Making Sense of Federal Indian Law
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Making sense of federal Indian law can be facilitated by pointing out inconsistencies in the existing rulings, by acknowledging possible rationales for those inconsistencies, and by suggesting remedies that might be applied. For example, some contemporary thinking holds that American Indians should not only accept certain realities about justice, but that those realities dictate bringing negotiation into careful balance with trying tribal matters before the court.

In a recent address to the Syracuse University law school, senior statesman Vine Deloria Jr. spoke of sovereignty in terms of American Indians reacquiring their land base but avoiding quick fixes and confrontational attitudes in doing so. Deloria said that, "while lawyers are prepared to go to the mat over the political issues, they rarely get as excited over religious aspects of sovereignty, a necessary step in founding a moral and religiously sound society."1

Deloria went on to caution against focusing too much on money, citing Indian-run gaming as having the potential to interfere with moral and religious arguments that are very difficult for the United States to contest when presented properly. In Deloria's view, the right way to proceed is to break arguments into morally and religiously sound parts that appeal to those who hold opposing points of view rather than attempting to intimidate them in the winner-take-all atmosphere of the courtroom.

Similarly, Steven Paul McSloy, formerly general counsel of the
Oneida Indian Nation of New York, has advised Indians to "Stay out of the Supreme Court. I am glad to hear about the Native American Rights Fund's Supreme Court Project, which seeks to screen cases before they go before the Court, but to me, taking Indian cases to the Supreme Court has been prima facie malpractice for the last 20 years."  

McSloy uses the metaphor of the "miner's canary" to suggest that Indians have been used to explore the uncharted territory between state, federal, executive, legislative, and judicial power. Citing the Supreme Court's major Indian cases, McSloy explains how, in *Cherokee Nation v. Georgia* (1831), the Court ruled in favor of the state over Indians; however, in a similar case one year later, *Worcester v. Georgia* (1832), the Indians won as a means of establishing federal supremacy over the state. In *Ex Parte Crow Dog* (1883), the government paid legal bills to get the case to the Supreme Court, where the resulting decision led to passage of the Major Crimes Act, allowing application of federal criminal law to Indians.

In similar fashion, *United States v. Kagama* (1886), an extension of *Crow Dog*, held that the federal government had the power to pass laws over Indians even if such power was not authorized by the Constitution, which made possible the General Allotment Act passed the next year; the 1968 Indian Civil Rights Act was sponsored by North Carolina senator Sam Ervin not necessarily to support Indians but to show how tribal governments were worse violators of civil rights than southern states; and the 1978 Indian Child Welfare Act resulted in the 1989 case *Mississippi Band of Indians v. Holyfield*, where tribal jurisdiction was upheld over that of the state. In the *State v. A-T Contractors* (1997), *Adkins v. Haldane* (1977), and *Nevada v. Hicks* (2001) cases, however, where tribal authority was pitted against that of the federal government, all the decisions went against the Indian parties.

With regard to Indian land claims and in the Indian Gaming Regulatory Act, McSloy emphasizes that Indians should stay out of court, unless, for whatever reason, the federal government is clearly on the Indians' side. He goes on to conclude that Indians should make deals instead of becoming all-or-nothing litigants, stating flatly that "Indian nations should get out of the sovereignty talk, get out of the rights talk, and get out of the constitutional talk, because it is not going to work before the current Supreme Court. Litigation is only one weapon in the arsenal of tribal sovereignty—it should not be a tribal way of life. The best way for the canary to survive is to stay out of the mine."  

Various aspects of current ambivalence toward federal Indian law can perhaps be better understood by considering the possibility that majority domination often finds its ultimate expression in the legal system, which is troubling in a very fundamental way, especially if that law can be said to echo the colonial experience of American Indians.

If lawyers and ultimately the Supreme Court are now in fact the ultimate decision makers regarding social, economic, and environmental
issues, it means the least democratic branch of the American decision-making process has control of American society and culture. Furthermore, if that branch's decision making is significantly biased, society and culture cannot shift and grow, making them vulnerable to the consequences of failing to understand the complexities of intercultural interaction. Needless to say, such complexities are now recognized as integral to very serious matters such as conflicts with Middle Eastern cultures.

Understanding and dealing effectively with such complexity appears increasingly subordinated to the overriding authority of lawyers and a maelstrom of judicial freewheeling that leads in a direction that has proven very problematic for tribal peoples. Within this paradigm the legal system's analogical exercises seem more ad hoc than adept, more Anglo-centric than analytical. Furthermore, it reflects a kind of narcissism that not only controverts the values upon which this nation was founded, but tends to affirm that the United States is yet another colonizing entity in the violent and destructive tradition of so many others who have gone before.

Nowhere is this more apparent than right here at home, in relations between the mainstream and American Indians, where congressional responsibility for decision making has been displaced by judicial freewheeling that has created a form of common law that favors the mainstream over Indians. The most obvious examples are those where large numbers of non-Indians have managed to ensconce themselves in Indian Country, usually motivated by profit, and where they then enjoy overwhelming support from the mainstream legal system, which finds ways to rule in their favor, often against both precedent and reason.

Such an assertion can be demonstrated by examples such as that of the Ninth Circuit Court of Appeals, which has jurisdiction over the western states probably most representative of the complex notion of "Indian Country." That court has consistently protected tribal sovereignty, from its 1981 ruling in United States v. Montana, in which the court affirmed tribal rights to regulate hunting and fishing on reservation fee land, to its 2001 ruling in Atkinson Trading Co. v. Shirley, in which judges ruled that tribes could tax non-Indian businesses on reservation fee land.

The United States Supreme Court, however, overturned both decisions, in addition to many other American Indian cases decided by the Ninth Circuit, which is a reflection of its ad hoc common law approach. For example, it is of great concern why the Court would so consistently ignore contrary statutory language as well as legal precedent in refusing to allow Indian people to exercise jurisdiction over non-Indians on their own reservations. One conclusion that can be drawn is that the problem the Supreme Court has with Indians exercising such jurisdiction is based on negative stereotypes.

Although associating stereotypic thinking with an entity such as the Supreme Court is troubling, precedent for such an assertion exists
in the fact that the Supreme Court affirmed establishment of concentration camps for Japanese Americans during World War II. When one of those Japanese Americans, Fred Korematsu, challenged that policy, the government defended by citing a list of racial stereotypes, including assertions that Japanese Americans were emperor worshipers who kept to themselves in "cliquish" communities, refusing to assimilate, and thus could not be trusted. 

Whether it is true that American Indians continue to be perceived to a certain degree through stereotypes, it does seem possible, there is some basis, going back as far as the mythological sale of Manhattan for sixteen dollars worth of beads, to say nothing of the language found in the first great case of U.S. Indian law, *Johnson v. McIntosh*:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency.

The subsequent doctrine of discovery as well as the congressional plenary power doctrine come from this language of *Johnson v. McIntosh*, which is thought to have established the rationale for affording Indians inferior rights because of their "character and religion."

It might also be asserted that, when the language of savagery was eliminated during the Warren Court years, the Indians won in court. The Rehnquist Court of the present time, however, has reintroduced problematic language. For example, in *Oliphant v. Suquamish Indian Tribe*, in 1978, the Rehnquist Court stated:

> The effort by Indian tribal courts to exercise criminal jurisdiction over non-Indians... is a relatively new phenomenon. And where the effort has been made in the past, it has been held that the jurisdiction did not exist. Until the middle of this century, few Indian tribes maintained any semblance of a formal court system. Offenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes; emphasis was on restitution rather than punishment.

Whether or not tribes maintained court systems in the past, the Suquamish certainly did at the time of *Oliphant*, which has come to stand for the implication that white people must be protected from Indian jurisdiction because the Indians and their systems are inferior. Although
such thinking needs to be confronted, both in and out of court, Indian
court systems must also take care not to play into it as well, such as when
they seem reluctant to cooperate with mainstream legal and business
communities. As a result, it is important that Indian people take the time
to explain cultural traditions and the ways they do things in order to
avoid replicating the kinds of behavior they find insensitive in others.

Although understanding the role problematic thinking may have
played in allowing the Supreme Court to develop common law doctrine
is necessary, it is equally important to understand the history and evolu-
tion of that doctrine. Such comprehension begins with the fact that, by
law, Indian tribes retain all aspects of sovereign nations except the ability
to bargain with foreign countries or to transfer lands on their own. The
tribes can bargain with the U.S. government, which they have, and they
are subject to Congress's plenary power over them, although it takes an
“Act of Congress” to activate that power, according to the law.7

Tribal sovereignty is based on three principles: first, prior to Euro-
pean contact, a tribe possessed all the powers of any sovereign state;
second, European conquest terminated external powers of the tribe,
e.g., its power to enter into treaties with foreign nations, but did not
affect the internal sovereignty of the tribe, e.g., its powers to govern
itself; third, tribes retain internal sovereignty subject to treaties and by
express legislation of Congress, construed narrowly to protect tribal
interests and interpreted as the Indians would have understood them.8

This can be confusing because it can be interpreted, from some
angles of vision, that tribal sovereignty has consistently been upheld
from the time of *Worcester v. Georgia* in 1832, including *Talton v. Mayes* in
1896 and in *Lone Wolf v. Hitchcock*, where the Court also concluded that
Congress had plenary power over Indians, a power the Court deemed
political and not subject to control by the judicial branch of govern-
One underlying reason for this seems to be related to geographical sovereignty or the concept of "Indian Country." The concept of Indian country, however, was developed in cases involving the tribes and either federal or state governments, or the tribes and their own members, but not the tribes and non-Indians. The issues related to non-Indians in Indian country might well have been avoided had Congress not adopted the General Allotment Act of 1887, which divided Indian country into allotments for tribal members, but which also opened up the land left over to non-Indian homesteaders. Because of allotment, much of Indian country today has a significant non-Indian population but no truly effective means of managing the conflicts resulting from juxtaposing radically different value systems.

Congress further complicated the concept of Indian country by "conferring" U.S. citizenship on Indians in 1924. Citizenship was also mandatory, however, and after that point in time Indians were not just members of their tribes living in Indian Country, they were also citizens of both the United States and whatever state within which they happened to be located. How, then, to maintain a geographical boundary against outsiders when Congress not only forces their entry but forces Indians outside for further interaction?

Had a geographic boundary been possible, Indians could have argued that the only outsider they had to deal with was Congress. Congressional policies of allotment and Indian citizenship, however, have insured that the interests of various individuals must now be considered. The issue of boundaries is hugely complicated by not only allotment policy but by subsequent conflict over reservation boundaries. At the same time, up to and including, for example, Solem v. Bartlett,11 "Indian Country" has been understandable as encompassed by the historic treaty boundaries or as by later-established reservation boundaries. Unfortunately, however, the court in Solem also vastly overcomplicated things by adding three layers of interpretation.

The first layer of interpretation focused on vague statutory language to the effect that only clear congressional intent could diminish Indian interests and that Congress had not been clear in clarifying whether allotment affected reservation borders. Second, the court concluded that circumstances such as negotiations, legislative history, and the demographics of a reservation following allotment could be used to infer diminishment or to shrink reservation boundaries.11 Third, the court concluded from reading earlier cases that the demographics of a disputed reservation after allotment could be used to show the disputed area had "lost its Indian character"12 and so it was no longer "Indian country."

Although not the seminal case, Solem v. Bartlett is representative of what have come to be known as diminishment cases, where Indian lands have been diminished by subjective decisions on the part of the
Supreme Court as to whether a disputed area has lost its "Indian character." The significance of such decision making is that its subjectivity ignores both statutory language and the clear intent of Congress, the proper means of arriving at a decision, and relies instead on a kind of quasi-common law approach that is, nevertheless, of its own making.

With regard to the intent of Congress, it might be said, however, that a subsequent case, *Hagen v. Utah*, reinforced the fact that it has tended to support assimilation of Indian lands rather than deal fairly with Indian interests. This assertion is supported by the observation that it is also with this case that the passage of time begins to be recognizable as the rationale for ignoring the legal rights of Indians in their own lands. Again, this is accomplished by a common law approach used to observe that current demographics show non-Indians living on those lands, patterns of governance showing that states have asserted jurisdiction over opened lands for significant periods of time, and that these factors "demonstrate a practical acknowledgment that the Reservation was diminished; a contrary conclusion would seriously disrupt the justifiable expectations of [white] people living in the area." This, unfortunately, downplays the justifiable expectations of Indian people living in the area, even when they are the majority.

In fact, a recent diminishment case, *South Dakota v. Yankton Sioux Tribe*, appears to simply have abandoned canonical legal process and capitulated to a fait accompli interpretation of the presence of non-Indians as a loss of Indian character, resulting in a privileging of the expectations of non-Indians and reinforcing state jurisdiction. This despite the fact that the surplus lands agreement contained a savings clause providing that "nothing in this agreement shall be construed to abrogate" the treaty language establishing the reservation, which clause has also been ignored.

Canonical legal process in federal Indian law means Indian lands can be diminished only by clear congressional intent. Furthermore, the Court insists that it has not abandoned the canonical method, and, in a sense, it has not. To understand this, however, it is necessary to look behind the veil of stated policy. To begin, it is necessary to understand and accept the fact that the American justice system is an instrument of colonial government engaged in an ongoing displacement of indigenous peoples.

Support for this exists in the argument that, where there are significant populations of non-Indians in Indian country, the Court consistently favors non-Indian interests over tribal legal autonomy and geographical sovereignty, even going so far as to reduce geographical sovereignty by changing reservation boundaries so that non-Indians are free from tribal control.

The Court has also seriously undermined tribal sovereignty by ruling that tribes have no criminal and only limited civil jurisdiction
over nonmembers found on reservations. For example, cases involving tribal authority and criminal and civil jurisdiction over non-Indians are significantly inconsistent, with some affirming tribal authority, some denying it, and others contradicting earlier rulings. Williams v. Lee and United States v. Mazurie are civil cases supporting tribal authority over both Indians and non-Indians in disputes arising on reservations. Three years after Mazurie, in Oliphant v. Suquamish Indian Tribe, the court held that “Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.” Duro v. Reina subsequently held that the tribe lacked criminal jurisdiction over an Indian who was not a member of the tribe bringing the suit.

Following its rulings precluding criminal jurisdiction, the Court took up civil jurisdiction again in Montana v. United States, Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, and South Dakota v. Bourland. In between addressing civil jurisdiction in these three cases, the Court had also considered tribal taxation of nonmembers in Washington v. Confederated Tribes of the Colville Indian Reservation and Merrion v. Jicarilla Apache Tribe.

The results of these cases are indicative of the conflict generated by imposing favoritism of the demographics of non-Indians admitted to reservations by the Allotment Act over legal precedent. For example, by the ruling in Merrion, a tribe can tax a nonmember company where a tribe has allowed that company on the reservation. Yet, without nonmember consent, the tribe does not have criminal jurisdiction by the rulings of Oliphant and Duro, cannot regulate nonmembers who hunt or fish on nonmember fee lands unless their conduct threatens a core tribal interest by the ruling in Montana, might be able to zone some nonmember lands on the reservation by the ruling in Brendale, but cannot even regulate the hunting or fishing of transient nonmembers on a federal recreation area within the reservation by the ruling in Bourland. On the other hand, the tribes may require their consent for nonmembers to enter reservation lands by the ruling in Confederated Tribes, and the tribes shall be viewed as having the power to exclude nonmembers and other sovereign powers unless they have explicitly waived them by the ruling in Merrion.

In yet another group of cases involving tribal attempts to regulate nonmembers, the Court again made a significant departure from policy that might have been established from its other rulings by reinforcing limitations on tribal authority over nonmembers, based on what probably could be interpreted as a continuation of the colonial experience of American Indians. In National Farmers Union Insurance Co. v. Crow Tribe, the Court spoke of the importance of examining legal precedent and concluded that tribal courts were best qualified to conduct such an examination. In Iowa Mutual Insurance Co. v. LaPlante, the Court reinforced the authority of tribal courts but made vague reference to Montana,
which had held that the tribes did not have civil authority over non-Indians except in certain circumstances. The resulting confusion was then addressed in *State v. A-t Contractors,* which is significant for the ways it found to ignore both *National Farmers* and *Iowa Mutual,* relying on *Montana* to deny tribal court jurisdiction.

Most recently, attention has been focused on *United States v. Lara,* which appears to be a continuation of colonial policies directed at tribal peoples in this country. In that case Billy Jo Lara, a Turtle Mountain Chippewa, was arrested for violation of an exclusion order by another tribe, a tribe that happens to employ Bureau of Indian Affairs (federal) police. During the arrest Lara struck a BIA police officer. Lara was tried by the tribe of which he was not a member and sentenced to tribal jail for the battery. The U.S. attorney, however, decided to file additional federal charges for the same battery, at which point Lara claimed he was being subjected to double jeopardy.

A number of years ago, following the Supreme Court determination in *Duro v. Reina* that tribes do not have jurisdiction over nonmember Indians, Congress responded by passing an amendment to the Indian Civil Rights Act asserting that Congress never intended to deprive tribes of such jurisdiction. Therefore, under the Supreme Court's 1990 determination in *Duro v. Reina,* Lara was subjected to double jeopardy; however, under Congress's subsequent "Duro fix" legislation, he was not.

Lara argued that in the *Duro* legislation Congress gave power to the tribes, which made his prosecution federal in essence, and thus the second federal prosecution constituted double jeopardy. The actual language of the legislation, however, spoke to recognizing and affirming "inherent tribal power," not delegating power to the tribes. As a result, a reasonable interpretation is that the tribes and the federal government are two separate sovereigns rather than one sovereign trying Lara twice. In fact, in April of 2004 the Supreme Court held, by a vote of seven to two, that the "Duro fix" meant tribal power to try nonmembers was inherent, not delegated by the federal government, and Mr. Lara could be prosecuted twice.

The implications of the Supreme Court ruling for tribal sovereignty are considerable. First, tribes do not necessarily provide counsel for all defendants in tribal proceedings who would be entitled to counsel in a state or federal court for the same offense. This opens the door to subsequent challenges to tribal court proceedings based on lack of counsel. For example, although the Court found Lara was not harmed by lack of counsel since he was challenging the federal, not the tribal court case, it also specifically wrote, "Other defendants in tribal proceedings remain free to raise that claim should they wish to do so."

Second, the history of Indian law includes common-law cases decided by judges as well as federal statutes enacted under the broad but not clearly constitutional "plenary power" of Congress. The "Duro
fix" enacted by Congress, however, indicates the Supreme Court may be entering an era of deferring to the political branches. Although this might seem like a good thing, it is also shrouded in complexity.

For example, making Congress the final word in Indian affairs allows Lara to go to federal prison, but, frankly, that is not what tribal peoples want. What they do want is for the case to have ended with the tribal court's decision and for tribal jurisdiction to be upheld on tribal lands. Instead, Lara's defense counsel, probably unwittingly, compromised Lara's interests by compromising tribal jurisdiction. If the Supreme Court has the last say, perhaps there is a better chance it will take responsibility for correcting the chain of bad decisions that are so detrimental to sovereignty.

Again, although the cases cited above differ on their facts and chronological sequence, the underlying reasoning prevails to this day, reasoning supporting the assertion that, when Congress passed the Allotment Act, it also precluded tribal authority over non-Indians. It is also clear that the Court has disproportionately taken upon itself the responsibility for making and enforcing this view of congressional intent and statutory interpretation by reaching whatever results seem most practical to protect non-Indian interests in various circumstances.

It has been said the problem with this approach is that it is "too obvious a usurpation [of tribal sovereignty]." There is also, however, a tendency to not fully accept the inherent complexity of federal Indian law, which has created considerable frustration: "As Justice Blackmun noted in one case, resolving the issue there required 'wander[ing] the maze of Indian statutes and case law tracing back 100 years.' For most of those who follow the court, these cases were almost certainly viewed as 'crud,' even if 'kind of fascinating,' 'peewee' cases, perhaps even 'chickenshit cases'—all epithets reportedly directed at federal, Indian law cases by the Justices themselves when they considered petitions for certiorari or, worse yet, when they were assigned the unenviable task of drafting majority opinions for those cases."

Part of the problem appears to be associated with an attempt to bring constitutional protections for non-Indians into Indian Country. This is largely a balancing act, where the Indian law cases have used a weighing process to conclude that tribal authority over non-Indians is prohibited for criminal jurisdiction, authorized for taxation, invalid for civil regulation except in specified circumstances, and unsettled for judicial jurisdiction in civil cases.

At the same time, there is a folding of federal Indian law into general public law that not only does not fully recognize the unique doctrines particular to a "domestic dependent nation" within the United States but that disrupts development of a means by which this nation might find ways to settle criminal, domestic, and environmental disputes among various communities of difference in the new world community.
The presence of non-Indians in Indian Country has pitted genuinely unique and little-understood tribal sovereignty against what appears to be the more obvious hardship of nontribal members going into Indian courts, possibly to face all-Indian juries. It doesn't matter that those individuals are interlopers on reservations in the first place; it could be that the justices identify with them more than with the Indians and that they may have taken it upon themselves to create a common law of colonization as a result.

The fact that tribal peoples are unique nations within the United States appears to have been particularly problematic for the Court, and it has been said that "states today look much more like sovereigns than do some tribes. For example, unlike the Cherokee Nation in Worcester, some Indian areas today have lost much of their distinctive character and contain many non-Indian residents." For tribes to be considered governments, or sovereigns, they must make it clear they are "a distinct political society, separated from others, capable of managing [their] own affairs and governing [themselves]." Although the means of doing this remain unclear, recent tribal success at gaming and a reevaluation of tribal values with regard to such things as environmental issues seem very positive.

Despite the complexities involved, it still seems beneficial for the Court to return to Congress more responsibility for balancing the interests of Indians and non-Indians on reservations as well as establishing policy for other issues. If a more careful balance could be struck, Congress might then be better encouraged to strengthen tribal courts in certain ways. Increased funding would, of course, be enormously helpful, but something like a special Court of Appeals for Indian Affairs would be a tremendous help in balancing the existing perception that non-Indians cannot get a fair trial in Indian courts. Certainly Indian lawyers should continue to coordinate with the Tribal Supreme Court Project set up by the National Congress of American Indians and the Native American Rights Fund (NARF) and work to make sure only winning cases go up to the high court. The most interesting possibility, however, and the one with the most far-reaching potential to quiet the existing chaos in Indian Country, would be for Congress to enact an "Unallotment Act." Bruce Duthu once discussed a federal statute that would provide that, after the passage of a certain amount of time, perhaps a decade, all nonmembers who remain in Indian country would be subject to full tribal territorial sovereignty. Congress might provide the tribe with a right of first refusal concerning any transfer of fee simple land within the reservation, so that the tribe would have the privilege of purchase. A more aggressive program would recognize a tribal power
of eminent domain concerning fee simple reservation. Such efforts may have a significant chance of success on some Indian reservations today, which because of depopulation trends by non-Indians have an increasingly "Indian character."38

The American legal system and its related complex of federal Indian law have traditionally sought to position themselves as objective, authoritative, politically neutral entities standing somehow above and outside the dynamics of living communities. The reality of the situation, however, as reflected in the present state of affairs in Indian country, is that the law consists of all-too-human practitioners attempting to straddle cultures that are contested, that are always in production, where meaning is plural and always open, and where there are politics at every turn.

What might be of more use than the unilateral creation of biased common law by the Court is a constructive conversation among Congress, tribes, and states that includes fair and equitable consideration of nonmembers in Indian Country, even if that ultimately means an offer to nonmembers to join in common government of an area or to accept an offer from the tribes to sell land back to them.

Dialogue and compromise leading to pragmatic solutions such as those described above would certainly be a vast improvement over the doctrinal confusion and practical chaos that now exists; furthermore, such solutions should become a priority item for unified Indian action as soon as possible.

NOTES


3 Ibid., 741.

4 Korematsu v. United States (1944), 323 U.S. 214.

5 Johnson v. McIntosh (1823), 21 U.S. (8 Wheat.) 543.


9 Lone Wolf v. Hitchcock (1903), 187 U.S. 553.


11 Ibid., 471.

12 Ibid.
14 Ibid., 421.
16 Ibid., 795.
21 Ibid., 208.
22 Duro v. Reina (1990), 495 U.S. 676.
31 United States v. Lara (03-107) 324 F.3d 635, reversed.
34 Ibid., 392, 418.