"Peoples Distinct from Others": The Making of Modern Indian Law

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“Peoples Distinct from Others”: The Making of Modern Indian Law

Charles Wilkinson*

I. INTRODUCTION

The story of how tribes have taken back their reservations, and through sovereign self-rule restored democracy and improved the lives of their people, is surprising, both in the means and the magnitude, and it cuts against preconceptions and stereotypes. Overwhelmingly, the central thrust has been the work of Indian people. People in the agencies, courts, and Congress were not sitting around wondering how they could benefit Indians. The tribes themselves initiated litigation or invited it by assertions of tribal sovereignty and jurisdiction and hunting, fishing, water, land and cultural rights. They themselves brought forth the legislative proposals. They constructed the legal framework in Indian country.

The institutions on the reservations are a critical part of Indian law. Indian tribes now own and govern fifty-eight million acres of land in the contiguous states,¹ “an area larger than all but ten states,”² and tribal hunting, fishing, water, and religious rights that reach beyond reservation boundaries. A million people live on or adjacent to the reservations. Some federal and state laws apply within the reservations (just as some federal and tribal laws apply within the states), but the tribes are the primary governments in Indian country. Tribal laws, including the actions of tribal administrative agencies, are important to Indian people, but they matter to the nation as a whole because of the number of people and the amount of land involved, and the significance of the issues.

Further, Indian law, and especially the doctrine of tribal sovereignty, has been the foundation for the modern Indian movement as a whole. Tribes today operate full-service governments that variously provide colleges, elementary and secondary schools, and preschools; clinics, hospitals, and alcohol, drug, and wellness programs; language restoration programs; museums and cultural events; casinos and other forms of economic development; functions we more specifically identify as “legal,” including legislatures, courts, attorney generals and tribal attorneys offices; police, probation, and counseling services; land,

*Distinguished University Professor and Moses Lasky Professor of Law, University of Colorado. These thoughts were presented as the fortieth William H. Leary Lecture at the S.J. Quinney College of Law, University of Utah, on November 3, 2005. This Article is drawn, in part, from my book, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS (2005). My thanks to my assistants, Josh Tenneson and Cynthia Carter, for their help on this piece. I dedicate this Article to Lou Callister, long-time leader in the Utah bar.

²Id. at 207.
Some of these functions could be done by Indian nongovernmental organizations, although probably not as well, but most depend on the governmental status of tribes. As Chief Justice John Marshall explained over a century and a half ago, Indian tribes are nations, sovereigns, "a people distinct from others," one of the three sources of sovereignty under the Constitution. Thus, they are entitled to govern their reservations under their own laws, traditions, and priorities, and, as well, to be part of the intricate, sometimes chaotic, but lastingly inventive webwork of democracy that characterizes the United States of America.

My aim, then, is to present the outlines of how these dispossessed peoples, small in population and wealth, undertook a daunting law reform effort. Their journey has been marked by disappointments and setbacks, as well as successes, but such is the stuff of ambitious movements. Tribal leaders will sometimes pronounce, "We aren't going anywhere." That brief but fiercely confident anthem sounds the rootedness, the determination, that fire their law-driven revival. What Indian people have accomplished is nothing short of stunning, testament not only to the efforts of the tribes but also to the best ideals and structures of the larger nation.

I will go forth in this order: Rock Bottom, the low station of Indian law in the 1950s; Origins, the initial gathering of Indian people to revive and improve Indian law; An Indian Bar, access of tribes to lawyers starting in the late 1960s; Litigating, the giving and receiving of lawsuits; Statute Making, the activity in Congress starting in the 1970s and, later, in the statehouses; and Law on the Reservations, the making of tribal legal institutions.

II. ROCK BOTTOM

Indian law seemed to be on its last legs in the 1950s. It was a terrible time out in Indian country: Native people were dispirited, enduring the worst health, education, and economic conditions in the country and suffering a relentless federal and church assimilation effort teaching them that being Indian was bad. Tribes had no legal capacity. Virtually the only cases in the court system were the tribal claims filed in the Indian Claims Commission under the 1946 Indian Claims Commission Act. This statute—which allowed for the recovery of money, but not land, for the taking of most of the country from the tribes—had tinges of beneficence, but was bred mainly of cynicism. The money payments were minimal for most tribes and, once made, erased forever any

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425 U.S.C. §§ 70-70v (1952) (omitted from current code since Commission terminated in 1978); see also id. (setting forth Indian Claims Commission and guidelines).
5WILKINSON, supra note 1, at 223.
claims for the land itself. Further, this making of amends, of supposedly wiping the slate clean, would pave the way for the final termination of the reservations and of Indian law itself.

In Congress, all the momentum was behind termination and rapid assimilation. There was no program for improving reservation life. The tribes still had not learned how to influence this powerful foreign government and had no effective voices, even if anyone would have listened. The first wave of termination bills hit the Menominee of Wisconsin, the Klamath of Oregon, and the Mixed-Blood Utes and Southern Paiutes of Utah.

The Interior Department was fully in line. The Bureau of Indian Affairs ("BIA") busily drew up lists of tribes eligible for termination and, except for an occasional maverick BIA superintendent, enthusiastically justified termination bills in Congress. Then there was the field of federal Indian law. The great jurisprudential scholar, Felix Cohen, who left academia to serve in the progressive Harold Ickes-John Collier administration, authored one of the great treatises in American law, the 1942 *Handbook of Federal Indian Law.* In 1958 the Interior Department, fearing the force of Cohen’s words, revised the treatise and issued a bastardized version that scrubbed Cohen’s—and John Marshall’s—powerful explanations of tribal sovereignty, the high federal duty to tribes as trustee, and other inconvenient doctrines.

On the reservations, the idea that Indian tribes were sovereign governments, that they could make and enforce laws, was of no moment at all. The real government in Indian country was the BIA, pure and simple, and it had been that way for generations. The agency ran the reservations by dint of statutes, regulations, and manipulations of paper tribal councils through withholding entitlements and handing out favors. To be sure, racism played a role, but much more fundamentally, BIA officers were following orders from a Congress that had no reason to pay much attention to Indian affairs and had not countenanced an alternative to forced assimilation and termination.

### III. ORIGINS

Somehow, Indians began to dare to take matters into their own hands. The raw fear of termination had something to do with it. So as did the return of veterans from World War II and the Korean War. They had gladly volunteered, proven themselves brave and capable, and received, rather than discrimination,
praise and commendation. They didn’t like what they saw at home. One of them, Joe Garry of the Coeur d’Alene tribe, took over as the head of the near-moribund National Congress of American Indians and, with help from Helen Peterson, a Lakota Sioux, organized testimony of the termination bills. They lost most of those fights, but had some successes, most notably the effort to terminate and sell off the magnificent Flathead reservation in Montana.

Then, in the 1960s, came the flowering of the civil rights movement. One of the legislative centerpieces was the War on Poverty, which would be carried out by a proposed activist agency, the Office of Economic Opportunity (“OEO”). The drafters of the bill agreed that Indian people should be beneficiaries, but there were problems. Indian country was beginning to stir, and the talk was about sovereignty, about tribal governments. The drafters of the OEO bill, however, never thinking of tribes as governments, considered only three possible ways to deliver OEO services to Indians: through the BIA, through the states, or through both the BIA and the states. In addition, no one had consulted with tribal leaders.

Why shouldn’t the grants go, not to the BIA or the state, but directly to the tribes, who would best know how to serve Indian people? Why not take our case to Congress?

Tribal leaders did exactly that. In May 1964 Garry, D’Arcy McNickle, Vine Deloria, Jr., and others organized a gathering in Washington, D.C. that they called the American Indian Capital Conference on Poverty. They persuaded Vice President Hubert Humphrey, Secretary of the Interior Stewart Udall, and influential members of Congress to attend. They made their case for self-determination, for the right to run their own programs, for “the right,” as they called it, “to be right and the right to be wrong.”

They achieved their goal by adding to the bill three words to the definition of grantees of OEO funds. Those three words—“a tribal government”—were the very first words in the entire history of the Republic that Indian people had ever conceived of and lobbied into federal legislation.

IV. AN INDIAN BAR

Until the 1960s, lawyers had not much less influence on the reservations than the BIA and the churches, and too often attorneys wrote dark chapters in tribal histories. To some extent, it was not their doing. Penniless tribes had few resources to retain attorneys. The law pushed attorneys toward just two fee-producing areas, mineral development and the money-damages claims cases for lost land. Even honest, nonmanipulative lawyers—and not all were—had a

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powerful incentive in favor of that kind of representation rather than other pressing matters that might have had a higher tribal priority.

The pattern of tribes being represented by lawyers from the cities, with no real commitment to the full range of tribal needs, began to change with the arrival of the legal services programs, part of the War on Poverty and still mainstays in Indian country. The first was DNA, an abbreviation of a Navajo phrase meaning "the organization that brings well-being to the people," which set up shop in the mid-1960s, with the idealistic young attorneys themselves constructing the modest office building in Window Rock.

The pent-up demand for lawyers at Navajo was unbelievable, especially in the area of commercial transactions—debts, repossessions, and the like. Navajo people also wanted to assert and protect tribal prerogatives such as sovereignty and water rights. I'll always remember my first visit, in 1972, to Window Rock and walking up to the DNA office and finding, even in the early morning, the parking area filled with equal numbers of tethered horses and well-used, dusty pick-ups. Inside, the waiting room and nearby offices were abuzz with Navajo lawyers and paralegals doing interviews in Navajo and interpreters passing on accounts from Navajo clients to white lawyers. A few years later, I went up to the DNA office in Mexican Hat, which served the Utah part of the reservation, and learned that their phone in that remote outpost was on a twenty-one-party line. Not so great for confidential attorney-client communications. Yet the new and vigorous representation of Navajo people went on.

It is said that Native Americans are covered by more laws than anyone in society save prisoners. By the late 1960s, Indian leaders made the goal of creating Indian lawyers—there were only about a dozen at the time—a top priority. The Pre-Law Summer Institute for American Indians opened in the summer of 1968 at the University of New Mexico Law School. The idea was to take thirty to forty potential law students and give them an intensive law school curriculum for two months before entering law school. The idea was not so much to teach them law as to introduce them to the rigorous, foreign, and often sordid culture of legal education. If you're going to be abused by some arrogant, Socratic cross-examiner, you might as well have some practice. The idea took, and the Pre-Law Institute has been a main contributor to creating the cadre of more than two thousand Native lawyers today.

The practice of Indian law changed in other fundamental ways. The Native American Rights Fund and the Indian Law Resource Center took wing, specializing in Indian law and representing tribes and individual Indians who

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had no means to take on major litigation.\textsuperscript{13} The legal services offices developed big-case capabilities in addition to their casework. The private bar steadily grew. Now dozens of smaller firms represent mostly tribal clients. The large firms commonly have experts in Indian law, sometimes representing tribal interests, sometimes their business partners or opponents in litigation. The growing importance of the field is suggested by Indian law being a mandatory bar exam course in New Mexico and Washington, with the bars of California, Colorado, and Arizona now considering making that move.

In the late 1970s, the Navajos broke new ground by creating an attorney general's office that today has more than twenty lawyers. Numerous other tribes have established tribal on-reservation legal offices with several attorneys.\textsuperscript{14} Today most of the larger tribes—and a number of smaller ones as well—organize their legal work much like a small state or large corporation in that they have loyal, responsive, in-house attorney staffs and will call in outside lawyers on specialized matters. In contrast to the situation two generations ago, tribes have many more and far better attorneys and, as clients should, exercise much more control over them.

The Supreme Court—properly, I think—often writes Indian law opinions broadly in that they may apply to all or most tribes, not just the one at bar, unless, of course, a tribe has a special treaty or statutory provision. There is economy in this, for there are more than five hundred federally recognized tribes; announcing general rules obviates the need for repetitive litigation. Also, Congress has passed many statutes that apply to tribes generally. This means that all tribes are likely to have an interest when just one tribe is litigating questions of tribal sovereignty, the trust relationship, hunting, fishing, and water rights, or tribal, federal, or state jurisdiction.

In the 1960s and 1970s, when the Indian bar was still small, there was a good deal of coordination among tribal lawyers. In several instances, they identified potential test cases with the best facts to be brought forth. This strategic cooperation began to wane as the field expanded in every way. By the 1980s, Indian law was one of the most active areas on the Supreme Court's docket—a pattern that still holds—with an average three or four opinions a year, more than in fields such as international, environmental, and securities law. Hundreds of others are pending in the lower courts.

Beginning in 2001 with the release of the opinions in \textit{Nevada v. Hicks}\textsuperscript{15} and \textit{Atkinson Trading Co. v. Shirley}\textsuperscript{16} that limited tribal civil jurisdiction over non-Indians,\textsuperscript{17} the tribes came together in an attempt to achieve more coordination over the sprawling field of Indian law litigation. The Tribal


\textsuperscript{14}See id. at 1039.

\textsuperscript{15}533 U.S. 353 (2001).

\textsuperscript{16}532 U.S. 645 (2001).

\textsuperscript{17}See Hicks, 533 U.S. at 367–69; Atkinson Trading Co., 532 U.S. at 652–54.
Supreme Court Project, sponsored by the largest intertribal organization, the National Congress of American Indians, and administered by the Native American Rights Fund, is modeled after an effort by the states. In the early 1990s, state attorney generals on a national basis were frustrated by Supreme Court opinions and decided to improve their quality of advocacy in front of the Court.

Tribal attorneys now hold regular meetings and conference calls to develop strategies for cases of general applicability. The first principle is that every tribe has the right to make its own decisions and not be guided by the Supreme Court Project. At the same time, the Project has been widely accepted in Indian country and is regularly giving advice and support on such matters as deciding which cases are favorable for certiorari, arguing for or against cert, briefing and bringing in amici curiae on the merits, using experienced Supreme Court advocates instead of trial attorneys for argument in front of the Court, and mooting the case thoroughly before argument. The Supreme Court Project is still young but it seems to be paying off, a necessary and significant institution in firming up tribal representation in the making of Indian law.

V. LITIGATING

In the 1960s, Indian lawyers faced the monumental task of reviving a field that time had seemingly passed by. John Marshall had done some of his best and most courageous work in Indian law, acknowledging tribal sovereignty, the trust relationship, tribal rights to land, and the general immunity of the reservations from state jurisdiction. Felix Cohen had written his monumental treatise true to Marshall’s view in 1942. But with the steady decline of active tribal governments, the embers of the Marshall-Cohen vision had grown cold.

The most influential case in the modern era, even with all of the activity in the United States Supreme Court, came out of the United States District Court for the Western District of Washington.

In the mid-1850s, tribes across the Pacific Northwest, from Puget Sound to western Montana, signed treaties with Isaac Stevens and Joel Palmer. Stevens was the powerhouse of the two, smart, organized, and determined to the depths of his being to eliminate as much Indian land ownership as possible in order to open the Northwest to settlement by non-Indians. He bullied tribes, drafted treaties in advance, consolidated tribes, selected chiefs, and forced them to accept small reservations until wars of outrage in the Puget Sound area forced him to accede to larger reservations.
With all his success—and there is no doubt that he achieved his main objective of obtaining most of the Northwest for the United States—he could not persuade the tribes to relinquish their right to fish for salmon on the landscapes they ceded to the United States. Thus, on off-reservation land occupied by tribes in aboriginal times—that is, on most of the Pacific Northwest—tribes retained in the treaties “[t]he right of taking fish, at all usual and accustomed grounds . . . in common with all citizens of the territory.”

The State of Washington paid little attention to these words that—without the context of how tribes had built their societies on salmon and never would have ceded their land without a guarantee of continued fishing—seemed so vague and opaque. Beginning in the late 1800s, and accelerating dramatically after World War II, state officers arrested Indian fishers for fishing without state licenses and outside of state seasons. Tribal fishers, sick of serving jail time and suffering confiscations of their catches, nets, and elaborately constructed and carved cedar canoes, resisted. The “Fish Wars” became a front-page issue in that state where the Pacific salmon is such an icon.

In the late 1960s, idealistic, young Indian leaders—Janet McCloud, Hank Adams, and others—succeeded in recruiting lawyers from the Native American Rights Fund, Seattle Legal Services, and private practice. The sprawling, complex litigation that resulted is notable for its high quality of lawyering. Among many other things, the tribal attorneys worked tirelessly to persuade Interior Department lawyers, the U.S. Attorney in Seattle, and finally the Justice Department in Washington and the Nixon White House to acknowledge the federal government’s obligation as trustee to file on behalf of the tribes and their treaty rights. Indeed, in 1970 the Justice Department—rather than the tribes—launched *United States v. Washington* in federal court (although the tribes would soon intervene). Does it not add quite a lot of credibility to have the United States of America weigh in on a very big controversy over a very few old words?

After lengthy discovery and trial, Judge Boldt handed down his decision on February 12, 1974. Initially, the tribal lawyers held serious misgivings about Boldt, a tough, law-and-order Eisenhower appointee, but as they watched the proper, diminutive, bow-tied judge during the long lead-up to trial, they began to think they saw a classic jurist who could rule on the law and the facts and who did not lack courage. His opinion, intentionally released on Lincoln’s birthday, reflected his reading, listening, and appreciation of the distinctive characteristics of Indian law. He understood the treaty negotiations—that under American law the tribes came to the negotiations as

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23 See generally *Wilkinson*, *supra* note 21, at 29–47 (discussing history of Nisqually river before late 1960s).
24 384 F. Supp. 312.
souvenirs and landowners, that the tribal representatives knew they had to
relinquish much of their land, and that the tribes had made the calculation that
they had a chance to preserve their societies if they could preserve their ability
to take the salmon. Judge Boldt also knew the legally obvious, though it was
not evident to state officials and the commercial and sports fishermen, that
these treaties were major events in American history and that their words
remained in place as the supreme law of the land unless Congress chose to
change them, which it never had.27

Judge Boldt ruled that the treaties remained in force.28 As Supreme Court
cases required,29 he construed the treaty language that tribes had the right to
fish "in common with" non-Indians at all off-reservation fishing sites in favor
of the tribes because the treaties had been negotiated in the spare, five-
hundred-word Chinook jargon and then written down in English, a foreign
language to the tribes; because the United States was the more powerful party;
and because the United States is trustee to the tribes.30 Using that rule of
interpretation and knowing from extensive trial testimony from academic
experts and tribal elders how insistent the tribes were in holding onto their
fishing rights, he found that "in common with" meant that tribes had the right
to take fifty percent of the runs.31 He also found that tribes were, and always
had been, governments, and that they, not the state, had the sovereign authority
to regulate Indian fishing.32

American law has no prouder moment. The Supreme Court affirmed the
Boldt decision in 1979,33 but Judge Boldt's much-watched ruling, so full, so
rife with integrity, was the signal event announcing that Indian law was no
dead letter and that Indian people were breathing life back into it.

The Boldt decision looked in part to Supreme Court decisions beginning
in 1959 that involved much less momentous issues but that favored the tribes.34
For some thirty years, through the late 1980s, the Court mostly ruled in favor
of tribal assertions of rights to sovereignty, land, court jurisdiction, regulatory
jurisdiction including taxation and gaming, and resource rights. Several

27 See Wilkinson, supra note 21, at 60–62.
29 E.g., Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 518–19 (1832); see also United States
v. Winans, 198 U.S. 371, 380 (1905) (requiring treaty interpretation as original parties
understood it).
31 Id. at 343–44.
32 Id. at 400–01.
33 See Washington v. Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658, 669–74,
696 (1979).
34 In 1959 the United States Supreme Court decided Williams v. Lee, 358 U.S. 217 (1959),
which signaled the beginning of the modern era of federal Indian law. Charles F. Wilkinson,
opinions addressed a main conceptual issue, whether Indian rights are "race-based," by consistently holding that the field of Indian law is based largely on a government-to-government relationship between tribes and the United States; thus an individual Indian may exercise, say, a fishing right or benefit from a federal hiring preference, but is doing so—not as a member of a race—but as a citizen of a tribal government. Another leading opinion came out of California v. Cabazon Band of Mission Indians in 1987, where the Court ruled that California could not regulate tribal gaming because of the limited reach of state law into Indian country.

John Marshall laid the foundation for many of the modern cases in three comprehensive opinions, most notably Worcester v. Georgia in 1832. In that case, the Court addressed a series of Georgia laws that, if valid, eviscerated the large and powerful Cherokee Nation—its legislature, courts, and land. Writing for the Court, Marshall struck the state laws down, drawing the full ferocity of President Andrew Jackson, who rumbled that "John Marshall has made his decision: now let him enforce it!"

Marshall's opinion in Worcester explained what political scientists, anthropologists, and jurisprudential scholars have always known, that before contact with whites, Indian tribes were sovereign governments: they made laws and enforced them. Though recognizing the superior power of the United States in the treaties, they never relinquished that independent sovereignty. They remained, as Marshall put it, "a people distinct from others." It is that sovereignty, the status of tribes as one of the three sources of sovereignty in our constitutional system of governance, that is to Indian people the most basic of all civil rights. It is what Cherokee chiefs fought so hard for in their day, and what modern tribal leaders fight for in theirs.

The Court changed directions in the late 1980s and the tribes found themselves losing most of their cases, especially in the realm of tribal jurisdiction over non-Indians. Several factors were at work. With many foundational aspects of Indian law settled, the tribes had been pushing for extensions of the law. Perhaps, as discussed, litigation strategy, especially Supreme Court advocacy, sometimes came up short. Justice Thurgood Marshall, a hero to Indian people who took a special interest in Indian law and

\[36\text{See id. at 221–22.}\]
\[37\text{See id.; Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574 (1823).}\]
\[38\text{Worcester, 31 U.S. at 542.}\]
\[39\text{Worcester, 31 U.S. at 559.}\]
wrote many of the major opinions and kept a vigilant eye on the others, retired in 1991.

The most frustrating reason has been the intransigence of Chief Justice Rehnquist, recently deceased, and Justices Scalia and Thomas. They've had no patience with the complex, counterintuitive field of Indian law, have been regular “no” votes, and sometimes have pulled in other justices. For nearly a generation the tribes, confronted with three hostile justices, often have been placed in the demanding position of persuading five of six justices.

There has been nothing conservative about this.\textsuperscript{44} The three justices, avowedly concerned with the original intent of the Founders, have never given serious analysis to how robust tribal sovereignty was in the 1780s and to how critical it was for the young nation to make treaties and otherwise forge alliances with the tribes; very plausibly, then, the original intent of the Constitution’s reference to Indian tribes was to recognize them as strong, substantial governments. The three justices have refused to examine seriously the text, minutes, or context of treaties that carried out one of the principal policies of the nation’s first century of existence. They have paid little heed to stare decisis, refusing to follow precedent generally, even carefully thought-out opinions handed down as recently as the 1980s.\textsuperscript{45} Their opinions fail to defer to the consistent self-determination policy of Congress, which has principal authority over Indian affairs under Article I of the Constitution. Although normally suspicious of federal power and deferential to local authority, they have ignored the fact that, in Indian country, the tribes, far more than the states, are the governments in our federal system closest to the ground, most able to serve those citizenries.

Perhaps the most notable instance is Justice Scalia’s 2001 opinion in \textit{Nevada v. Hicks}.\textsuperscript{46} It was a close and difficult case and I have no quarrel with the holding against the tribe. But Scalia roamed far beyond the facts to offer all manner of unnecessary asides on Indian law.\textsuperscript{47} For example, he exactly reversed a century and a half of jurisprudence ever since \textit{Worcester v. Georgia}\textsuperscript{48}—that state law normally does not apply on the reservations—by writing the opposite, that “‘[o]rdinarily,’ it is now clear, ‘an Indian reservation is considered part of the territory of the State.’”\textsuperscript{49} As support for this radical proposition he offered only two sources, both discredited: a 1962 opinion\textsuperscript{50} that

\textsuperscript{46} 533 U.S. 353 (2000).
\textsuperscript{48} 31 U.S. (6 Pet.) 515 (1832).
\textsuperscript{49} \textit{Hicks}, 533 U.S. at 361–62 (quoting \textit{FEDERAL INDIAN LAW}, \textit{supra} note 9, at 510 n.1).
the Court later renounced and the revisionist version of the Felix Cohen treatise that the termination-minded Interior Department issued in 1958. Justice O'Connor, in an atypically scathing concurring opinion, found Scalia's opinion "unmoored from our precedents," and that it, "without cause, undermines the authority of tribes to 'make their own laws and be ruled by them.'" The majority opinion by Scalia in *Hicks* may well become one of those that future Justices will just politely ignore, but it remains on the books as an example of the extremist judicial agenda that now haunts Indian law.

Of course, just as tribes did not prevail in every case from the 1950s through the 1980s, neither have they always come up short during this recent stretch. They achieved important victories on hunting and fishing rights and on Congress's authority to override a Supreme Court opinion that limited tribal jurisdiction. In a larger sense, the sovereignty now recognized by the courts remains substantial and the tribes have worked hard in the legislatures and on the reservations to fortify their rights. In all—and this is a point I'll elaborate on—the persistence of tribes has led to a surprising dynamic, especially given the primacy that Indian leaders have placed on litigation in the modern era: over the past fifteen or so years, when the Court has been generally crabbed in ruling on tribal assertions of sovereignty, during that same period the actual authority of tribes—their real-world quantum of legal, political, and economic power—has gone steadily up.

**VI. STATUTE MAKING**

There is a sense that Congress does not so much pass laws as it receives proposals from interest groups (who often draft their proposed legislation) and then the national legislature accepts some of those proposals and rejects others. The tribes did that for the first time in 1964 when they added their three words to the OEO legislation. In time they became full participants in the making of statutory Indian law.

Forrest Gerard, a Blackfeet tribal member who, in 1971, became the second American Indian congressional staffer and was responsible for Indian affairs on the Senate Interior Committee, has seen the whole progression. "When I first sat in the committee room during hearings," Gerard told me, "here's what I saw. I saw polished lobbyists for industry, energy, the environment, wildlife, parks. Indian representation was not that developed. But over my several years on the committee, I could see an emerging

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52 *See* FEDERAL INDIAN LAW, supra note 9, at 510 & n.1.
sophistication. Ada Deer, for example, on the Menominee Restoration Act, was so impressive, so charismatic.\footnote{Interview with Forrest Gerard, former congressional staffer, in Albuquerque, N.M. (Oct. 17, 2002).}

"By, say, 1990," he continued,

tribes had a much better understanding of the legislative process. By then the system had produced more Indian lawyers and tribes had more Indian representation. Tribal leaders were much more knowledgeable. Most citizens don’t know that the agencies can’t sue, only the Department of Justice can, but tribal leaders know that.\footnote{Id.}

Then, Gerard, who chooses his words carefully, said this: “Today, the quality of tribal representation in Congress is on a par with Microsoft and US Steel.”\footnote{Id.}

For the past thirty-five years, despite the relatively small population of Indians, tribes have put through literally hundreds of laws. Some have been overarching laws, applying to all tribes, on self-determination, health, housing, education (including tribal colleges), tribal courts, natural resources management and research, and other subjects. Many laws, including most of the environmental statutes, treat tribes as states so that, for example, some tribal governments administer the Clean Air Act and Clean Water Act on the reservations. Other statutes have been put forth by individual tribes and have dealt with such matters as land acquisition, jurisdiction, and funding proposals.

The self-determination legislation, initiated in 1975 and broadened and strengthened several times since at the behest of tribal leaders, deserves special mention. The BIA had for so long been such an affront to tribalism, to personal dignity. The self-determination statutes allowed the tribes to take over BIA programs and directed the agency to step back. It took time for the tribes to achieve self-rule, but the tribal leaders refused to take no for an answer, and congressional will held firm.

In addition to identifying priorities and lobbying for them, tribes have been able to fend off almost all of the attempts to limit tribal rights legislatively. “Indian rights” may seem benign but tribal actions have threatened non-Indian rights holders, including landowners. The Boldt decision on fishing rights forced many salmon non-Indian boats off the waters; state and federal buy-out programs helped financially, but not emotionally, for those non-Indian fishers who loved to work on the open ocean. “Jurisdiction” may seem like a grey term, but not to a non-Indian reservation resident who is taxed, zoned, or brought into tribal court. Tribal gaming, however much the proceeds may benefit low-income Indian people and charities in nearby
communities, may be opposed by people who simply don’t approve of gaming, Indian or otherwise.

Ever since the 1970s, tribes faced serious efforts to eliminate or reduce tribal prerogatives in all of these areas and more, but in nearly every case tribal leaders defeated the measures. Indians suffered some significant federal budget cuts and, recently, appropriations riders that they opposed. They will face still more cuts. Now Senator John McCain, a supporter of the tribes on most issues, is proposing a measure that would prohibit off-reservation tribal gaming (Indian gaming is already prohibited throughout the borders of the two states, Utah and Hawaii, that outlaw all forms of gaming). Mostly, however, Congress has remained faithful to self-determination.

The heart of the matter is participation. As early as the 1700s, tribes sent delegations to Washington but they were never involved in the mechanics of legislation. Now tribes are involved at every stage of all legislation affecting Indians. Bills and hearing records are flies specked by many protribal lobbyists—some with nonprofits, others in Washington offices that some tribes have established, still others with many professional lobbying firms that do some Indian business. Tribes have access. Tribal leaders are politicians and, like state and local officials, work with senators and members of congress from both parties. Most tribes have good, ongoing relations with their congressional delegations. Now, many states have formalized government-to-government relationships with tribes and some state legislatures have enacted laws proposed by tribes.

For better or worse, the nature of democracy in modern America requires that any group affected by federal or state legislation must participate in politics, in lobbying, to protect or improve its situation. Tribes do not somehow control Congress, but they do operate on a surprisingly level playing field, and this has fundamentally changed the making of Indian laws.

VII. LAW ON THE RESERVATIONS

No longer does the BIA govern Indian country. Tribal governments, with a handful of employees at most in the 1960s, have dramatically expanded and diversified. At least seventy tribes, with more than 90 percent of the Indian populations, have three hundred or more governmental employees, excluding gaming operations. Typically they are as large or larger than nearby county governments. The tribal councils, which are legislatures, make the positive law. Many of their administrative agencies—for example, the police, taxation and land use boards, and natural resource offices with jurisdiction over grazing, timber, water, recreation, and wildlife—make regulations and enforce them. All of these laws and others can and do end up in tribal court. Because of their importance to the reservations, I will focus my remarks on the courts.

59 See Wilkinson, supra note 1, at 294–95.
Federal statutes and Supreme Court decisions have charted out the jurisdiction of tribal courts. In the 1978 case of *Oliphant v. Suquamish Indian Tribe*, the Court ruled that tribes lack criminal jurisdiction over non-Indians. The tribes had put forth a compelling fact situation—the defendants had engaged in disorderly conduct at the annual Suquamish celebration, Chief Seattle Days, and eventually rammed their pickup truck into a tribal police car—but to no avail as the Court, by Justice Rehnquist, ruled that the United States did not intend in the treaties to submit its citizens to tribal criminal prosecutions.

While tribes possess broad criminal jurisdiction over tribal members and no criminal jurisdiction over non-Indians, there is a third category—nonmember Indians, such as when the Ute Tribe might assert criminal jurisdiction over a Sioux. In the 1989 case of *Duro v. Reina*, the Court held that tribes lacked criminal jurisdiction over nonmember Indians. Then Congress, responding to entreaties from Indian leaders, legislatively overruled *Duro* in 1990. In 2004 the Supreme Court in *United States v. Lara* recognized the primacy of Congress in Indian law and upheld the legislative override of *Duro* so that tribes may assert criminal jurisdiction over members of other tribes as well as their own members.

Tribal jurisdiction over nonmembers in civil matters has proceeded differently, basically because imprisonment is not an issue. From 1959 through the 1980s, the Court recognized quite broad civil court and regulatory jurisdiction over non-Indians. The so-called "tribal interest" test, developed in several decisions in the 1980s, honored tribal jurisdiction if some important tribal interest was involved. Then, in the 2001 case of *Atkinson Trading Co. v. Shirley*, another Rehnquist opinion, the court struck down a Navajo hotel occupancy tax on an establishment run by a non-Indian on non-Indian land within the reservation. As with *Oliphant*, tribal attorneys thought that the case presented favorable facts—people came to the hotel mainly because of

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61See id. at 195.
62See id. at 199.
64See id. at 688.
67See id. at 200.
70Id. at 659.
Navajo culture and the tribe provided police, fire, and other services—but, nevertheless, the Court denied the tribal assertion of tax jurisdiction.\textsuperscript{71}

These and the other recent decisions are well known in the tribal council chambers and, as with their successful congressional campaign on jurisdiction over nonmember Indians, tribal leaders have fought back. For example, the Court has been especially reluctant to uphold tribal civil jurisdiction over non-Indians when the cases arise on non-Indian land or state highway easements across Indian land.\textsuperscript{72} In response, tribes have accelerated their already aggressive land acquisition programs and have refused to consent to new state highway easements unless the states agree to tribal jurisdiction on those roads. In any event, even with the limited jurisdiction over non-Indians, tribal courts are busy, critical institutions in Indian country with court dockets for the larger tribes holding thousands, or tens of thousands, of cases.\textsuperscript{73}

Tribal justice systems reach back into the millennia, but the courts in their current incarnations are young, many of them being formed, or revived, since the 1970s.\textsuperscript{74} They are underfunded but have a dedicated corps of tribal judges. The steady movement has been toward lawyer judges and Indian judges, and both are now in the majority. The most troubling criticism has been that tribal council members have sometimes put pressure on judges when family members or pet issues come to court. Such interferences seem never to have been common and are declining, with increased sophistication and professionalism in both the councils and the tribal judiciary on the rise. Also, many tribal constitutions were adopted decades ago and those BIA-drafted constitutions gave the councils line authority over all tribal functions, including the courts. Tribes are gradually amending constitutions or adopting codes to provide for judicial independence.

Tribal justice systems are maturing and the ultimate objective is now clear: as with most endeavors in Indian country today, the tribes want to enrich tribal life by using both the worthwhile ideas and benefits from the larger society and the traditions of the tribe. Court proceedings are rife with Miranda warnings, formal rules of procedure and evidence, and access to tribal appellate courts. Having gone to great length to incorporate Anglo procedures, tribes are now deep into the exciting enterprise of integrating tribal traditions into the tribal justice systems.\textsuperscript{75}

\textsuperscript{71}See id. at 654–55.

\textsuperscript{72}See id.; see also Strate v. A-I Contractors, 520 U.S. 438, 458–59 (1997) (denying tribal jurisdiction over even “commonplace state highway accident”).

\textsuperscript{73}See David H. Getches et al., Federal Indian Law 421 (5th ed. 2005).


\textsuperscript{75}See Frank Pommersheim, Braid of Feathers: American Indian Law and Contemporary Tribal Life 57–136 (1995); Wallace Coffey & Rebecca Tsosie, Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations,
Some tribes have code provisions that require the courts to look to traditions, and many tribal courts have written opinions exhibiting aspects of the common law of their own reservations. Individual judges also find it appropriate to bring customs into their judging. Chief Justice Malcolm Escalante of the Tohono O'odham Nation of Arizona gives juveniles access to medicine men, or Maka’i, for counseling. Once I visited the tribal court at the Warm Springs reservation in Oregon. One of the cases was a probate proceeding and a daughter put in a claim for compensation for the time she spent caring for her mother during her final days. The daughter’s attorney argued that that Oregon law supported such a claim and Chief Judge Irene Wells asked him to submit a brief on the issue. Afterward, I met with Judge Wells in her chambers and asked her how she planned to rule on the question. She replied, “Well, I’ll read the brief but this is a matter of Warm Springs, not Oregon, law and I’m pretty well satisfied that at Warm Springs people are expected to care for their parents, and that doesn’t include compensation.”

Just as tribes are looking to their traditions for substantive law, so too are they rediscovering traditional approaches toward resolving disputes and punishment. In aboriginal times, the overriding concern in most tribal justice systems was making the victim and injured family whole and maintaining village stability and harmony. Sanctions such as imprisonment and capital punishment did not address the needs of the wronged family. Fair payment to the family, often determined in discussions between the families mediated by an elder, created less resentment among the guilty party’s family and allowed him to be a productive member of the community. In some tribes, such as those in western Oregon, the overall goal of restoring order and promoting peace and harmony in the village were also furthered by the rule that, once compensation was decided on and paid, it was final—even bringing it up later was an offense that would itself require compensation. We call this restorative justice, and while the federal and state systems have traditionally been premised on retributive justice, restorative justice is in the ascendency in this country and other nations.

The Navajo Nation has adopted an elaborate and much-praised Peacemaker system, in which tribal elders meet with the parties, and often their parents and other family members, to talk through the conflict in the context of

76 E.g., In re Validation of Marriage of Francisco, 6 Navajo Rptr. 134, 135–39 (1989).
77 Interview with Irene Wells, Chief Judge, Warm Springs Tribal Court, in Warm Springs Reservation, Or. (circa 1979).
the Navajo way.\textsuperscript{80} Navajo Nation Chief Justice Robert Yazzie has explained that the Anglo system is "vertical," with the judge at the top, while peacemaking is "horizontal," with the peacemaker, the parties, and the families all treated as equals.\textsuperscript{81} The goal is to achieve true justice among the individuals and the larger community. When agreements are reached, the result is usually sealed by a Navajo ceremony. Many other tribes have adopted peacemaking processes and other aspects of restorative justice because the approach represents their traditional way of conflict resolution as well.

 VIII. CONCLUSION

 I’ll finish off by saying this: I’ve emphasized the extraordinary accomplishments of Indian people, but I’d like to return to my earlier reference to the ideals and the constitutional and legal system of the United States of America.

 Idealism in the making of public law and policy so often seems in such short supply, and one can point to numerous instances in which tribal rights have been denied, often peremptorily, without fair or deep consideration. Yet, despite the blemishes, the full tableau is brightly drawn with bold strokes of minority rights, historical redemption, and morality. The nation’s legal system has accepted this despite the disruption, strangeness, and inconvenience that action in the name of minority rights, historical redemption, and morality always entails.

 Indian tribes have now become active members of our nation’s community of government. That is a great and historic accomplishment for the tribes and the country, but it comes with the rasping and colliding with other governments that is, and always will be, the bane and brilliance of our federal system. What of the future? Two things are sure. The rasping and colliding will continue. And so will the determination of Indian tribal leaders. “We aren’t going anywhere.”
