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Charles F. Wilkinson

University of Colorado Law School

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CIVIL LIBERTIES GUARANTEES WHEN INDIAN TRIBES ACT AS MAJORITY SOCIETIES: THE CASE OF THE WINNEBAGO RETROCESSION

CHARLES F. WILKINSON*

I. INTRODUCTION: INDIAN TRIBES AND CIVIL RIGHTS GUARANTEES

When Indian law intersects the larger body of jurisprudence, it usually angles in from an off direction. One result is that legal rules at play in Indian country typically vary from American law as it operates generally. Thus, special principles apply within Indian reservations in many fields of law, including criminal and civil jurisdiction, tort and contract law, and even constitutional law.

The distinctive qualities of Indian issues are also at work with regard to civil liberties. The field of civil rights law is comprised of the rules that an enlightened majority has adopted, usually at a moment of intensified scrutiny, such as a national social crisis or during the drafting of a constitution, to restrain future majorities from discriminating against dispossessed people. Although white males have invoked the civil rights statutes under very limited circumstances, the heartbeat of civil rights law has been to protect minorities — the races, religions, splinter political groups, aliens, gays, the handicapped, and women, who are numerically a majority but who bear the legal and political characteristics of a minority. In this sense, Indians, who as a people are profoundly dispossessed, plainly constitute a classic group entitled to shelter under the civil rights laws when the majority acts upon a minority.

This is not, however, the way in which the leading civil liberties disputes arise with respect to Indians. To be sure, individual Indians have their share of traditional civil rights cases involving, among many other things, discrimination in voting, housing, education, and jury selection. Nonetheless, the toughest questions — the ones that

* Professor of Law, School of Law, University of Colorado. This article is based upon the Annual Civil Rights Lecture, delivered at the Creighton University School of Law on October 29, 1987. I am indebted to William Barnes, my research assistant, for his careful and thought-provoking work. I also thank Robert Peregoy, Staff Attorney at the Native American Rights Fund; Reuben Snake, Tribal Chairman of the Winnebago Tribe; Daryl LaPointe, member of the Winnebago Tribal Council; and Dr. Nancy Lurie, Head Curator of Anthropology at the Milwaukee Public Museum for their assistance in reviewing the manuscript for historical accuracy.

are most essential to the future of American Indian tribes — involve situations that seem to reverse the expected civil rights context. In Indian country, Indian tribes — the dispossessed — are the actors, and non-Indians — the majority — are acted upon. It is the majority that claims recourse to the protections of the civil rights laws.

This anomalous situation traces to the constitutional status of Indian tribes. We are taught from grade school that there are just two sovereigns in the United States — the federal government and the states — but those traditional teachings are wrong. The Constitution recognizes a third source of domestic sovereignty — the governmental status of American Indian tribes. The judiciary, in cases both very old and very recent, has squarely and consistently acknowledged the sovereign status of tribal governments.¹

As might be expected, it has been a difficult task for Congress and the courts to reconcile the rights and responsibilities of this third source of domestic sovereignty. Perhaps the most basic problem is that the Founders, while they acknowledged the existence of Indian governments, almost certainly anticipated that the tribes would shortly die out. Thus, the constitutional structure is set out in some detail with regard to the state and federal governments but is sketchy at best concerning tribal governments. Tribes were considered only six times in the Constitution and several of those references are now obsolete: two references to "Indians not taxed," both of which have been obviated by later amendments;² the recognition of the war power (the tribes were formidable opponents for the young nation);³ the reaffirmation of previously negotiated treaties (most of which were with Indian tribes);⁴ the creation of a treaty-making process for future treaties (Indian treaty-making was a major part of Congress' early business);⁵ and, most importantly today, the establishment in the commerce clause of congressional, as opposed to state, authority "[t]o regulate Commerce with foreign Nations, and

1. See, e.g., *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *United States v. Wheeler*, 435 U.S. 313 (1978); *Williams v. Lee*, 358 U.S. 217 (1959); *Talton v. Mayes*, 163 U.S. 376 (1896); *Ex parte Crow Dog*, 109 U.S. 556 (1883); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). See generally C. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 53-106 (1987).

2. U.S. CONST. art. I, § 2, cl. 3 (addressing the allocation of seats in the House of Representatives and levying of direct federal taxes); U.S. CONST. amend. XIV, § 2 (addressing the revision of apportionment formula for House of Representatives to eliminate the slave fraction).

3. U.S. CONST. art. I, § 8, cl. 11 (providing: "The Congress shall have Power . . . To declare War").

4. U.S. CONST. art. VI, cl. 2 (providing: "[A]ll Treaties made . . . shall be the supreme Law of the Land").

5. U.S. CONST. art. II, § 2, cl. 2 (providing: "The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties").

among the several States, and with the Indian Tribes."⁶

The Constitution's vague treatment of Indian tribes has caused considerable perplexity with respect to the civil rights of persons within tribal jurisdiction. In general, civil rights laws place specified limits on governments when they act on individuals or groups. The Bill of Rights, for example, is a restraint upon the federal government; the first amendment begins with the phrase, "Congress shall make no law,"⁷ and the other nine Bill of Rights amendments were similarly intended as limits upon the United States. Alternatively, the fourteenth amendment, which was adopted in 1868 and which the courts have construed to incorporate much of the Bill of Rights, restrained only the states; its proscriptions against any laws abridging privileges or immunities, depriving due process, or denying equal protection, are prefaced by the phrase "[n]o state shall."⁸ Because Indian tribes are neither state nor federal governments, the Supreme Court has found, both in 19th century and in modern era cases, that neither the Bill of Rights nor the fourteenth amendment limits tribes.⁹ Thus, there is no constitutional requirement that Indian tribes must, for example, protect free speech or religion; refrain from unreasonable searches and seizures; or guarantee the equal protection of the laws.¹⁰ Indian tribes are the only governments in the United States not required to provide basic civil liberties as a matter of constitutional law.

Congress, however, has very broad authority to legislate over tribes pursuant to the Indian commerce clause.¹¹ In 1968, just as it finally had become clear that tribes had no intention of dying out but that they had every intention of exercising substantial governmental powers, Congress took action in the form of the Indian Civil Rights

6. U.S. CONST. art. I, § 8, cl. 3. The grant of congressional power to regulate commerce with the Indian Tribes is commonly referred to as the "Indian Commerce Clause."

7. U.S. CONST. amend. I.

8. U.S. CONST. amend. XIV.

9. *See, e.g.*, *United States v. Wheeler*, 435 U.S. 313 (1978) (holding the double jeopardy provision of fifth amendment not infringed when an Indian is convicted in federal court after being convicted of a lesser included offense in tribal court); *Talton v. Mayes*, 163 U.S. 376 (1896) (finding Cherokee Nation not bound by fifth amendment grand jury requirements). For preconstitutional and extraconstitutional status of tribes, *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

10. *See, e.g.*, *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967) (holding that neither the fifth nor the fourteenth amendment due process clause imposes restraints on Indian Tribes); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959) (stating that the Constitution does not require tribes to protect freedom of religion).

11. *See, e.g.*, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *United States v. Kagama*, 118 U.S. 375 (1886). *See supra* note 6 and accompanying text.

Act (ICRA).¹² The 1968 statute accomplished most of what the Constitution did not. It mandated that tribal governments be bound by due process, equal protection, free speech, and most of the other basic civil rights guarantees.¹³ There is no prohibition against the establishment of religion or any requirement that tribes adopt a republican form of government in recognition of the fact that a number of tribes did, and still do, select some or all of their leaders on the basis of heredity or religious stature. But it appeared that the ICRA had imposed on tribes a civil rights regime substantially similar to the structure applicable to the state and federal governments.

The case law, however, took what many civil libertarians regard as a very curious turn. In 1978, the Supreme Court heard argument in *Santa Clara Pueblo v. Martinez*.¹⁴ A female tribal member argued that the tribe had denied her equal protection on the basis of sex.¹⁵ The Santa Clara Pueblo had adopted an ordinance that granted tribal membership to children of male tribal members who married outside the tribe but denied tribal membership to children of women who married outside the tribe.¹⁶ The tribe, seeking to protect its sovereignty, argued that the federal courts had no jurisdiction and that this was a matter to be resolved inside the Pueblo.¹⁷ The American Civil Liberties Union filed an amicus brief, disputing the tribal position and arguing strenuously that the Indian Civil Rights Act ought to be enforceable in federal court.¹⁸

The Supreme Court, while casting no doubt upon the validity of the Indian Civil Rights Act as binding law, ruled that the Act provided for no federal judicial review in civil cases.¹⁹ The Court acknowledged that Congress has ample authority to waive tribal sovereign immunity, but the only express provision for federal court review in the 1968 Act was a grant of habeas corpus review in criminal cases.²⁰ Since the statute contained no waiver of tribal immunity from suit in civil cases, the Court found that violations of civil liberties in civil cases must be handled internally by the tribe, not by the federal courts.²¹ Thus, while federal courts can review violations of civil liberties in criminal cases, as to civil cases we are presented with

12. 25 U.S.C. §§ 1301-1303 (1982).

13. *Id.* §§ 1302(1), 1302(8).

14. 436 U.S. 49 (1978).

15. *Id.* at 51.

16. *Id.*

17. *Id.* at 53.

18. *Id.* at 50.

19. *Id.* at 72.

20. *Id.* at 56-58.

21. *Id.* at 72.

the anomalous situation in which a mandatory federal statute is unenforceable in federal court.

During the last generation, Indian tribes across the country have resuscitated their sovereign powers. This revival has followed on the heels of the termination policy of the late 1940's and the 1950's, when Congress and the executive branch attempted, on a tribe-by-tribe basis, to break up the reservation system and end the federal government's special relationship with Indian tribes.²² Some tribes were terminated, but most were not and most of the terminated tribes have since been restored.²³ In retrospect, it is clear that the termination assault helped create an unflinching resolve on behalf of the tribes to save their reservations and their governmental status.

Beginning in the 1960's, tribes expanded their legislative programs and tribal courts. This meant, among other things, the adoption of zoning, taxation, and environmental laws that regulated non-Indian individuals and businesses on reservations. It also meant the acceptance of jurisdiction by tribal courts in major civil lawsuits. Many non-Indians have been outraged by the idea that their rights

22. In 1953 Congress formally adopted a policy of termination that was intended "as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards of the United States." H.R. Con. Res. 108, 67 Stat. B132 (1953). The Bureau of Indian Affairs, to promote assimilation, instituted its Voluntary Relocation Program designed to place reservation Indians in permanent off-reservation jobs. Initially this program gave participants a one-way ticket to the city and a subsistence allowance until the first paycheck. See H. FEY & D. McNICKLE, *INDIANS AND OTHER AMERICANS* 181-183, 186 (1959). The most important termination era statute was Public Law 280, which transferred judicial jurisdiction over specified reservations to their respective states and opened the door for all other states to take jurisdiction over the tribes within their boundaries, if the states chose to do so. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (§ 7 repealed and reenacted as amended 1968) (codified as amended at 18 U.S.C. § 1162 (1982); 25 U.S.C. §§ 1321-26 (1982); 28 U.S.C. § 1360 (1982)). See also *Bryan v. Itasca County*, 426 U.S. 373 (1976) (holding that Public Law 280 transfers civil court but not regulatory jurisdiction to states). See generally Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975).

23. Among the principal terminated tribes were the Menominee of Wisconsin, the Klamath of Oregon, 61 tribes and bands from western Oregon, the Ottawa of Oklahoma, the Catawba of South Carolina and the Ponca of Nebraska. See J. HUNT, *FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION, REPORT ON TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS 1640* (1976). To date the Restoration acts include the Menominee Restoration Act of 1973, Pub. L. No. 93-197, 87 Stat. 770 (codified at 25 U.S.C. §§ 903-903f (1982)); the Siletz Indian Tribe Restoration Act of 1977, Pub. L. No. 95-195, 91 Stat. 1415 (codified at 25 U.S.C. §§ 711-711f (1982)); the Oklahoma Indians Restoration Act of 1978, Pub. L. No. 95-281, 92 Stat. 246 (codified at 25 U.S.C. §§ 861-861c (1982)); the Paiute Indian Tribe of Utah Restoration Act of 1980, Pub. L. No. 96-227, 94 Stat. 317 (codified at 25 U.S.C. §§ 761-768 (1982)); Ysleta del Sur Pueblo and Alabama and Coshatta Indian Tribes of Texas Restoration Act of 1987, Pub. L. No. 100-89, 101 Stat. 666 (codified at 25 U.S.C. §§ 731-737c (1987)).

could be legislated or adjudicated by what they view as racially-composed governments in which they cannot participate at the ballot box. Still, when mineral companies and insurance firms challenged tribal regulatory and court jurisdiction, the Supreme Court upheld tribal powers over non-Indians.²⁴ Today, most disputes in civil cases go to tribal court and federal judicial review is extremely limited. The only question for the federal courts is whether the tribal courts have jurisdiction — whether they have the power to hear the case.²⁵ The basic fairness of the tribal action is not subject to review in federal court.

The objections to expansive tribal jurisdiction with little federal oversight come from many quarters. The United States Civil Rights Commission is conducting hearings into tribal courts and, if one reads between the lines, seems bent on limiting tribal jurisdiction in the name of protecting civil liberties.²⁶ Senator Melcher and Representative Marlenee, both of Montana, have introduced legislation that, if passed, would greatly reduce the ability of tribes to tax non-Indians.²⁷ Movements have long been underway in the Great Lakes and the Pacific Northwest regions to obtain federal legislation cutting back on special Indian fishing rights.²⁸ Tribal water rights have also come under attack.²⁹

24. See, e.g., *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985); *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

25. See *National Farmers*, 471 U.S. at 856-57; *Iowa Mutual Ins. Co. v. LaPlante*, 107 S. Ct. 971, 976-77 (1987).

26. See, e.g., *Hearing Before the United States Commission on Civil Rights, Enforcement of the Indian Civil Rights Act, Hearing Held in Rapid City, South Dakota July 31-Aug. 1, and Aug. 21, 1986*, 99th Cong., 2d Sess. (1986). On limiting tribal court jurisdiction to protect civil liberties, see *Indian Courts Islands of Injustice*, Minneapolis Star & Tribune, Jan. 5-7, 1986.

27. See, e.g., S. 1039, 100th Cong., 1st Sess. (1987) (introduced by Senator Melcher to "review and determine the impact of Indian tribal taxation on Indian reservations and residents"); H.R. 2184, 100th Cong., 1st Sess. (1987) (introduced by Representative Marlenee to "review and determine the impact of Indian tribal taxation on Indian reservations and residents"); H.R. 2185, 100th Cong., 1st Sess. (1987) (introduced by Representative Marlenee to "provide for nondiscriminatory taxation of non-Indians by Indian tribes").

28. See, e.g., S. 954, 99th Cong., 1st Sess., 131 CONG. REC. 54,401-02 (daily ed. Apr. 18, 1985) (authorizing state regulation of steelhead trout fishing by Indians on and off reservations).

29. S. 2084, 97th Cong., 2d Sess., 128 CONG. REC. 1229-30 (1982) (extinguishing all land and natural resources claims arising prior to January 1, 1912); H.R. 9951, 95th Cong., 1st Sess., 123 CONG. REC. 37,033 (1977) (abolishing aboriginal water rights and establishing a reservation's priority for water according to the date of the federal reserving document). Regarding the activities of citizens' action groups such as Interstate Congress for Equal Rights and Responsibilities, and Civil Liberties for South Dakota Citizens, see Norgren and Shattuck, *Still Fighting the Indians*, 1978 JURIS DR. 30; Sotsisowah, *The Confusing Specter of White Backlash*, Akwesasne Notes, December, 1977, at 22, col. 1.

There is ample heat to the debate. One state legislator recently said, "Indian reservations are the single dumbest, criminal thing that this country ever did. I hope to see the day when Indian reservations and the Bureau of Indian Affairs are completely eliminated. Let us all be Americans instead of Indians and Americans."³⁰ The attitudes behind that kind of statement may not be laudable, but there is no escaping the fact that there are legitimate civil liberties concerns here. Another state senator posed the problem in more compelling terms:

I oppose [tribal jurisdiction] because I do not believe that it is in the best interests of [citizens] on either side of this issue to create parallel competing judicial systems with lines drawn racially. The racial discrimination faced by [Indians] is a burden thrust on them by the white man for hundreds of years, and I would have to be blind or foolish to suggest that it doesn't exist . . . today. . . . [But] I believe that . . . separate judicial systems for Indians and non-Indians . . . provide fertile ground for greater race hatred. . . . I believe in equality for all persons and I do not see [tribal jurisdiction] as a step toward that goal.³¹

These last two statements were made by Nebraska state legislators with regard to a recent legislative proposal made by the Winnebago Tribe of Nebraska.³² This article will examine the generalities about tribal jurisdiction by using the historical and contemporary situation of the Winnebago Tribe as an example. The Winnebagos are small, in both people and land, but their efforts over the course of more than two centuries exemplify the interaction of American Indians with the majority society. The tribe's recent proposal involving tribal jurisdiction and implicating the civil liberties of non-Indians is very much in the mainstream of modern Indian legal issues. Thus my hope is that the discrete experience of the Winnebago tribe will provide a fit context for broader, systemic issues by putting flesh and blood into the many practical and jurisprudential considerations raised by the matter of civil liberties in Indian country.

II. WINNEBAGO SOVEREIGNTY AND THE UNITED STATES

The Winnebago are a Siouan-speaking people of the Central

30. *Senators Give Winnebagos Jurisdiction*, Omaha World-Herald, Jan. 17, 1986 at 1, col. 1. (Statement by Nebraska State Senator John DeCamp).

31. *Hearing on Legislative Resolution 57 Before the Judiciary Committee of the Nebraska Legislature on April 17, 1985*, Neb. Unicameral, 89th Leg., 1st Sess. 9 (Statement by Nebraska State Senator James Goll).

32. See L. Res. 57, Neb. Unicameral, 89th Leg., 2d Sess. 8 (Jan. 16, 1986).

Plains and Great Lakes region.³³ There is archaeological proof that the Winnebago were living along the Mississippi River in what is now southeastern Iowa and northwestern Illinois as early as 1000 A.D.³⁴ The traditional tribal stories, however, tell of a tribal existence that is much older,³⁵ and there is every reason to believe that tribal history goes much further back in time than archaeologists have yet been able to establish.³⁶ It is known that around 1400 A.D. the tribe pushed northward into Wisconsin.³⁷ The first European contact with the Winnebago was in 1634, when Jean Nicolet, a Frenchman with Indian guides, was sent to meet with the western tribes to extend trade and encountered a band of tribal members at the western end of Green Bay.³⁸

The Winnebago were fierce and famous warriors and engaged in frequent combat with various Algonquian-speaking tribes in central and northern Wisconsin.³⁹ In this context, the coming of white people had one positive effect on the tribe. When the French established missions in central and northern Wisconsin, the Winnebago moved into southern Wisconsin and established dozens of villages on the Wisconsin, Fox, Rock, and LaCrosse Rivers.⁴⁰ As Paul Radin, the leading historian on the tribe, has put it, they "spread over the whole of southern Wisconsin and establish[ed] autonomous villages where much of the old distinctive Winnebago culture could flourish and reassert itself."⁴¹

The period that the Winnebago spent in the southern Wisconsin woodlands during the late 17th, 18th, and early 19th centuries seems to have been a golden era in the history of the tribe. Wildlife was plentiful and tribal hunters were skilled with bow and arrow and

33. P. RADIN, *THE EVOLUTION OF AN AMERICAN INDIAN PROSE EPIC PART 1*, at 10 (Special Publications of Bollingen Foundation No. 3 1954). On Winnebago history, see generally P. RADIN, *THE TRICKSTER* (1956); P. RADIN, *THE WINNEBAGO TRIBE* (1923); LURIE, *Winnebago*, in 15 *HANDBOOK OF NORTH AMERICAN INDIANS* 690-707 (1978); N. LURIE, *THE WINNEBAGO INDIANS: A STUDY IN CULTURAL CHANGE* (June, 1952) (unpublished doctoral dissertation).

34. See P. RADIN, *EVOLUTION*, *supra* note 33, at 10-11; P. RADIN, *TRICKSTER*, *supra* note 33, at 112-13.

35. See generally P. RADIN, *WINNEBAGO*, *supra* note 33.

36. *Id.*

37. P. RADIN, *TRICKSTER*, *supra* note 33, at 113.

38. *Id.*; see also Letter from Dr. Lurie to Professor Wilkinson (March 11, 1988).

39. See P. RADIN, *EVOLUTION*, *supra* note 33, at 11.

40. See P. RADIN, *WINNEBAGO*, *supra* note 33, at 3. See also LURIE, *Winnebago*, *supra* note 33, at 690, 692-93. Lurie explains that, while the emphasis on village life remained strong among the Winnebago, adaptation to the fur trade instigated by French and American traders, from the late 17th to the early 19th centuries, caused the great dispersion of Winnebago villages along the riverbanks and lakeshores of western and southern Wisconsin. *Id.*

41. P. RADIN, *TRICKSTER*, *supra* note 33, at 114.

various traps in the pursuit of deer, bear, beaver, and many other species.⁴² Fish were taken by spear and by bow and arrow.⁴³ Families cultivated corn, squash, and beans.⁴⁴ Most families also had small fields of tobacco and sacred gourds.⁴⁵ Although the Winnebago were never reluctant to go to war, there was in fact little military combat as there were few whites or hostile tribes in the area.⁴⁶

The Winnebago had an elaborate social and governmental structure. There were twelve clans, four upper clans and eight lower clans, with an intricate set of religious and social customs that governed each clan and the relationships among the clans.⁴⁷ One chief from the upper clans had primary responsibilities for the fair administration of tribal law.⁴⁸ A chief from one of the lower clans was responsible for functions that would roughly parallel our police and military responsibilities.⁴⁹ Thus, the Winnebago had a mature system of lawways. Proper behavior was established by uncounted centuries of religious and social custom. The Winnebago framework of justice allowed violators a determination of whether an infraction of tribal law had occurred and, if so, whether clemency should be granted.⁵⁰ In the international sphere, the tribe was amply organized for warfare.⁵¹

Of course, a new nation was formed on the Atlantic Coast, and its Northwest Ordinance of 1789 left little doubt that it intended to charter new states in the Great Lakes area.⁵² Slowly but steadily, the region began to fill up with permanent settlers who wished to create the state of Wisconsin, a goal that was eventually achieved in 1848.⁵³

It is worthwhile to note the legal rights of American Indian tribes, including the Winnebago, as they faced the oncoming press of Anglo-European civilization. The rules were established in three early United States Supreme Court opinions authored by Chief Justice John Marshall, *Johnson v. McIntosh*;⁵⁴ *Cherokee Nation v. Geor-*

42. P. RADIN, WINNEBAGO, *supra* note 33, at 61-66.

43. *Id.* at 66.

44. *Id.* at 67.

45. *Id.* at 68.

46. *Id.* at 108. See also P. RADIN, TRICKSTER, *supra* note 33, at 114; P. RADIN, EVOLUTION, *supra* note 33, at 11.

47. See P. RADIN, WINNEBAGO, *supra* note 33, at 142-43.

48. P. RADIN, TRICKSTER, *supra* note 33, at 114-15.

49. *Id.*

50. *Id.* See also Lurie, *Winnebago*, *supra* note 33, at 703. (Dr. Lurie describes the traditional resolution of a Winnebago murder.) *Id.*

51. P. RADIN, WINNEBAGO, *supra* note 33, at 108.

52. See Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

53. See Act of May 29, 1848, ch. 50, 9 Stat. 233.

54. 21 U.S. (8 Wheat.) 543 (1823).

gia,⁵⁵ and *Worcester v. Georgia*.⁵⁶ The Marshall Trilogy established basic rules essential not just to Indian law but fundamental to American land and constitutional law as well.

First, as a matter of real property law, Indian tribes possessed a real property interest in their aboriginal lands.⁵⁷ Although aboriginal Indian title is not equivalent to ownership in fee simple absolute, this interest in real property acknowledges the right of tribes to live upon their aboriginal land and to hunt and fish there.⁵⁸ Homesteaders entering tribal lands without permission were trespassers and state law had no effect on aboriginal land rights.⁵⁹ Only federal action — whether by a treaty or by military combat — could affect Indian aboriginal title.⁶⁰ Second, the Winnebago and other tribes were recognized by federal law as sovereign governments.⁶¹ As Chief Justice Marshall put it in *Worcester*, Indian tribes are “distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all of the lands within those boundaries.”⁶² Third, the Marshall Trilogy recognized that the United States has a special relationship with Indian tribes and that the relationship carries with it high obligations, usually referred to as a trust responsibility.⁶³ Thus, when the Winnebago negotiated with the United States over the tribe’s aboriginal lands in southern Wisconsin, the tribe did so as the possessor of recognized real property rights and as a sovereign government with authority over its lands.

However, because the United States had greater military power, to prevent hostilities, the Winnebago and other tribes of the region signed a peace treaty with the United States in 1825.⁶⁴ The tribe

55. 30 U.S. (5 Pet.) 1 (1831).

56. 31 U.S. (6 Pet.) 515 (1832).

57. Aboriginal title and the Indian rights of occupancy and possession were explored at length in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 574, 584-85, 603. See also *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 233-35 (1985). See generally F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 486-93 (1982 ed.).

58. See *McIntosh*, 21 U.S. (8 Wheat.) at 574; *Oneida*, 470 U.S. at 233-35; F. COHEN, *supra* note 57, at 486-93.

59. *Worcester*, 31 U.S. (6 Pet.) at 560. See also *Cramer v. United States*, 261 U.S. 219 (1923).

60. *McIntosh*, 21 U.S. (8 Wheat.) at 584-85; *Worcester*, 31 U.S. (6 Pet.) at 557-61; *Oneida*, 470 U.S. at 233-35.

61. *Worcester*, 31 U.S. (6 Pet.) at 556-57, 559-60.

62. *Id.* at 557. See generally F. COHEN, *supra* note 57, at 229-57.

63. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17-18. See generally F. COHEN, *supra* note 57, at 207-28.

64. See Act of Aug. 19, 1825, 7 Stat. 272. Lurie explains that “in 1825 . . . the United States convened a huge intertribal conclave at Prairie du Chien to sign a treaty establishing firm boundaries among the various tribes in the western Great Lakes region in order to expedite future land cessions.” Lurie, *Winnebago*, *supra* note 33, at 697. Lurie notes that there was lead-mining country south of Prairie du Chien and that a mining rush in 1821 had already brought thousands of white miners from the

signed subsequent treaties in 1827,⁶⁵ 1828,⁶⁶ 1829,⁶⁷ and 1832.⁶⁸ The latter two treaties ceded considerable land to the United States.⁶⁹ The next successive treaty, which the tribe has always believed to have been the result of duress and fraud by the United States, was signed in 1837.⁷⁰ Article 1 of the 1837 treaty was short and to the point: "The Winnebago nation of Indians cede to the United States all their land east of the Mississippi."⁷¹ The tribe was forcibly removed from its historic lands in Wisconsin to northeastern Iowa.⁷²

There were many more treaties. In 1846, a treaty was signed and the tribe was evicted from its reservation in Iowa.⁷³ In return, the United States promised the tribe 800,000 acres at Long Prairie in northern Minnesota.⁷⁴ In 1855, the United States obtained another

East. *Id.* The United States' chief negotiator for this treaty was General William Clarke, who said in his opening address to the gathered tribes on August 5, 1825: "Children, your great father has not sent us here to ask any thing from you — we want nothing. Not the smallest piece of your land. Not a single article of your property. We have come a great way to meet you for your own good and not for our benefit." Record Group 75: Microcopy T494, Documents Relating to the Negotiation of Ratified and Unratified Treaties with Various Tribes of Indians, 1801-69, Roll 1: Ratified Treaty No. 139 [hereinafter Record Group 75]. (These treaty documents can be obtained on microcopy from the National Archives and Records Service).

65. Act of Aug. 11, 1827, 7 Stat. 303.

66. Act of Aug. 25, 1828, 7 Stat. 315. Lurie notes that the treaties of 1827 and 1828 were primarily intertribal boundary treaties. N. LURIE, *Winnebago*, *supra* note 33, at 697.

67. Act of Aug. 1, 1829, 7 Stat. 323.

68. Act of Sept. 15, 1832, 7 Stat. 370.

69. See Lurie, *Winnebago*, *supra* note 33, at 697-99.

70. Act of Nov. 1, 1837, 7 Stat. 544. Lurie explains that, while the tribe refused to sell more land, in the summer of 1837 it accepted an invitation to send a delegation to Washington to meet the President. "To make sure no land would be sold, the tribe sent 20 men who had no authority to sign a treaty of cession." Lurie, *Winnebago*, *supra* note 33, at 699. The delegation "held out until it became apparent they would not be allowed to return home unless they signed a treaty." *Id.* They finally signed under protest, but with assurances that the tribe would have eight years to leave Wisconsin; when put into writing, however, the treaty read "eight months," not eight years. *Id.* Lurie also notes that this treaty created a permanent split in the tribe. One faction believed it would be wisest to move, the other refused to leave. *Id.*

71. Act of Nov. 1, 1837, art. 1, 7 Stat. 544.

72. See N. LURIE, MOUNTAIN WOLF WOMAN 112-13 n.5 (1961). In Iowa, the Winnebago were placed on a rectangular tract of "neutral ground" to act as a buffer between the warring Sioux and Sauk Tribes. See generally Peterson, *Nicolet and the Winnebagoes*, 41 PALIMPSEST 325 (1960); Peterson, *Moving the Winnebago into Iowa*, 58 IOWA J. HIST. 357 (1960).

73. Act of Oct. 13, 1946, 9 Stat. 878.

74. *Id.* Major Andrews, one of the United States' chief negotiators addressed the Winnebago delegation: "My friends! It is the anxious wish of your great father the President, to provide a comfortable and permanent home for the Winnebago people . . . Are you willing to move to a permanent and good home? From which you will not be again asked to remove?" Record Group 75, *supra* note 64, Roll 4: Ratified Treaty No. 249. This new reservation in Minnesota would hardly be permanent. Further, located as it was between the contentious Sioux and Ojibwa Tribes, it proved to be almost as dangerous as the "neutral ground" in Iowa. Lurie, *Winnebago*, *supra* note 33,

treaty and another removal, this time to Blue Earth on the Mississippi River in lower Minnesota.⁷⁵ Half of this reservation was sold in the treaty of 1859.⁷⁶ Then, in the dead of winter in 1862, the Winnebagos were taken from the farms they had established in southern Minnesota to Crow Creek on the high plains of central South Dakota.⁷⁷

The public, to the extent that it has any general knowledge at all of Indian removal, tends to think of removal as the Trail of Tears of the Cherokees and other tribes when they were removed from the Southeast to Oklahoma during the Jackson Administration in the 1830's.⁷⁸ In fact, these forced marches called removals occurred all over the country.⁷⁹ The Winnebago experience was much like the other removals. While many Winnebago people died on these long and arduous journeys, all were subjected to physical and emotional hardship.⁸⁰ And, like other tribes, the Winnebago were split apart by removal. Some families and bands had resisted removal from the lands ceded by the bitterly-contested treaty of 1837, stayed behind, and hid out in the forests of Wisconsin.⁸¹

Needless to say, those tribal members who had been located in central South Dakota in 1862 were disoriented and dispirited over this table-top flat land with no trees, little water, and biting, frigid winds. Within two years, most tribal members had fled down Crow Creek in dugout canoes to the mainstem of the Missouri.⁸² They vis-

at 699. On Winnebago removal from Iowa to Minnesota see Mahan, *Moving the Winnebago*, 3 PALIMPSEST 33 (1922).

75. Act of Feb. 27, 1855, 10 Stat. 1172. This reservation was smaller but was in a fertile farming area at Blue Earth, Minnesota. "The treaty-abiding Winnebago took to farming with enthusiasm . . . cut their hair, donned 'citizen's dress,' and even built their own jail to handle miscreants. . . . When the Civil War broke out, Blue Earth men enlisted in the Union Army." Lurie, *Winnebago*, *supra* note 33, at 699-700.

76. Act of April 15, 1859, 12 Stat. 1101. See Lurie, *Winnebago*, *supra* note 33, at 700.

77. Lurie, *Winnebago*, *supra* note 33, at 700. While the Winnebago men were fighting for the Union Army, "the 1862 Sioux uprising in Minnesota prompted a measure to remove not only the Sioux but the peaceful Winnebago as well." *Id.* For a general account of removal to Crow Creek see Lass, *The Removal from Minnesota of the Sioux and Winnebago Indians*, 38 MINN. HIST. 353 (1963).

78. Act of May 28, 1830, ch. 148, 4 Stat. 411. See generally R. SATZ, *AMERICAN INDIAN POLICY IN THE JACKSONIAN ERA* (1975).

79. See, e.g., S. BECKHAM, *REQUIEM FOR A PEOPLE* (1971) (discussing the removal of Oregon coastal Indians to the Siletz Reservation). On the confederation of western tribes, often on new lands, see generally, F. COHEN, *supra* note 57, at 92-98.

80. See N. LURIE, *MOUNTAIN*, *supra* note 72, at 112-13 n.5.

81. *Id.* See also Lurie, *Winnebago*, *supra* note 33, at 702-05.

82. See N. LURIE, *MOUNTAIN*, *supra* note 72, at 112-13 n.5. Lurie claims "that of the 1,934 Winnebago taken from Blue Earth, only 1,382 survived the harsh winter of 1862." Of these, "1,357 managed to escape by the summer of 1863." "[D]escending the Crow Creek to the Missouri . . ." in dugout canoes, "they traveled downstream and some 1,200 finally landed among the Omaha." Lurie, *Winnebago*, *supra* note 33, at 700.

ited the Omaha Indians in the very northeast corner of Nebraska, who were allies of the Winnebago from the old days.⁸³ The Winnebago purchased the north half of the Omaha reservation—approximately 100,000 acres⁸⁴—and about twelve hundred tribal members settled there.⁸⁵

This move was more propitious than any of the others. Although far from the native forest land in Wisconsin that the elders still remembered from their youth and that burned bright in the minds of young people through the stories of their parents, this land of rolling hills and scattered woodlots in the Territory of Nebraska had much to recommend. As naturalist John K. Townsend reported when he passed through the region in 1834,⁸⁶ there was wildlife in great abundance — antelope, deer, sandhill crane, the great heron, buffalo, and many a wolf, after which one of the traditional Winnebago clans was named.⁸⁷ The land was bordered on the east by the bluffs and oxbows of the Missouri. When the first chill winter broke, the Winnebago must have exulted in the power of the raging spring flows bursting down from the snowy mountains far to the west, and they also must have been buoyed by the benign weather of that first spring and fall. Mountain Wolf Woman, a Winnebago, whose life has been recorded by Nancy Lurie,⁸⁸ recalled stories telling that some of the people cried and struck back for the ancestral Wisconsin woodlands.⁸⁹ Yet, this new land plainly held out more hope than any government arrangement in nearly two generations. This Nebraska countryside was to be a permanent home.

In an 1865 treaty, the last signed by the tribe, the United States agreed to guarantee this new reservation to the Winnebago.⁹⁰ It did so by using a new word, one that the much-removed Winnebago understandably insisted upon during the treaty negotiations. The treaty provided: “[T]he United States agree to set apart [this land] for the occupation and future home of the Winnebago Indians, *forever*.”⁹¹

When the Winnebago exacted the United States’ promise in 1865 that their new reservation would be set apart for their occupation

83. See Lurie, *Winnebago*, *supra* note 33, at 700. See also, P. RADIN, TRICKSTER, *supra* note 33, at 113.

84. See N. LURIE, STUDY, *supra* note 33, at 151.

85. See Lurie, *Winnebago*, *supra* note 33, at 700.

86. See J. TOWNSEND, NARRATIVE OF A JOURNEY ACROSS THE ROCKY MOUNTAINS TO THE COLUMBIA RIVER 42, 46 (1839). Townsend travelled with the Columbia River Fishing & Trading Company, which was formed to establish trading posts beyond the Rocky Mountains. *Id.*

87. P. RADIN, WINNEBAGO, *supra* note 33, at 190.

88. See N. LURIE, MOUNTAIN, *supra* note 72.

89. N. LURIE, MOUNTAIN, *supra* note 72, at 2-4, 113 n.9.

90. Act of March 8, 1865, 14 Stat. 671.

91. *Id.* at art. 2 (emphasis added).

and future home forever, they were surely talking about tribal governmental authority as well as title to real property. The Winnebago were culturally very conservative and believed in their own lawways. Long ago, in connection with the negotiation of the Treaty of Green Bay conducted in 1828, one of the Indian negotiators said: "You think nothing of the land because the Great Spirit made you with paper in one hand and pen in the other, and although he made us at the same time, he did not make us like you. We think of nothing but what is on the land."⁹² In negotiations over the 1827 treaty with the Winnebago Tribe, a chief made this memorable comment about the Indians' desire to keep control over reservation society:

We were glad to hear you say that you had come here to build a strong fence and that if any strange animal gets over it, your arms are long enough and strong enough to pull it back. We expect that . . . you will put down this interference in our business. . . . Our people have depended upon the promise of the Great Father that the Whites should not intrude upon [our] land and hope it will not be forgotten.⁹³

"Forever" did not mean forever.⁹⁴ In 1887, Congress passed the General Allotment Act.⁹⁵ The idea was to turn Indians into farmers. Tribal land initially would be transferred to tribal members in trust — 160 acres of grazing land or 80 acres of farmland.⁹⁶ Since the land was in trust, it retained some of the characteristics of tribal trust land; it could not be taxed by the state, sold, or mortgaged. After a fixed amount of time (25 years, which could either be shortened or lengthened by the Federal Government on the authority of the President) the tribal member would, however, take his or her allotment in fee and the trust relationship would be ended.⁹⁷

Allotment was devastating to the Winnebago. The former reservation of approximately 100,000 acres has been reduced to less than 30,000 acres.⁹⁸ Most of the remaining land is owned by individual Indian allottees rather than the tribe. Under the pressure of Nebraska's Thurston County, which encompasses most of the Winnebago Reser-

92. Record Group 75, *supra* note 64, Roll 2: Ratified Treaty No. 153; *see supra* note 66.

93. Record Group 75, *supra* note 64, Roll 2: Ratified Treaty No. 148. *See supra* note 65.

94. *See supra* note 91 and accompanying text.

95. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-34, 339, 341-42, 348-49, 354, 381). *See generally* F. HOXIE, *THE FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE INDIANS 1880-1920* (1984).

96. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-34, 339, 341-42, 348-49, 354, 381). *See also* F. COHEN, *supra* note 57, at 127-43.

97. *Id.*

98. Telephone interview with Daryl LaPointe, member of the Winnebago Tribal Council (Feb. 3, 1988). *See also* Lurie, *Winnebago*, *supra* note 33, at 701.

vation, Congress passed the Brown Act in 1910⁹⁹ and the Brown-Stevens Act in 1916,¹⁰⁰ making trust allotments at Winnebago taxable by the state. These statutes are unique or nearly so — I know of no other that explicitly abrogates the historic immunity of Indian trust land from state taxation in this manner. There are no complete records of how the Winnebagos lost two-thirds of their land through allotment, but there is no doubt about the general pattern of land transfers in Indian country. Tribal land was lost at tax sales or sold, sometimes by arms-length transactions, but much more often by sharp dealing or fraud.¹⁰¹

The situation was not much better in the late nineteenth and early twentieth centuries for those lands that did remain in Indian ownership. Although the Winnebagos had a strong tradition of agriculture and although the Allotment Act was intended to promote farming by Indians, the Bureau of Indian Affairs leased most Winnebago tribal and individual land to non-Indian farmers.¹⁰² In most cases, the lease payments were far below market value. Many lessees would pay the bargain price to the tribal member, then turn around and sublet the land at a vastly increased price to another farmer. This was a nationwide problem in the administration of the Allotment Act, but it was particularly severe in Nebraska. As D.S. Otis, a leading scholar on the Allotment Act, has reported, “[p]erhaps the most flagrant example of the corrosive influence of leasing was that of the Omahas and Winnebagos, in Nebraska. . . Real estate syndicates had leased lands even before the allotment was completed. One company had rented 47,000 acres from the Winnebagos at eight to ten to twenty-five cents an acre and sublet to white farmers for one to two dollars an acre.”¹⁰³

It is small wonder that one Nebraska historian wrote in 1913 that “[i]n a few years the old languages and the old Indian ways will be gone forever and nothing will remain of Indian life in Nebraska but its story.”¹⁰⁴

That prediction, like so many others of its kind, proved to be utterly wrong. Indian policy began to shift direction in ways that forti-

99. Act of May 6, 1910, ch. 202, 36 Stat. 348. The Brown Act affected only the Omaha Tribe to the south of the Winnebago Reservation. *Id.*

100. Act of Dec. 30, 1916, ch. 10, 39 Stat. 865. The Brown-Stevens Act applied to both the Omaha and Winnebago Tribes. *Id.*

101. Total Indian landholdings dropped from 138 million acres in 1887 to 52 million in 1934. See generally II F. PRUCHA, *THE GREAT FATHER* 896 (1984); A. JOSEPHY, *NOW THAT THE BUFFALO'S GONE* 131-32 (1982).

102. See D. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS* 130-31 (1973).

103. *Id.* at 128-29.

104. A. SHELDON, *HISTORY AND STORIES OF NEBRASKA* 291 (1913).

fied the tribes' determination to maintain their own separate societies. The Meriam Report of 1928 exposed the bankruptcy of the allotment policy.¹⁰⁵ In 1934, Congress passed the Indian Reorganization Act, which brought the allotment program to an end; provided that all new allotments would be held in trust in perpetuity; increased federal expenditures for Indian health, education, and economic development programs; and provided support for tribal self-government.¹⁰⁶ In 1936, the Winnebago Tribe adopted a new constitution under the Indian Reorganization Act.¹⁰⁷

The regrouping of the tribe moved forward slowly but steadily. Then, in the late 1960's and early 1970's, several able young men and women who had left the reservation for the cities returned to the Winnebago reservation. Armed both with new ideas and a deep respect for the old ways, they galvanized the tribal membership.¹⁰⁸ The tribe took on new responsibilities in the areas of health, education, and child welfare.¹⁰⁹ The tribe fought, and prevailed over, an Army Corps of Engineers project on the Missouri River that would have flooded Winnebago land; a federal court found that the Corps' project would violate the treaty guarantee that Winnebago land would remain Winnebago land "forever."¹¹⁰ The tribe constructed a new tribal community center to house the tribal government offices and the post office; the community center also has a gymnasium and swimming pool for the young people. The tribe licenses an all-Indian firm which has a number of defense contracts on the reservation. The tribe also operates several modest businesses including a gas station, a truck farming operation, and, on tribal land on the Iowa side of the river, a bingo operation that is run under tribal, not Iowa, law.

105. See INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (1928). The Meriam Report documented the failure of federal Indian policy during the allotment period and provided part of the impetus for the passage of the Indian Reorganization Act of 1934.

106. Act of June 18, 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-79 (1982)).

107. The Winnebago Constitution was approved by the Secretary of the Interior Harold L. Ickes on April 3, 1936. See generally G. FAY, CHARTERS, CONSTITUTIONS AND BY-LAWS OF THE INDIAN TRIBES OF NORTH AMERICA, PART 13: MIDWESTERN TRIBES 92 (Occasional Publications in Anthropology Ethnology Series, No. 14, 1972).

108. Telephone interview with Robert Peregoy, Staff Attorney at the Native American Rights Fund (Feb. 2, 1988) (regarding tribal members Reuben Snake, Sterling Snake, Louis La Rose, and Nicki Solomon and their impact on reservation life in recent years). See also Lurie, *Winnebago*, supra note 33, at 702.

109. Telephone interview with Robert Peregoy, Staff Attorney at the Native American Rights Fund (Feb. 2, 1988).

110. *United States v. Winnebago Tribe*, 542 F.2d 1002, 1004 (8th Cir. 1976) (holding that without a clear expression of congressional intention to abrogate the treaty, the Army Corps of Engineers was without authority to take tribal lands by eminent domain).

It is entitled, as you might guess, "Winn-A-Bingo."¹¹¹ The Winnebago, like all other Indian tribes, would much prefer to raise revenues by methods other than bingo. But theirs is a marginal economy and there is no real choice.

In a broad sense, life today on the Winnebago Reservation is much as it is in Indian country across the United States. The average income at Winnebago is excruciatingly low — under \$6,000 per family, far below the poverty level — and unemployment is excruciatingly high — around 50%.¹¹² Alcoholism is a heartbreaking curse. There are serious health problems and the confusion of young people in the state-run schools is almost palpable as they seek to navigate their way through a world that is both Indian and non-Indian, separatist and assimilationist, progressive and racist in its rawest form.

But, if you spend some time in the living rooms and offices tucked in among these rolling hills, you come away with no doubt that this is an Indian community. Some of the old people, and a few of the younger ones, still speak the old language. The Native American Church is active. More people than not depend heavily on subsistence deer hunting. The light-hearted joking and teasing is the staple ingredient for human interaction with a light, humane touch. Winnebago people really do believe the old tribal adage that people are measured by what they have given away, not by what they possess. There is utter tenacity in the desire to preserve and enrich a tribal life. The Indian way is alive and well at Winnebago.

III. THE WINNEBAGO TRIBE, PUBLIC LAW 280, AND RETROCESSION

Let me return to the recent legislative initiative by the Winnebagos and the way in which it has implicated the civil liberties of non-Indians.

The basic background is this. During the repressive termination policy of the post-World War II era, the Winnebago — unlike the small Ponca Tribe of Nebraska¹¹³ — were able to avoid outright termination. Thus the Winnebago Tribe was not among those tribes that saw their reservation sold, their treaty rights wiped out, and their federal benefits cut off. Congress did, however, single out the Winnebago as one of the tribes that would be subjected to an experiment that would significantly restrict tribal powers within Indian

111. Telephone interview with Robert Peregoy, Staff Attorney at the Native American Rights Fund (Feb. 2, 1988).

112. Telephone interview with Reuben Snake, Chairman of the Winnebago Tribal Council (Feb. 5, 1988).

113. See Act of Sept. 5, 1962, Pub. L. No. 87-629, 76 Stat. 429 (Ponca termination).

country. This termination-era law, enacted in 1953, is commonly referred to as "Public Law 280."¹¹⁴

Traditionally, the courts have recognized broad tribal civil and criminal jurisdiction in Indian country. Although tribes do not possess criminal jurisdiction over non-Indians,¹¹⁵ they do possess criminal jurisdiction over Indians¹¹⁶ and extensive civil jurisdiction over all persons within reservation boundaries, Indian or non-Indian, when some important tribal interest, such as tribal health, safety, and welfare is involved.¹¹⁷ Tribal jurisdiction is both regulatory and judicial. That is, tribal legislatures can enact laws in areas such as environmental protection, zoning, taxation, and business regulation.¹¹⁸ In addition, tribal courts can hear a broad range of cases such as those involving personal injuries, debts, divorce, and general business litigation.¹¹⁹

In 1953, Congress altered this structure for tribes in five states, including Nebraska. Public Law 280 granted court jurisdiction, both criminal and civil, to the states. Thus, where once Winnebagos charged with crimes could go only to tribal and federal courts, after Public Law 280 they went to state courts. Public Law 280 also allowed state courts to hear all civil cases. Winnebago people were

114. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (§ 7 repealed and reenacted as amended 1968) (codified as amended at 18 U.S.C. § 1162 (1982), 25 U.S.C. §§ 1321-26 (1982), 28 U.S.C. § 1360 (1982)). See *supra* note 22.

115. See, e.g., *United States v. McBratney*, 104 U.S. 621 (1881) (upholding state jurisdiction over the murder of a non-Indian by a non-Indian in Indian country); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (denying tribal criminal jurisdiction over non-Indians).

116. See *Ex parte Crow Dog*, 109 U.S. 556, 571-72 (1883). In the absence of federal statutes limiting it, tribal criminal jurisdiction over the Indian in Indian country is complete, inherent, and exclusive. *Id.* On the federal statutory scheme, see F. COHEN, *supra* note 57, at 286-308. On the relationship of tribal and federal criminal jurisdiction over Indians, see generally *United States v. Wheeler*, 435 U.S. 313 (1978).

117. See, e.g., *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985); *Montana v. United States*, 450 U.S. 544 (1981); *Williams v. Lee*, 358 U.S. 217 (1959).

118. See, e.g., *Confederated Tribes and Bands of the Yakima Indian Reservation v. Whiteside*, 828 F.2d 529 (9th Cir. 1987) (zoning and environmental protection); *Kerr-McGee Corp v. Navajo Tribe of Indians*, 471 U.S. 195 (1985) (taxation of non-Indians); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (regulation of non-Indian hunters); *Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982) (zoning and environmental protection).

119. Tribal courts have exclusive jurisdiction when the parties are Indians. See, e.g., *Fisher v. District Court*, 424 U.S. 382 (1976) (adoption proceeding); *Whyte v. District Court*, 140 Colo. 334, 346 P.2d 1012 (1959), *cert. denied*, 363 U.S. 829 (1960) (divorce proceeding). Under the tribal interest test, *supra* note 117, where a non-Indian brings an action against an Indian and the action arises in Indian country, tribal jurisdiction usually applies. See, e.g., *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (personal injury suit); *Kennerly v. District Court*, 400 U.S. 423 (1971) (action on a debt). In the reverse situation, however, when a tribe sues a non-Indian, the tribe can invoke state court jurisdiction. See *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 106 S. Ct. 2305 (1986).

now required to face local juries and judges in Thurston County Court in Pender, Nebraska.

Much later, in 1976, the Supreme Court construed Public Law 280 and held that it did not transfer any regulatory or taxation power to the states.¹²⁰ Thus Public Law 280 did not remove any tribal legislative authority to regulate or tax. But this termination-era program did modify the historic immunities in Indian country and grant the states civil and criminal court jurisdiction.¹²¹

The termination policy has since been thoroughly discredited. Every president from Kennedy through Reagan has spoken out against it.¹²² Congress has restored to federal recognition most of the tribes that were terminated.¹²³ Similarly, Public Law 280 has long fallen out of favor. In reform legislation adopted in 1968, Congress provided that no additional tribe could be subjected to state jurisdiction under Public Law 280 unless the tribe would give its consent.¹²⁴ No tribe has so consented.

The 1968 Act also gave relief to those tribes that had been brought under Public Law 280. The 1968 Act authorized "retrocession" — that is, Congress gave authority to the states to retrocede, or transfer back, to the United States and the tribes the criminal and civil court jurisdiction that had been given to the states by Public Law 280.¹²⁵ Many tribes have achieved retrocession.¹²⁶ In 1969, for example, Nebraska invited tribes in the state to seek retrocession and

120. *Bryan v. Itasca County*, 426 U.S. 373, 387 (1976).

121. There has been no definitive ruling on whether Public Law 280 preserved concurrent tribal jurisdiction. See F. COHEN, *supra* note 57, at 344-45.

122. See, e.g., S. REP. NO. 994, 87th Cong., 1st Sess., 801-03 (1961) (statement by John F. Kennedy that if elected he would support a change in the direction of federal Indian policy). President Lyndon Johnson, proposed among other things, a new goal for Indian programs stressing Indian self-determination. See [1968-1969] Pub. Papers, pt. I, at 335, 336 (Lyndon B. Johnson). President Nixon called for a rejection of termination and paternalism in Indian policy. See Special Message to the Congress on Indian Affairs, [1970] Pub. Papers 564, 565-66 (Richard M. Nixon). In 1983 President Reagan pledged that his administration would deal with Indian tribes on a "government-to-government basis. . . . Excessive regulations and self-perpetuating bureaucracy have stifled local decision-making, thwarted Indian control of Indian resources, and promoted dependency rather than self-sufficiency." Statement by the President of the United States on American Indian Policy, 19 WEEKLY COMP. PRES. DOC. 98, 98-99 (Jan. 31, 1983). On the repudiation of termination see generally F. COHEN, *supra* note 57, at 180-88.

123. See *supra* note 23.

124. Act of April 11, 1968, Pub. L. No. 90-284, §§ 201-701, 82 Stat. 73, 77-81 (codified at 25 U.S.C. §§ 1301-1341). The tribal consent provision of the Indian Civil Rights Act is found at Title IV, §§ 401-402, 82 Stat. 77, at 78 (codified at 25 U.S.C. §§ 1321-1322).

125. Act of April 11, 1968, Pub. L. No. 90-284, 82 Stat. 73, 77-81 (codified at 25 U.S.C. §§ 1301-1341). The retrocession provision of the Indian Civil Rights Act is at Title IV, § 403, 82 Stat. 77 at 79 (codified at 25 U.S.C. § 1323). See also F. COHEN, *supra* note 57, at 370-71.

126. See F. COHEN, *supra* note 57, at 370-71 n.195.

the Omaha Tribe achieved retrocession of criminal jurisdiction in 1971,¹²⁷ a time when Indian issues were much less controversial than they are today.

When Nebraska offered to retrocede criminal jurisdiction on the Omaha Reservation, it made the same offer to the Winnebago Tribe.¹²⁸ After much soul searching, however, the Tribe reluctantly concluded that it was not then prepared to accept the responsibilities of retrocession.¹²⁹ In the mid-1970's, growing ever more confident, the Winnebagos petitioned Nebraska for retrocession.¹³⁰ Those efforts, however, were of no avail because they came after a change of heart in the Nebraska legislature;¹³¹ indeed, Nebraska had attempted to revoke its retrocession affecting the Omaha Reservation,¹³² although the courts ruled that the retrocession was final and would remain in effect.¹³³

In early 1985, the Winnebago resumed their drive for civil and criminal retrocession in earnest.¹³⁴ The issue of Winnebago retrocession was quite widely publicized in Nebraska. Civil liberties were the main issue. As I have mentioned,¹³⁵ arguments of all stripes were made on behalf of those non-Indians who feared tribal jurisdiction. Some of the objections were nothing less than baseline racism, while others were based on good faith concerns about civil liberties within

127. See 35 Fed. Reg. 16,598 (1970) (Omaha criminal jurisdiction retrocession). See also *Omaha Tribe v. Village of Walthill*, 334 F. Supp. 823 (D. Neb. 1971), *aff'd*, 460 F.2d 1327 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973).

128. L. Res. 37, Neb. Unicameral, 80th Leg. (1969). See also JUDICIARY COMMITTEE OF NEBRASKA, REPORT OF THE JUDICIARY COMMITTEE INTERIM STUDY ON WINNEBAGO RETROCESSION LEGISLATIVE RESOLUTION NO. 57, Neb. Unicameral, 89th Leg., 2d. Sess. 15-16 (Jan. 1986).

129. Res. 69-19, Winnebago Tribe of Nebraska (1969) (acknowledging that the tribal government was not prepared to accept the responsibilities attendant to retrocession and opposing any form of retrocession authorized by the Nebraska Legislature). This decision was made in part because the Winnebago tribal budget in 1970 was \$16,000.00; in contrast, by 1986 the tribal budget was almost \$3,000,000.00. Telephone interview with Robert Peregoy, Attorney with the Native American Rights Fund (Feb. 2, 1988).

130. See JUDICIARY COMMITTEE REPORT, *supra* note 128, at 16-17, 29.

131. When the Winnebago Tribe petitioned for retrocession in 1975, the Judiciary Committee of Nebraska recommended an interim study, largely out of the fear that non-Indians would be prosecuted in tribal court. As such, the 1975 Legislative Interim Report on Retrocession posited that the state of the law left too many unanswered questions as to the relative powers of the State of Nebraska and the Winnebago Tribe upon retrocession. In effect, this report "indefinitely postponed" the retrocession resolution. See generally JUDICIARY COMMITTEE REPORT, *supra* note 128, at 29.

132. See L. Res. 16, Neb. Unicameral, 82d Leg., 1st Sess. (1971).

133. See *Village of Walthill*, 334 F. Supp. at 835.

134. See Res. 85-31, Winnebago Tribe of Nebraska (1985) (petitioning the State of Nebraska for retrocession of criminal and civil jurisdiction).

135. See *supra* notes 30, 31 and accompanying text (various arguments made against Winnebago retrocession). See also *infra* note 136.

a tribal legislative and judicial system in which persons subjected to tribal jurisdiction would have relatively limited access to the federal courts.¹³⁶ Thurston County officials stoutly opposed Winnebago retrocession, as did local non-Indian landowners and other politically powerful forces in northeast Nebraska.

The legislative battle was extraordinarily burdensome and enervating for all concerned.¹³⁷ This was particularly true for advocates on the tribal side. James Botsford, an attorney with Omaha Legal Aid, spent a great amount of his time working on related matters at the local level. Robert Perego, a Flathead Indian attorney with the Native American Rights Fund in Boulder, Colorado, came close to becoming a resident of Nebraska during his representation of the Winnebago. Perego spent a total of four to five months in Nebraska during the 15-month campaign. Reuben Snake, Louis LaRose, and other tribal leaders saw their working hours and their time with their families consumed by the issue.

Ultimately, the Winnebago were forced to drop their request for the retrocession of civil jurisdiction.¹³⁸ Although many legislators

136. Among the opponents to Winnebago retrocession were The Concerned Citizens Council of Walthill, the Thurston County Board of Supervisors (which voted 5-2 to oppose retrocession), and the Thurston County Sheriff. See, e.g., *Interim Study - Winnebago Retrocession January 4, 1986, Hearing Before the Judiciary Committee of Nebraska*, Neb. Unicameral, 89th Leg., 2d Sess. 76-77, 80 (1986) (comments by non-Indian landowner of Dixon County, Nebraska); *id.* at 84-103 (comments by the Sheriff of Thurston County, Nebraska); Nebraska State Legislative Record of Jan. 16, 1986 on L. Res. 57, Neb. Unicameral, 89th Leg. 2d Sess 14-16 (Jan. 16, 1986) (statements by Senator DeCamp calling for an end to the reservation system); *id.* at 19-20 (statements by Senator Hefner arguing against two sets of laws and predicting that the Winnebago will "not . . . pay any attention to our state government laws" if retrocession is passed); *id.* at 25 (comments by Senator Remmers arguing that tribes should be brought "into the mainstream" and that "retrocession . . . goes in the other direction"); *id.* at 33-35 (comments by Senator Goll arguing that retrocession segregates Americans by race).

137. In addition to a great number of formal and informal community meetings, the principal events leading up to passage of the retrocession resolution included: The Winnebago Tribe of Nebraska adopted a resolution calling for retrocession of criminal and civil jurisdiction on February 23, 1985; Senator James Pappas introduced Legislative Resolution No. 57 on February 28, 1985; a county-wide and reservation-wide meeting was co-sponsored by the County Board of Supervisors and the Tribe in mid-April 1985; the Judiciary Committee held hearings in Lincoln, Nebraska on April 17, 1985; the Winnebago Tribe withdrew its request for retrocession of civil jurisdiction on April 24, 1985; the Judiciary Committee voted to "indefinitely postpone" Legislative Resolution No. 57 in late April, 1985; the Nebraska Legislature revived the resolution on May 14, 1985; the Judiciary Committee held hearings on the Winnebago Reservation on January 4, 1986; a series of meetings between the Tribe, the BIA, and the Nebraska State Patrol between January 10-14, 1986, resulted in an agreement to full cross-deputization; finally, Legislative Resolution No. 57 was passed by the state legislature by a vote of 25-21 on January 16, 1986. J. Botsford & R. Perego, *Chronology of Events Leading to the Passage of LR 57, Winnebago Retrocession* (unpublished materials compiled by James Botsford and Robert Perego of the Native American Rights Fund).

138. See JUDICIARY COMMITTEE REPORT, *supra* note 128, at 1.

supported civil retrocession, there simply was not a majority in the Nebraska Legislature that would recognize tribal court authority over major civil lawsuits involving non-Indians. The campaign for criminal retrocession, which would restore tribal jurisdiction only over Indians,¹³⁹ continued with the support of Attorney General Robert Spire and the dogged efforts of State Senators Ernie Chambers, Vard Johnson, and James Pappas. The debate was vitriolic and cluttered with false issues concerning gambling, which was wholly outside of the retrocession issue: retrocession could not restore tribal authority over gambling because Public Law 280 never removed tribal authority over regulatory matters such as gambling in the first place.¹⁴⁰ Finally, Legislative Resolution 57 was adopted by the Legislature on January 16, 1986.¹⁴¹ The vote was 25-21, the barest possible majority since a resolution must receive an absolute majority of 25 votes from the 49 Nebraska senators. It was an historic victory for the tribe, and it means that tribal members will not be held to answer for alleged crimes in the Thurston County courts — such cases will go to tribal or federal forums. Thurston County still has jurisdiction over civil cases arising on the reservation.

IV. CIVIL LIBERTIES AND TRIBAL SOVEREIGNTY: A RECONCILIATION

Why should decent people — especially those who view civil liberties as the heart and soul of our national character — not pause at the idea of Winnebago jurisdiction over non-Indians? With honest questions about whether civil liberties of non-Indians can be fully preserved in this setting, why should one support the idea that the Nebraska Legislature should go further and retrocede to the Winnebago Tribe full civil jurisdiction? Why should fair-minded people support the Winnebago Tribe's current power to tax and regulate non-Indians within the reservation? Why is it, ultimately, that this nation should accept the idea of these sovereign governments whose citizens are determined by race?

The following are some of the reasons, offered by one person, a civil libertarian who, after twenty years in the law, has concluded that Winnebago jurisdiction — tribal jurisdiction — even when non-Indians are involved, is right and just.

A preliminary point needs to be made that at first blush seems to

139. For examples of cases denying tribal criminal jurisdiction over non-Indians see *supra* note 115.

140. See F. COHEN, *supra* note 57, at 363-65; *California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083 (1987); *Bryan v. Itasca County*, 426 U.S. 373 (1976).

141. See L. Res. 57, *supra* note 32.

be hypertechnical but on reflection is not. In a long line of cases, the Supreme Court of the United States has reasoned through the question of whether special Indian rights are based on race. The Court's conclusion in every instance has been that, for constitutional purposes, Indian tribes are best understood as governments, not racial institutions.¹⁴² Their governmental status is an historical fact: they made laws and enforced them before contact with white people.¹⁴³ The United States acknowledged tribes as sovereigns, made treaties with them, and have at all times recognized tribal governmental authority within reservation boundaries. Thus, the Court has found that special Indian rights are not race-based — they are premised upon government-to-government compacts, which have created a relationship that remains in effect today.¹⁴⁴ Citizens of one state routinely travel to other states where they are subject to regulatory and court jurisdiction, even though they do not have the right to vote in that other state. We accept the fact that citizens residing abroad cannot vote in their nation of residence. These principles are part of the legal and historical foundation for tribal sovereign authority over nonmembers. I recognize that some level of concern remains because non-Indian residents within reservation boundaries cannot vote in tribal elections. But such people are hardly disenfranchised; they are constituents of the county, state, and national governments, all of whom, as the Winnebago experience shows, can have a mighty influence on tribal governance.

Another foundational legal and constitutional point needs to be underscored. The Constitution imposes the obligation of civil liberties only on the federal and state governments, not upon Indian tribes.¹⁴⁵ That may have been an historical oversight, or it may have reflected a generally accepted notion that tribal lawways ought to apply in Indian country, but the point remains a settled matter of constitutional law. Granted, for civil libertarians the fact that the Constitution does not bind tribes is not a conversation stopper. Civil rights have validity as great ideas regardless of their adoption in any constitution. Still, there is a middle ground here: Indian reservations are unique institutions within our society and it is appropriate to

142. See, e.g., *Fisher v. District Court*, 424 U.S. 382, 390 (1976) (stating that "[t]he exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law"); *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (stating that a federal employment preference statute deals with "Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities").

143. See, e.g., *LLEWELLYN AND HOEBEL, THE CHEYENNE WAY* (1941).

144. See, e.g., *Morton*, 417 U.S. at 554-55 (upholding a special BIA hiring treatment because it fulfills "Congress' unique obligation toward the Indians").

145. See *supra* notes 7-10 and accompanying text.

structure a set of civil liberties guarantees that is tailored to those unique societies.

Let me now turn from these legal doctrines to broader policy justifications for tribal jurisdiction over non-Indians.

First, tribal jurisdiction is supported by the ethic of promising. Promises have a high station throughout our society — in a very real way they are the glue that binds us together. From marriage and parenting, to economic and business transactions, to law and government, the keeping of promises creates the basic social framework that allows people to live and work together peaceably. The ethic of promising has major legal consequences when formal contracts are signed because they are enforceable in court. Yet the ethic rises to its zenith in importance and solemnity in the case of treaty making, where promises bind whole nations. As a people, we take our promises seriously and, when a group is promised its land and sovereignty "forever," that promise ought to be enforced.

Second, allowing an expansive tribal sovereignty will further the highest ideals of federalism — bringing power down to the local units of government, and promoting the experimentation and individuality that are the hallmarks of a diversified democracy.

Third, as Dean Lee Bollinger has concluded in his recent book, *The Tolerant Society*, the recognition of minority rights elevates the majority.¹⁴⁶ Bollinger made the point in connection with the guarantee of freedom of speech, but the point applies as well in the area of minority rights generally. Recognition of rights in a small minority, with virtually no numerical strength at the polls, ennobles us and gives us the truest kind of strength, that of tolerance.

Fourth, the concept that aboriginal peoples possess group rights is gaining acceptance in international law.¹⁴⁷ Today there is wide rec-

146. L. BOLLINGER, *THE TOLERANT SOCIETY* (1986).

147. The belief that human rights adhere not only to individuals but also to groups is a relatively new theory in the field of human rights. See V. VAN DYKE, *HUMAN RIGHTS, ETHNICITY, AND DISCRIMINATION* 14-16 (Contributions in Ethnic Studies No. 10 1985). Van Dyke points out that human rights cannot be enjoyed by a person whose essential identity is with a group if human rights are allocated only on an individual basis. When the majority society denies a particular group the right to be self-determining, in effect it denies that group's members the right to maintain a chosen or inherent identity — clearly a violation of a human right. See *id.* at 80-84. As Van Dyke notes, there are no conflicts with theories of equal protection when a particular group characterized by its race, culture or language possesses special rights; equal protection is violated only if the differentiation between groups is discriminatory. *Id.* at 6. As such, it is important to determine whether the special treatment is detrimental or benign, and to consider whether that treatment will seriously infringe upon the rights of the majority. *Id.* at 13.

A major argument against special treatment for groups is that every ethnic group will claim a right to self-determination and that this would make national government impossible. In this context, it is apparent that a group must be able to show not only

ognition of the general principle that basic human rights include the right of aboriginal peoples to live and develop their economies and societies free of the control of the dominant society.¹⁴⁸ This, too, is one of the threads of justification for the sovereign rights of American Indian tribes.

Fifth, forced assimilation of Indian people simply does not work. Indian reservations are homelands and the experience of five hundred years on this continent tells us without question that Indian people will not relinquish their tribal ways. Neither does it work to keep Indian reservations geographically intact while still allowing the majority society to pull the levers from the outside.¹⁴⁹

What does work in Indian country is Indian control. It will take time — Indian societies have been battered in many different ways and the modern revival has not been easy. Still, the surest path toward social and economic betterment in Indian country is through Indian self-determination. Tribes need to tax persons within their borders to generate revenues for essential government services. They need to adjudicate controversies within their borders because that is a primary way in which societies set and enforce norms.

cultural, linguistic or racial congruity, but also an historical right to, and tradition of, actual self-government. Indian tribes can make especially strong cases on this issue and their historical rights as self-determining groups ought to outweigh any infringement of non-Indians' rights as individuals to political representation, particularly where the non-Indians continue to possess a powerful political voice within the majority society.

148. For examples of the acceptance of the doctrine of self-determination in international law, see, e.g., I. BROWNLIE, *BASIC DOCUMENTS ON HUMAN RIGHTS* 28-29 (2d ed. 1981) (United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted December 14, 1960 — "The General Assembly . . . convinced that all peoples have an inalienable right to complete freedom . . . Declares that . . . all peoples have the right to self-determination."); *id.* at 118 (United Nations International Covenant on Economic, Social, and Cultural Rights, 1966 — "The States Parties to the present Covenant . . . Recognizing that these rights derive from the inherent dignity of the human person . . . Agree [that] . . . All peoples have the right of self-determination."); *id.* at 418 (First Conference of Independent African States, 1958 — "We pledge ourselves . . . to recognize the right of the African peoples to independence and self-determination."). See also I. BROWNLIE, *BASIC DOCUMENTS IN INTERNATIONAL LAW* 18 (3d ed. 1983) (United Nations Charter Chapter 9, International Economic and Social Co-operation — "[B]ased on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . universal respect for . . . human rights and fundamental freedoms."); R. SUREDA, *THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION* (1973) (for an historical analysis of the right of self-determination).

149. See generally K. PHILP, *INDIAN SELF-RULE* (1986); UNITED STATES DEPARTMENT OF THE INTERIOR, *TASK FORCE ON INDIAN ECONOMIC DEVELOPMENT, REPORT OF THE TASK FORCE ON INDIAN ECONOMIC DEVELOPMENT* (July 1986). Noting that the imposition of political systems on Indian tribes is no longer feasible as federal policy, the Task Force recognized that in the areas of political and economic development "[t]ribes have reached the point where they are demanding and receiving much greater control over their own affairs." *Id.* at 159.

Those powers are necessary to build lasting societies.¹⁵⁰

Sixth, we ought to celebrate differences, not deny them. We as Americans must achieve a fuller appreciation of the worth of our pluralistic heritage.¹⁵¹ Strong Indian societies have much to offer the larger society. You can see that in a small way at the bustling, electric pageantry at the Winnebago pow-wow each summer or you can learn it in a larger way by receiving the gentle tolerance, wisdom, and humor of Indian people over many years, as I have been lucky enough to do.

Seventh, if any substantial limits are to be placed on Indian tribal sovereign powers, the late twentieth century is precisely the wrong time to do it. Circumstances remain tough in Indian country, but there is a great deal of activity, creativity and determination there. Everywhere, tribes are upgrading their economic and governmental systems. It may well be that most tribal courts, for example, are not as elaborate as their state counterparts. But remember that the state courts are many generations old, while tribal justice systems were repressed by federal authority until the late 1960's. Although they trace to ancient origins, in their modern form tribal courts in fact are young institutions and they ought to be given time to grow. Tribes should be given time to develop their own systems of civil liberties within the context of both national values and local circumstances. They ought to be given time to do that on their own terms. They should not be forced to enter a race against time out of a fear that the larger society will crimp their new and exciting exercises of power.

Last, we ought to recognize that it is ultimately superficial to

150. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). In a footnote, the Merrion Court acknowledges that "[t]hrough various Acts governing Indian tribes, Congress has expressed the purpose of 'fostering tribal self-government.' We agree with Judge McKay's observation that '[i]t simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes or severance taxes.'" *Id.* at 138-39 (quoting *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 550 (10th Cir. 1980) (citations omitted). See also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). In assessing the federal and tribal interests the Court exclaimed, "[w]e have stressed that Congress' objective of furthering tribal self-government encompasses far more than encouraging management of disputes between members, but includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.' In part as a necessary implication of this broad federal commitment, we have held that tribes have the power to manage the use of their territory and resources by both members and nonmembers." *Id.* at 335. See also *supra* note 149 and accompanying text.

151. See generally H. ISAACS, *IDOLS OF THE TRIBE* (1975). For an example of one nation's attempt to recognize its cultural diversity see Canadian Charter of Rights and Freedoms, Constitution Act, 1982, as enacted by Canada Act 1982 (U.K.), 1982, ch. 11, § 27 ("This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.").

view civil liberties in Indian country in the context of Indian tribes as a majority society, forcing their laws and views upon a non-Indian minority. When one looks at the whole system, non-Indians within Indian country have far greater political power. They may not be able to vote for tribal officials, but they have direct and substantial access to every other arm of government in the county, state, and nation. Thus, if we are to move away from form and toward substance, and if I was correct when I said earlier that the heartbeat of the civil rights laws is to protect the dispossessed and that Indian people are profoundly dispossessed, then we can perceive the true context for tribal jurisdiction over non-Indians. The informal restraints coming from the outside majority provide a whole range of tangible and intangible limits on Indian tribes when the civil liberties of non-Indians might be infringed. Granted, there are risks here, but there are also terrible risks every time an Hispanic-American must go before the Immigration and Naturalization Service, a black child must go before a white teacher, or a Winnebago Indian must go into state court. Civil rights laws protect the dispossessed and we will hue to the truest course if we remember exactly who the dispossessed are and what special kinds of protections each discrete dispossessed group needs and deserves.

We meet annually at Creighton's Civil Rights Lecture Series to celebrate the rights and accomplishments of minority people and to look out toward what we hope will be a better future. None of us will be here to know whether, 100 or 200 years or more hence, the spring melt from the high Rockies will flow down into the great river and rush past a peaceful, prosperous and sovereign settlement of Winnebago Indians in northeastern Nebraska. But I happen to believe that such a thing will occur. And I believe that this great and good majority society ought to take every reasonable step to see that such a thing does occur.

There is, I am satisfied, only one path to assure that event. It is through a principled morality that blends into enlightened laws that accord enduring respect and protection to the ideal of Indian tribal sovereignty. Such a consciousness requires certain basic things. It entails taking words like "forever" seriously. It involves an honest and objective feel for history. It demands a tough-minded search for the truest national traditions. Many of those traditions in turn merge and form the noble idea of civil rights. For, when it has all been said, if a nation is great enough to protect its very least, its most dispossessed, then surely it is a nation with the fiber and strength to achieve any task.

