminal authority in Indian country.<sup>442</sup> Thus there are no "Category B" cases in the criminal jurisdiction area. For reasons explained below, however, the federal statutory scheme addressing crimes in Indian country creates a confusing morass in which tribes, states, and the federal government may, depending on various factors, have exclusive or concurrent criminal jurisdiction. The Supreme Court cases that divest Indian tribes of categories of criminal jurisdiction contribute to this morass. First, in *Oliphant v. Suquamish Indian Tribe* the Court held that Indian tribes lack criminal jurisdiction over non-Indians.<sup>443</sup> The finding was not based on any explicit congressional deprivation. Rather, the Court interpreted the historical record to indicate that the dependent status of Indian tribes was inconsistent with criminal jurisdiction over non-Indians.<sup>444</sup> The Court's examination of history has been subject to much criticism.<sup>445</sup> Indeed, almost every aspect of the *Oliphant* decision has been subject to criticism.<sup>446</sup> Still, perhaps because the national demographic scales tip so heavily in favor of non-Indians, there has been no significant congressional attempt to reverse *Oliphant*.

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<sup>440</sup> See Res. of Navajo Tribal Council, CO-94-07 (1997) (on file with author) (approving President Clinton's directive on improving public safety and criminal justice in Indian country, and stressing the need for more funding, coordination, and enhancement of tribal courts, and not just more police officers).

<sup>441</sup> See *id.*

<sup>442</sup> The precedent for state criminal jurisdiction over white-on-white crimes in Indian country is still *United States v. McBratney*, 104 U.S. 621 (1881); see *supra* note 35 and accompanying text.

<sup>443</sup> 435 U.S. 191, 195 (1978).

<sup>444</sup> *Id.* at 197-206 (reviewing historical treatment of tribes regarding criminal jurisdiction).

<sup>445</sup> See, e.g., Berger, *supra* note 17; Russel L. Barsh & James Y. Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609, 611-16 (1979).

<sup>446</sup> See generally Getches, *supra* note 11; Frickey, *supra* note 13; David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996).

By contrast, the Court's next step in the categorical prohibition of tribal criminal jurisdiction was swiftly overturned by Congress. In *Duro v. Reina*, the Court held that Indian tribes lacked criminal jurisdiction over non-member Indians.<sup>447</sup> Applying a historical analysis that many have argued is similarly, if not more egregiously, flawed than *Oliphant*,<sup>448</sup> the Court concluded that criminal jurisdiction over non-members was inconsistent with the common-law doctrine of tribal sovereignty.<sup>449</sup> Given the usually slow and deliberate way in which the national legislature works, it was with remarkable alacrity that Congress passed a law reversing *Duro* and recognizing tribal inherent powers to prosecute non-member Indians.<sup>450</sup> Congress was persuaded by the impacts the criminal jurisdictional void would have on law enforcement within Indian country.<sup>451</sup> And unlike in *Oliphant*, the class of criminal defendants benefited by *Duro* does not have an overwhelming majority demographic in Congress.

In *United States v. Lara*, the Court upheld Congress's authority to recognize tribal inherent power to prosecute non-member Indians, affirming the view that the Court's decision in *Duro* was based on the federal common law of tribal sovereignty rather than on any constitutional provision.<sup>452</sup> The *Lara* decision, however, leaves open direct constitutional challenges to tribal criminal jurisdiction over non-Indians. Mr. Lara's challenge came in the context of arguing that a second federal prosecution for the same crime to which he pled guilty in tribal court violated the Constitution's double jeopardy prohibition.<sup>453</sup> Lara argued that the federal prosecution violated double jeopardy because the tribe's prosecution was pursuant to a delegation of federal power, and thus the tribe and the United States acted as the same sovereign prosecuting the same crime.<sup>454</sup> The Court rejected

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<sup>447</sup> 495 U.S. 676, 679 (1990).

<sup>448</sup> 435 U.S. 191 (1978).

<sup>449</sup> *Duro*, 495 U.S. at 679. All commentators agree that *Duro* was a common law, and not a constitutional decision, even though they may disagree sharply about the propriety of the "*Duro* fix" legislation. See, e.g., Gould, *supra* note 12, at 685-92; Pommersheim, *supra* note 14.

<sup>450</sup> See 25 U.S.C. § 1301 (1989), amended by Pub. L. No. 101-511 § 8077(b), 104 Stat. 1856 (1990).

<sup>451</sup> See generally *The Duro Decision: Criminal Misdemeanor Jurisdiction in Indian Country: Hearing on H.R. 972 Before House Comm. on Interior & Insular Affairs*, 102 Cong. 137 (Apr. 11, 1991).

<sup>452</sup> 541 U.S. 193, 196 (2004).

<sup>453</sup> See *id.*

<sup>454</sup> *Id.* at 196-97.

Lara's argument, holding that Congress can recognize inherent tribal powers even after the Court has called them into question.<sup>455</sup> Because Lara did not raise constitutional due process and equal protection challenges in the first tribal court prosecution, the Court declined to reach them, but essentially invited such challenges in subsequent cases.<sup>456</sup> One very prominent non-Navajo, Russell Means, appears poised to accept the invitation. Means, who is a member of the Oglala Sioux Nation, relied on dicta in *Duro* to challenge the Navajo Nation's criminal jurisdiction over him in a case involving his alleged battery of two people, one of them a Navajo tribal member and the other, Means's father-in-law, an Omaha tribal member.<sup>457</sup> Therefore, while in some respects the congressional fix of *Duro* rendered that decision a non-issue for tribes, in other respects *Duro* and *Oliphant* have contributed to an atmosphere of uncertainty with respect to tribal control over criminal behavior within tribal Indian country.

The impact of *Oliphant* on the Navajo Nation is, in some respects, difficult to assess. There are very few non-Indians who reside in Navajo Indian Country. According to the 2000 Census, only 3,794 white people lived on Navajo trust lands either on or near the reservation.<sup>458</sup> One might assume, therefore, that white criminal activity plays a relatively insignificant role in terms of challenges to law and order. Still, the Navajo Nation has done what it can to ensure that criminal behavior by non-Indians can be addressed in some manner. In 1978, shortly after *Oliphant* was decided, the Tribal Council passed a resolution strengthening its exclusion laws, which enable the expulsion from the Navajo Nation of non-members who engage in behavior that would otherwise be punishable under Navajo law.<sup>459</sup>

In addition to the Navajo Nation's practical response of amending its exclusion law, tribal governmental officials voiced their objection to what they perceive as unjustified deprivation of inherent powers. Following *Oliphant*, the Tribal Council also passed a resolution calling for Congress to overturn the case by

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<sup>455</sup> *Id.* at 200.

<sup>456</sup> *See id.* at 209.

<sup>457</sup> Means v. Dist. Ct., No. SC-CV-61-98 (Navajo 1998) (on file with author).

<sup>458</sup> *See* U.S. Census Bureau, Census 2000, Navajo Nation Reservation and Off-Reservation Trust Land (including only Caucasians in the census) (on file with author).

<sup>459</sup> *See Amending the Exclusion Law of the Navajo Nation*, Navajo Tribal Council Minutes, at 227-28 (Oct. 5, 1978) (on file with author).

federal statute.<sup>460</sup> In more recent times, the Council has passed similar resolutions calling for the restoration of civil and criminal territorial jurisdiction.<sup>461</sup> Thus, in the category of expressive sovereignty, the Court's unilateral divestment of criminal jurisdiction has a great impact.<sup>462</sup> The reasons for this are in some ways obvious. The power to sanction criminal behavior lies at the core of governmental powers.<sup>463</sup> If criminal transgressions cannot be addressed by the government, people are left vulnerable to private responses that may be unjust, ineffective, or both.

The expressive slight, as in the civil context, is linked to actual impairment of governance, even for a tribe as intact in terms of land base and tribal membership as the Navajo Nation. The eastern portion of the Navajo Nation consists of heavily allotted lands known as the "checkerboard." In the checkerboard area, there have been longstanding disputes between the Navajo Nation and New Mexico concerning criminal as well as civil jurisdiction. In 1980, two years after *Oliphant*, an editorial in the *Navajo Times* complained: "The New Mexico state government appears to be totally unconcerned about the problems it has created in the checkerboard area with its decision to prohibit Navajo police from citing non-Indians into tribal courts."<sup>464</sup> The editorial closes with a plea to tribal officials to "continue to follow their present policy of fighting for the doctrine of self-determination and self-sufficiency at all times."<sup>465</sup> The confusion and disputes over jurisdiction, which involve land status as well as the identity of defendants, have led to what many perceive to be a jurisdictional void that encourages criminal behavior. In 1980, President

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<sup>460</sup> See Res. of the Navajo Tribal Council, CMY-21-79 (1979) (on file with author).

<sup>461</sup> Res. of the Navajo Tribal Council, CAU-73-01 (2001) (approving of policy position urging congressional response to Supreme Court decisions diminishing tribal powers); see *id.* at Exhibit A, p. 3 (stating goal of restoring to Indian nations full territorial jurisdiction over criminal matters).

<sup>462</sup> See Navajo Tribal Council Minutes, May 1, 1978 (considering Res. of the Navajo Tribal Council, CMY-21-79). In the discussion of the resolution, the tribal attorney, Lawrence Ruzow, pointed out that the slight to the Navajo Nation by the blanket rule in *Oliphant* was particularly acute because the Navajo, unlike the Suquamish Tribe that attempted to prosecute Mr. Oliphant, have a "full fledged government," and moreover are "the largest and best run Indian nation in the country." *Id.*

<sup>463</sup> See FOWLER & BUNCK, *supra* note 175, at 13 (noting that one of the duties accompanying sovereignty is the obligation to enforce laws and protect citizens).

<sup>464</sup> An Editorial—*Jurisdiction Problems Abound*, NAVAJO TIMES, Feb. 14, 1980, at 6.

<sup>465</sup> *Id.*

Peter MacDonald put it this way: "The only ones who are benefiting from the present situation are those who violate the laws . . . . It is wrong to have different sovereign entities fighting over turf while people are without protection . . . . The concept of sovereignty is meaningless if the price is fear and destruction of social fabric."<sup>466</sup>

More recently, former Chief Justice Robert Yazzie provided several discrete examples of how the Court's jurisdictional decisions have impaired the Navajo Nation's ability to provide public safety and assure victims' rights.<sup>467</sup> In addition to the *Means* case, Justice Yazzie mentioned Bruce Williams, a non-Indian who "raced through a community located within the territorial jurisdiction of the Navajo Nation just to demonstrate that the Navajo Nation did not have jurisdiction over his activities."<sup>468</sup> Another matter involved a Hopi tribal member who was arrested for unlawful weapons possession and possession and distribution of liquor within the boundaries of the Navajo Nation. Because he was arrested on a state right of way, however, the state of Arizona, the defendant, and the Navajo Nation are involved in a protracted jurisdictional dispute over prosecution of the crimes.<sup>469</sup>

The jurisdictional problems are caused by the federal statutory scheme for enforcing crimes in Indian country as well as the Supreme Court's limitations on tribal authority. The combination of statutory and decisional law creates the following patterns of criminal enforcement powers. For crimes committed by tribal members within tribal Indian country, the Navajo Nation has jurisdiction over misdemeanors and the federal government has jurisdiction over felonies.<sup>470</sup> But if a tribal member commits a crime outside Indian country, the state has jurisdiction. For crimes committed by non-Indians against non-Indians, the state

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<sup>466</sup> *Navajos Continue Discussion of Jurisdictional Rights*, NAVAJO TIMES, May 15, 1980, at 10.

<sup>467</sup> Testimony of Chief Justice Yazzie, *supra* note 10, at 7-10.

<sup>468</sup> *Id.* at 7.

<sup>469</sup> *Id.* at 8.

<sup>470</sup> See NATION CODE tit. 17, §§ 1-5 (Equity 1995); Major Crimes Act, 18 U.S.C. § 1153 (2000); Indian Country Crimes Act, 18 U.S.C. § 1152 (2000). The Navajo Nation maintains that it also has concurrent jurisdiction to prosecute major crimes, but because it can only impose punishment of up to one year in prison and/or a \$5,000 fine, the Navajo Nation is effectively limited to treating major crimes as misdemeanors. See 25 U.S.C. § 1302(7) (2000).

has criminal jurisdiction irrespective of location of the crime.<sup>471</sup> For crimes committed by non-Indians against Indians, irrespective of tribal membership, the federal government has jurisdiction over all categories of crimes committed within Indian country.<sup>472</sup> For crimes committed by non-member Indians, the tribe has jurisdiction over misdemeanors committed within Indian country, the federal government has jurisdiction over felonies committed within Indian country, and the state has jurisdiction over all crimes committed outside of Indian country.<sup>473</sup> Thus, for each crime alleged to be committed in the checkerboard area, the following facts must be assessed in order to determine which government has authority to prosecute: tribal membership of the alleged perpetrator; tribal membership of the alleged victim; degree of the alleged criminal activity (i.e., misdemeanor or felony); and land status. As to the last factor, the courts have not made the determination a simple one. Whether land is Indian country depends on whether it falls into one of the following statutory categories:

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
- (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
- (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.<sup>474</sup>

The definition and application of “dependent Indian communities” has resulted in frequent litigation in the checkerboard area.<sup>475</sup> The legal determinations appear to depend less on pre-

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<sup>471</sup> See *United States v. McBratney*, 104 U.S. 621 (1882); *supra* note 35 and accompanying text; see also *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

<sup>472</sup> 18 U.S.C. §§ 1152-53 (2000).

<sup>473</sup> See 18 U.S.C. § 1151 (2000) (defining Indian country); 25 U.S.C. § 1301(2) (2000) (recognizing inherent tribal powers to prosecute non-member Indians for crimes in Indian country).

<sup>474</sup> 18 U.S.C. § 1151 (2000).

<sup>475</sup> See *State v. Frank*, 52 P.3d 404 (N.M. 2002) (holding that the evidence supported the trial court’s finding that the area where the accident occurred was not a dependent Indian community, and thus the court had jurisdiction); *State v. Dick*, 981 P.2d 796 (N.M. Ct. App. 1999); see also Interview with Marcelino Gomez, *supra* note 419.

dictable factors than on who has taken the lead in prosecuting. If the United States prosecutes, the Indian country determination is upheld in order to preserve the conviction; but if the United States Attorney does not want to pursue a case, "they are just as happy to let the decisions [regarding land status] go."<sup>476</sup> Whether lands in the checkerboard are Indian country thus rests somewhat within the discretion of individual members of the U.S. Attorney's office.

Another concrete consequence of the jurisdictional deprivation is that the Navajo Nation cannot respond to changing patterns of criminal activity. As criminal behavior increasingly includes activity related to gangs and drugs,<sup>477</sup> one might expect that non-Navajos who play instrumental roles in drug importation and the spread of gang activity would become more of a factor on the reservation. If this is the case, the Navajo Nation will not be able to act unilaterally to address this source of criminal behavior. In addition, a recent study by the U.S. Department of Justice came to several unsettling conclusions concerning American Indians and violent crime.<sup>478</sup> American Indians are twice as likely, per capita, to be the victims of violent crime as the average U.S. resident.<sup>479</sup> American Indians have higher rates of victimization from violent crime than any other racial group.<sup>480</sup> And most relevant to the jurisdictional challenges to prosecuting non-Indians in Indian country, at least seventy percent of the violent crimes committed against American Indians are perpetrated by persons of a different race.<sup>481</sup> Unfortunately, the study did not distinguish between on-reservation and off-reservation crime, and the seventy percent figure may therefore reflect a fair amount of off-reservation crime. Even if only some of the non-Indian perpetration occurs in Indian country, however, these statistics reinforce the challenges that the Navajo Nation faces in providing adequate police protection to its members.

The Court's categorical limitation on tribal powers to prosecute non-Indians is only one aspect of the problem of law en-

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<sup>476</sup> Interview with Marcelino Gomez, *supra* note 419.

<sup>477</sup> See James W. Zion, *Navajo Therapeutic Jurisprudence*, 18 *TOURO L. REV.* 563, 580-84 (2002).

<sup>478</sup> See generally LAWRENCE A. GREENFIELD & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, *AMERICAN INDIANS AND CRIME* (1999).

<sup>479</sup> *Id.* at v.

<sup>480</sup> *Id.* at v.

<sup>481</sup> *Id.* at vi.

forcement on the Navajo Nation. Congressional assumption of criminal jurisdiction over major crimes, statutory limits on the extent to which Indian tribes can police themselves, and jurisdictional uncertainties caused by land status further inhibit the Navajo Nation's ability to provide peace and security. The combination of *Oliphant* and the federal statutory limitations leaves tribes relatively powerless to take strong measures against some of the criminal behavior affecting reservation life. Even a tribe like the Navajo Nation, with a largely intact land base and an overwhelmingly tribal population, is impinged. First, the tribe lacks criminal jurisdiction over the non-Indian criminal behavior that does occur on tribal lands.<sup>482</sup> And second, the territorial and punishment limitations often leave the tribe at the mercy of spotty federal and state enforcement in Indian country.<sup>483</sup>

Shortly after the *Oliphant* decision, advocates recommended enacting civil measures that could accomplish the same end.<sup>484</sup> Today, *Montana*, *Strate*, and *Hicks* would likely frustrate any attempt to impose civil sanctions in a way that would make up for the absence of criminal jurisdiction. Moreover, for many serious crimes, including those arising out of domestic violence, civil sanctions are not enough. Justice Yazzie asked: "How many women across the United States have been either injured or killed while under the purported protection of restraining orders?"<sup>485</sup> With respect to the sovereign function of securing peace and security, the Supreme Court's decisions dovetail in an unfortunate way with preexisting legislative commands to undermine the Navajo Nation's ability to respond to criminal behavior.

## II

### TOWARD AN EXPERIENTIAL THEORY OF AMERICAN INDIAN TRIBAL SOVEREIGNTY

The framework of federal law is inescapable, yet federal law renders tribal sovereignty a fragile concept, resting vulnerably in the hands of potentially unconstrained federal courts that articu-

<sup>482</sup> See Testimony of Chief Justice Yazzie, *supra* note 10.

<sup>483</sup> See *Means v. Dist. Court*, No. SC-CV-61-98 (Navajo 1999) (noting inadequate federal and state law enforcement in Indian country).

<sup>484</sup> See Ron Schreier, *Tribal Criminal Codes are Limited by Penalty Restrictions*, NAVAJO TIMES, June 29, 1978, at A19 (speaking at a conference on the federal trust responsibility, the former Commissioner of Indian Affairs recommends that tribes pass civil provisions to regulate non-Indian behavior).

<sup>485</sup> Testimony of Chief Justice Yazzie, *supra* note 10, at 10.

late a nebulous common law and legislators who exercise an insufficiently constrained plenary power. The commentary on this unsatisfactory state of doctrinal affairs is extensive.<sup>486</sup> There is not much left to say about the doctrine of tribal sovereignty, at least from the perspective of federal law.<sup>487</sup> Yet, as the foregoing study shows, the lived experience of tribal sovereignty is something else again. Sovereignty, as witnessed on the Navajo Nation, is resilient, not fragile. The Navajo Nation has enacted sovereignty in the shadow of federal law, sometimes in response to it and sometimes not. The relationship between legal sovereignty and sovereignty on the ground is not precisely linear, yet neither is there no relationship. This study points toward the need for a theory of tribal sovereignty that does not depend upon legal definitions, but nonetheless acknowledges them.

Consistent with this study's attempt to shift the gaze away from exclusive focus on the federal courts, some legal scholars have begun to consider how tribes enact their sovereignty from within. For the most part, commentators have focused on tribal judicial systems, analyzing how they can be vehicles for reviving and sustaining uniquely tribal forms of law and dispute resolution.<sup>488</sup> These articles complement the growing body of literature by scholars from other disciplines who theorize about tribal life and identity. Emerging from some of these writings, directly and indirectly, is a conception of tribal sovereignty that is vital, evolving, and intertwined with the maintenance of American Indian identity.

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<sup>486</sup> See Frickey, *supra* note 13; Getches, *supra* note 11; Krakoff, *supra* note 11; Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonization and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219 (1986) (criticizing inherently colonial origins of federal Indian law).

<sup>487</sup> Or, perhaps more to the point, what there is left to say will either fall on deaf ears (the courts), or ears that already agree (most commentators). See Frickey, *supra* note 16, at 11-12; see also Robert Laurence, *Indian-Law Scholarship and Tribal Survival: A Short Essay, Prompted by a Long Footnote* 27 AM. INDIAN L. REV. 503, 506 (2003) (noting perverse correlation between increase in scholarship about American Indian law and the Supreme Court's steady erosion of Indian law principles).

<sup>488</sup> E.g., POMMERSHEIM, *supra* note 17; Gavin Clarkson, *Reclaiming Jurisprudential Sovereignty: A Tribal Judiciary Analysis*, 50 U. KAN. L. REV. 473, 473 (2002) ("For both political and economic reasons, American Indian tribes should reclaim jurisprudential sovereignty by establishing or reestablishing vibrant judiciaries."); Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community*, 18 N.M. L. REV. 49 (1988); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994).

Various vocabularies have been used to articulate a theory of tribal sovereignty that does not depend upon legal doctrine. Wallace Coffey and Rebecca Tsosie, both legal scholars, have coined the term “cultural sovereignty” to describe the ways in which tribes engage in activities that further their unique tribal identities, notwithstanding the cracked crucible of federal Indian law.<sup>489</sup> Coffey and Tsosie describe “a doctrine of cultural sovereignty, premised on the central components of sovereignty as it is exercised and understood within tribal communities.”<sup>490</sup> In Professor Robert Allen Warrior’s study of the works of pioneering American Indian writers Vine Deloria, Jr. and Joseph Mathews, Warrior uses the term “intellectual sovereignty” to capture the project of creating an evolving sense of Indian identity that is still tied to culture and tradition.<sup>491</sup> Deloria himself does not propose a term to encompass the idea, but he delineates the kinds of projects that tribes should engage in to ensure that their political power maps onto the underlying agenda of strengthening tribal communities and cultures.<sup>492</sup> Similarly, Stephen Cornell and Joseph Kalt have studied what they call “de facto” sovereignty, by which they mean “genuine decision-making control over the running of tribal affairs and the use of tribal resources.”<sup>493</sup>

Regardless of the labels, the project of articulating a theory of tribal sovereignty that is not doctrinally dependent propels scholars to stop perseverating on what is wrong with the federal courts,<sup>494</sup> and to focus instead on what tribes and individuals are doing to build their communities from within. A second goal is

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<sup>489</sup> See generally Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191 (2001).

<sup>490</sup> *Id.* at 191.

<sup>491</sup> See ROBERT ALLEN WARRIOR, *TRIBAL SECRETS: RECOVERING AMERICAN INDIAN INTELLECTUAL TRADITIONS* 87-98 (1995) (discussing Deloria’s process-centered approach to tribal revitalization).

<sup>492</sup> See VINE DELORIA, JR. & CLIFFORD M. LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* 245 (1984) (suggesting three areas that tribes could work on to “help Indians reestablish themselves”: structural reform of tribal government, cultural renewal, economic sufficiency, and stabilization of relations with the federal and state governments).

<sup>493</sup> Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in *WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT* 14 (Stephen Cornell & Joseph P. Kalt, eds., 1992).

<sup>494</sup> Coffey & Tsosie, *supra* note 489, at 194-96 (assessing recent case law limiting tribal sovereignty, and predicting that the future does not look bright for strengthening federal law concerning tribal self-governance).

to describe some of the essential features of what sovereignty protects and nurtures in order to deepen our understanding of why "sovereignty," in some form, matters. These theories articulate that sovereignty matters because it is protecting and nurturing a distinct, separate, and ancient yet evolving cultural and political existence. In some sense what these writers are trying to do is connect the dots between the traditional Indian who speaks her own language, perpetuates tribal religion and culture through ceremonies, practices tribal arts, and passes her knowledge and life-ways on to her grandchildren, and the more assimilated Indian scholars, lawyers, other professionals, and their non-Indian allies, who tend to staff tribal political institutions and therefore safeguard the legal aspects of tribal sovereignty.<sup>495</sup> And in connecting the dots, there is also an attempt to blur the static images that tend to emerge from polar descriptions, such as the one in the preceding sentence.

Coffey and Tsosie outline the parameters for their alternative vision of sovereignty by using the metaphor of repatriation. They focus on the recovery and revival of three essential aspects of tribal community life as the core of cultural sovereignty—wisdom, land, and cultural identity.<sup>496</sup> In focusing on the repatriation of wisdom, land, and cultural identity, Coffey and Tsosie are careful to steer clear of a fixed or static notion of tribal life. It is not the recovery of wisdom from pre-Columbian times so that it can be applied wholesale (as if that would even be possible) to present circumstances. Nor is it retrieving some caricaturized version of culture, such as requiring all schoolchildren to wear traditional tribal clothing. Rather, in the context of wisdom, the idea is to revive traditions, such as oral story-telling, which contain "the philosophical core of tribal cultures, including the values and norms that structure our moral universe."<sup>497</sup> Coffey and Tsosie also point out that the three strands of cultural sovereignty that they identify are interdependent; wisdom and cultural

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<sup>495</sup> See DELORIA & LYTLE, *supra* note 492, at 242-43 (describing the gap between traditional tribal people's views of appropriate political solutions and the views of most tribal officials).

<sup>496</sup> Coffey & Tsosie, *supra* note 489, at 202. Coffey and Tsosie note that focusing on these three does not exclude other components of cultural sovereignty. Rather, "We use tribal wisdom, land, and cultural identity as examples of key aspects of Native culture, which are interrelated and depend upon a holistic understanding of their importance to Native cultural survival." *Id.* at 202 n.140.

<sup>497</sup> *Id.* at 203.

identity lie intermingled with the attachment to place.<sup>498</sup>

Warrior, in explicating his theory of intellectual sovereignty, also stresses tradition and attachment to place.<sup>499</sup> Traditions matter for tribal survival not because they are aesthetically pleasing or quaint, nor because they offer rigid, dogmatic codes that can be followed today. They matter because they are the link to lived experiences based on intimate knowledge of particular places.<sup>500</sup> American Indian rituals and traditions are grounded in relationships of all sorts—family, earth, seasons—and perpetuating the traditions entails perpetuating those relationships. Warrior stresses that intellectual sovereignty involves revival of the processes embodied in traditional ceremonies, stories, and wisdom that make those community relationships possible:

As any look around Indian country will show, the presence of traditions does not in and of itself make the future. Rather, those traditions make the future a possibility, just as they did for the people with whom the traditions originated. One way to become part of that same possibility is to follow the process-centered, experiential path.<sup>501</sup>

Group identity, at present an embattled and waning concept in some quarters,<sup>502</sup> also lies at the core of these alternative theories of tribal sovereignty.<sup>503</sup> Sovereignty protects the ability of the group, as a distinct cultural and political unit, to continue to exist. Indeed, the other strands—culture, wisdom, and land—both depend on and foster the continuation of group identity.<sup>504</sup> Thus, for example, there is an indelible sense of what it means to be “Navajo,” notwithstanding that a part of being Navajo is and has always been to incorporate successfully the traditions and prac-

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<sup>498</sup> *Id.* at 205.

<sup>499</sup> WARRIOR, *supra* note 491, at 105.

<sup>500</sup> *Id.* at 105 (discussing Deloria’s view that Indian religious traditions emerge from scientific knowledge of particular places).

<sup>501</sup> *Id.* at 106.

<sup>502</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (affirming use of race-conscious approaches to bolster minority admissions at public universities to serve educational interest in diversity, but predicting that such means will no longer be necessary in twenty-five years).

<sup>503</sup> See DELORIA & LYTLE, *supra* note 492, at 264. Deloria’s thesis is that the revival of Indian governments, as proposed by John Collier during the IRA period, opened the way for the discussions and conflicts within tribes about precisely which forms of group existence should be perpetuated. This healthy, yet difficult, process remains one of the essential aspects of tribal sovereignty.

<sup>504</sup> Coffey & Tsosie, *supra* note 489, at 197 (discussing group-based structure of tribal societies, and distinguishing “constructive group action” from demands for individual self-determination).

tices of others.<sup>505</sup> Tribal sovereignty serves to perpetuate that sense of being Navajo as distinct from just being an American Indian by ethnicity. This perceived link between sovereignty and culture is evident in the comments in the foregoing sections by various Navajo tribal members.<sup>506</sup> And, to relate this to the strands of wisdom, culture, and land, group identity exists because of the relationship of the group to particular places, and the wisdom and cultural practices that grow from those places.

The theory of tribal sovereignty that emerges is that tribes should continue to exist as sovereigns because tribal political institutions foster and protect a unique group identity that stems from place-based wisdom and culture. The emphasis on a process-based understanding of this group identity avoids the tendency to fix American Indian tribes in a particular time period, and also allows for history's impact on tribes to be considered. That history includes the various times the federal government has unilaterally imposed policies aimed at eliminating tribal identity, resulting in major disruptions to tribal connections to land as well as to tribal culture.<sup>507</sup> Notwithstanding those policy periods, tribes as distinct political bodies have endured. The disruptions and dislocations become a part of their culture,<sup>508</sup> as well as something to attempt to redress politically.

Tribes can, and do, further policies of land and cultural repatriation, as Coffey and Tsosie observe and applaud.<sup>509</sup> But to act as governments, tribes must also constantly negotiate their legal status with the federal government and, at times, state governments.<sup>510</sup> To forge a sovereignty that retrieves and protects tribal

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<sup>505</sup> See *supra* Part II.

<sup>506</sup> See, e.g., *supra* notes 2, 240-42, 250 and accompanying text.

<sup>507</sup> See *supra* notes 27-29 and accompanying text (discussing history of forced relocation and assimilation).

<sup>508</sup> For example, the Navajo have incorporated the story of their Long Walk into an essential aspect of their modern identity. See IVERSON, *supra* note 55, at 51-65 (describing the Long Walk, the imprisonment at Bosque Redondo, and the Treaty of 1868 negotiations). Iverson begins his chapter on the Long Walk with a quotation from a Navajo poet to the effect that she was told as a girl that she was who she was because of what happened to her ancestors during the Long Walk and at Bosque Redondo. See *id.* at 35. To all Navajo who have been told the story by relatives, the message is the same. History, including the history of colonialism, forges the identity of a people. To me this is quite familiar. Every year my extended family gathers to tell the story of our enslavement in Egypt and subsequent deliverance. Indeed, much of Jewish identity revolves around surviving various kinds of eviction and oppression.

<sup>509</sup> Coffey and Tsosie, *supra* note 489, at 204-08.

<sup>510</sup> See *supra* Part I.C.

culture, Indian tribes inevitably confront the framework of federal decisional law. The dilemma for tribes is that entanglement with federal statutory and decisional law is unavoidable. The domestic legal status of tribes may be indefensible as a doctrinal and normative matter, but it is the present reality for tribes, and will remain so for the foreseeable future.

The study of the Navajo Nation's responses to federal law, described in Part I, reveals that even in the shadow of these doctrines and laws, tribes are enacting their sovereignty in ways that comport with the larger goals of cultural and intellectual sovereignty. The Navajo Nation experience indicates that domesticating federal Indian law, warts and all, can be part of the process of enacting tribal sovereignty. At the same time, the Navajo Nation experience indicates that the ability to enact sovereignty may be sorely tested if federal limitations go too far. This study thus adds to the tribally-centered theories of tribal sovereignty in two ways. First, it reveals that reacting to federal legal definitions of sovereignty can itself become a forum for the enactment of tribal sovereignty. Second, it indicates where federal doctrines run the greatest risk of eroding tribal ability to protect and nurture those aspects of tribal life most closely associated with sovereignty. The Supreme Court's decisions that divest tribes of categories of jurisdiction over non-members are doing the most mischief. In the case of the Navajo Nation, they threaten protections for on-reservation employment, inhibit the application of consumer and tort laws, create uncertainty for litigants in tribal court, inhibit the transactional environment, contribute to a chaotic and unpredictable administration of criminal laws, and decrease tax revenue. Taken together, these effects could well destabilize the Navajo Nation in ways that ultimately eat away at the vital yet delicate Navajo identity that has managed to persist, despite very long odds. Experiential sovereignty, which describes the link between legal and cultural sovereignty, provides the necessary context for assessing the law's impacts on tribal cultural survival.

### III

#### EXPERIENTIAL SOVEREIGNTY'S INDICATIONS FOR FEDERAL INDIAN LAW

The Supreme Court's recent agenda of shaping the self-governing powers of Indian tribes has resulted in various calls for reform. Some scholars insist that Indian tribes should abandon

their claims to independence from the Constitution and incorporate the Bill of Rights fully into their legal systems in order to obtain jurisdiction over non-Indians.<sup>511</sup> Others assert that only a complete overthrow of the inherently colonial doctrine of federal supremacy over tribes will alleviate the present dysfunction in tribal self-governance.<sup>512</sup> Somewhere in between, scholars advocate for a legislative restoration of tribal inherent powers that would put tribes in the position they seemed to be in prior to the last three decades of judicial divestment.<sup>513</sup> A draft proposal by the National Congress of American Indians ("NCAI") includes the possibility that tribes would trade restoration of territorial jurisdiction for some form of direct federal judicial review over tribal court decisions.<sup>514</sup> Consistent with the idea of restoring tribal powers, some scholars have suggested substituting the unilateral approach of a statutory fix with a regime of bilateral, negotiated compacts between tribes and the federal government.<sup>515</sup>

The foregoing examination of the actual impacts the Supreme Court decisions have had on the Navajo Nation informs an assessment of which reforms, if any, are appropriate. And there is also the question of "appropriate for what?" Here, the assumption is that reforms should be consistent with the lessons of experiential sovereignty: tribes need enough legal sovereignty to protect cultural and intellectual sovereignty. Even if the lessons from the Navajo Nation only plausibly apply to other tribes, legislators and courts should adopt a precautionary principle with respect to tribal legal sovereignty: err on the side of preserving enough legal sovereignty so as not to risk extinguishing the only fonts of living American Indian culture.

All of the reform proposals concur that *something* should be done to address the divestment of tribal jurisdiction over non-

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<sup>511</sup> See Gould, *supra* note 12, at 691.

<sup>512</sup> See Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 U. MICH. J.L. REFORM 899 (1998).

<sup>513</sup> See Frickey, *supra* note 13; Getches, *supra* note 11.

<sup>514</sup> Gould, *supra* note 12, at 685 & nn.102-03 (describing NCAI proposal, NCAI Res. #SD-02-005 (2000)); see also Res. of the Navajo Nation Council, CAU-73-01, Exhibit A (2001) (adopting policy statement in support of restoration of full territorial jurisdiction and accepting consideration of federal judicial review in exchange).

<sup>515</sup> See T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 140-145 (2002) (discussing the advantages of a compact approach as well as doctrinal modifications to plenary power that would be required for such an approach to be durable).

Indians.<sup>516</sup> With respect to this common starting point, the experiences of the Navajo Nation affirm that tribal jurisdiction over non-Indians should be restored, at least in the civil context. The common-law barriers—developed in *Montana*, *Strate*, *Atkinson*, and *Hicks*—to asserting civil jurisdiction over non-Indians have placed an impediment in the path of tribal economic development for reasons relating to regulation, adjudication, and taxation.<sup>517</sup>

The picture is less clear on the criminal side, and more research should be done to determine whether the deprivation of tribal criminal jurisdiction over non-Indians warrants legislative attention. The results of this research may indicate that Congress has created just as many, if not more, problems in the criminal area as the Supreme Court. The bizarre and unpredictable patchwork of tribal, state, and federal jurisdiction over crimes committed within Indian reservation boundaries is the result not just of *Oliphant*, but of the legislative commands that carve up defendants by tribal membership, nature of the crime, status of victim, and land status.<sup>518</sup> Moreover, other tribes are much more significantly affected by both the *Oliphant* ruling and the legislative quagmire. Studies of other tribes, with particular attention to the legislative problems, are warranted to determine the appropriate congressional fix to the problem of criminal jurisdiction. Even the Navajo experience reveals, however, that Congress should study this issue seriously and propose a comprehensive approach to Indian country crimes.

What trade-offs should tribes be required to make in order to re-acquire territorial jurisdiction? Scott Gould suggests that nothing short of full incorporation of the Bill of Rights will address underlying constitutional problems with tribal control over non-Indians.<sup>519</sup> Gould also suggests that tribes could continue to apply traditional and customary law to tribal members in a separate, internally-focused court system.<sup>520</sup> The NCAI proposal, which the Navajo Nation has endorsed, considers trading territorial jurisdiction for federal judicial review of tribal decisions.<sup>521</sup>

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<sup>516</sup> See Gould, *supra* note 12, at 691.

<sup>517</sup> See *supra* Parts I.C.1.c. and I.C.2.c.

<sup>518</sup> See *supra* Part I.C.3.b.

<sup>519</sup> Gould, *supra* note 12, at 691; ALEINIKOFF, *supra* note 515, at 140-50 (discussing various reform proposals).

<sup>520</sup> Gould, *supra* note 12, at 691-92.

<sup>521</sup> See *supra* note 489 and accompanying text.

Both of these proposed trade-offs include the option for tribes to continue under the current framework of limited jurisdiction over non-Indians if they do not want to incur the increased federal oversight.<sup>522</sup>

Reviewing the Navajo Nation experience, as well as considering my own time there, gives me serious pause concerning Gould's proposed trade-off. Segregating "tradition" and "custom" into tribunals that govern only members runs the risk of imposing cultural and legal stagnation on a Nation that has managed successfully to adapt its laws according to a more organic and open process.<sup>523</sup> The adaptation process was mutually beneficial in many cases I observed; non-Indian lawyers learned to trust and respect tribal courts, and Navajo tribal courts acquired procedures that reassured all litigants. The federal judicial review trade-off in the NCAI proposal is less problematic; as discussed above in Part I.C.1.c, tribal litigants already waded through multiple layers of review on questions of tribal jurisdiction. A more direct route to federal appellate review could hardly be worse, and would provide more clarity to all litigants. What is essential, however, is the idea that tribes can opt in or out of any proposed legislative fix. This comports with the notion of experiential sovereignty, which will be different for each tribe. Indian nations know best themselves how much tinkering with legal sovereignty their cultures can withstand. Unlike categorical rules issuing from the Supreme Court, congressional solutions, whether in the form of legislation or negotiated compacts, can be tailored to allow for individual tribal assessment of the gains and losses implicit in any legal fix.

### CONCLUSION

In the shadow of federal decisional law, the Navajo Nation is doing what it has always done: adapting and resisting in order to remain a distinct Navajo people. The Navajo are not, and have never been, frozen in one particular historical period, like an Edward Curtis photograph of an exotic time past. Inherent tribal powers that the Supreme Court has affirmed have been essential and well-used to ensure that the process of adaptation continues. The power to adjudicate has been crucial to the development of a

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<sup>522</sup> See Gould, *supra* note 12, at 685, 691.

<sup>523</sup> See *supra* Parts I.C.1.a, I.C.2.a. (reviewing Navajo responses to cases recognizing tribal inherent powers).

home-grown Navajo court system. The power to regulate has allowed for Navajo employment and consumer protections. The power to tax has enabled the Navajo to plot an economic future that does not depend solely on limited natural resource extraction.

With respect to Supreme Court decisions that allow concurrent state authority, the Navajo Nation has responded creatively to the challenge. At times the Navajo Nation has used these decisions to force states to live up to obligations to provide equal services. And regarding dual taxation, the Navajo Nation has reached out to the surrounding states and negotiated with them as a sovereign to achieve a mutually beneficial economic solution. The cases that deprive Indian tribes of categories of authority provide fewer avenues of response. In some instances, there is nothing the Navajo Nation can do but seek redress in Congress, which it is attempting to do along with other tribes. For Navajo, the immediate economic effects of these decisions may not be great, but the long-term effects on the Nation's ability to negotiate on equal terms with non-Indian businesses will suffer. The ability to impose standards of behavior in contexts that pose serious health or economic threats to Navajo people is also badly compromised.

Navajo perceptions about the link between sovereignty and survival are grounded in these practical realities, as well as a larger intangible sense that their culture has greater significance than the transient presence of a recent, though overwhelmingly powerful, colonizing government. The Navajo have found ways to live with, and even within, that government. But it is clear in many of their reactions that they worry that the Court's creeping challenge to their separate political existence will be the final step in the uneven march toward Indian conquest.

It seems probable, though not certain, that the Supreme Court will continue in this vein of unilateral common-law divestment of tribal powers. If so, it will remain to be seen how well tribes can continue to adapt and enact sovereignty in the shadow of federal law. The working conclusion from this research is that tribes need enough legal sovereignty to ensure their continued existence as separate nations, capable of fostering growth and development of their endemic cultures. Part of that growth and development, as it turns out, has been to grapple with the federal legal doctrines restricting sovereignty. But too much intermed-

dling by the Supreme Court, a body that is unaccountable and extremely difficult to override in Congress, might well be more than even the Navajo Nation, a Nation formed by adaptation, can absorb. For the Navajo Nation, and for the rest of us who benefit from the living culture and link to history that our American Indian nations provide, let us hope that the experience of tribal sovereignty can ride out this historical moment, just as it has so many other apparently greater challenges. It seems probable that it will. Raymond Etcitty certainly believes so: "Let's let it run its course . . . . In the greater scheme of things, it doesn't matter . . . as long as there are tribal members, [tribes] will still be here . . . . Tribes are full-bore . . . they're not going away."<sup>524</sup> Implicit in Raymond Etcitty's comment is the notion that tribal sovereignty originates from tribal people. "We the People." It has a familiar ring. For the Navajo, "we" historically has been a flexible and inclusive term. And for the Navajo, "we" also includes ancestors who pre-date European arrival. As we, the United States, proceed to temper tribal sovereignty through the rule of law's quiet colonialism, perhaps we can keep in mind the moral force behind the notion that unaccountable attacks on self-governance violate, if not a higher law, then at least our highest conceptions of ourselves.

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<sup>524</sup> Telephone Interview with Raymond C. Etcitty, *supra* note 2.

**APPENDIX A: GOVERNMENT FUNCTIONS COMPARISON:  
ARIZONA VS. NAVAJO NATION**

Governmental Function	Arizona	Navajo Nation
<b>Environmental Protection</b>		
— Air	Y	Y
— Water	Y	Y
— Toxic Wastes	Y	Y
<b>Natural Resource Management</b>		
— Parks	Y	Y
— Fish and Wildlife	Y	Y
— Water Resources	Y	Y
— Minerals	Y	Y
— Agriculture	Y	Y
<b>Law Enforcement</b>		
— Courts	Y	Y
— Police	Y	Y
— Jails	Y	Y
<b>Department of Revenue</b>		
— Income tax	Y	N
— Sales tax	Y	Y
<b>Education</b>		
— Headstart/preschool	Y	Y
— K-12	Y	Y *
— Post-secondary	Y	Y

\* Most K-12 education in the Navajo Nation is run through the respective state school system. However, the Navajo nation has opened several charter schools and runs others through contracts with BIA.

*Source: Data derived by author from Navajo Nation website (<http://www.navajo.org>) and from the state of Arizona's website (<http://az.gov/webapp/portal>).*

## APPENDIX B: NAVAJO NATION JUDICIAL BRANCH CASE LOAD

	2001	2002	2003
Total Court Cases	88,000	98,771	95,411
Criminal traffic	22,275	24,453	25,334
Criminal	6,372	6,604	6,519
Civil Traffic	27,980	30,399	24,319
Civil	5,150	5,199	5,236

*Source: Data Derived from The Navajo Nation Judicial Branch – Administration, Window Rock, AZ (Phone Interview by Christopher Nerbonne on January 31, 2005).*