The Third Branch of the Third Sovereign:

A Brief History of Tribal Courts and Their Perception in the Supreme Court

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No other branch of any government at any level in the United States faces the same sorts of unique challenges, jurisdictional quandaries,[1] resource limitations, and threats to its authority than tribal courts. Yet, despite the challenges tribal courts face—not the least of which is a wariness and sometimes outright hostility from other American courts—tribal nations and especially tribal courts have grown increasingly adept and innovative at finding ways to overcome the myriad of hurdles that confront them.

The role of today's tribal court often requires it to blend two different, although not necessarily competing, legal traditions: older tribal common law and more recent Western-inspired sources of law, such as constitutions and codes. Many tribal courts have risen to the challenge, finding innovative ways to make the teachings, traditions, and rules of previous generations—the common law of the tribal nation—speak to the issues of the present and provide guidance in how to read the contemporary law of the community. This valuable work has helped tribal nations develop and engage in American legal, political, and financial life like never before, with substantial benefits to tribal peoples in a changing world with greater opportunities.

Unfortunately, the innovative work that many tribal courts are engaged in is not always recognized and appreciated outside of Indian Country. As a consequence, there remains a fair amount of trepidation about tribal courts, particularly in other American courts and perhaps especially in the Supreme Court. This trepidation is often founded by the same presumptions about tribal peoples that existed in the nineteenth century and were expressed in the Indian law cases of that era.

It is time for judges at all levels to reexamine the bases of their perceptions about tribal courts. This article hopes to provoke that critical reflection through a brief examination of the history of tribal courts. The first section of the article will discuss the history of tribal adjudication and some of the innovation in which tribal courts are currently engaged. The second section will trace the Supreme Court's understanding of tribal courts and that understanding's lack of change from its nineteenth-century roots. The conclusion will return to the discussion of what American courts and judges can and should do to rectify the situation.

THE DEVELOPMENT OF TRIBAL COURTS

As tribal nations have become increasingly sophisticated and have extended their reach beyond the boundaries of their reservations and communities in recent years, tribal courts have become an increasingly important component to the success and vitality of those nations. Although tribal nations have always engaged in dispute resolution and the effectuation of justice, tribal courts are playing a more practical and visible role both inside and outside of their nations. Tribal courts are shaping the future in ways never before thought to be possible. To more fully understand their current role within their communities, it is important to know something of the history of tribal courts.

It should be noted at the outset that any description of the history of tribal courts or where they stand now is going to be particularly broad and cannot adequately account for the complete range of experiences of all tribal nations and courts. Akin to the descriptor "European," terms like "Native American," "American Indian," or "Native" are relatively loose, describing

Footnotes

1. Determining who has jurisdiction over criminal activity can be a particularly confusing analysis that requires an assessment of several questions, including the status of the land on which the crime occurred, the type of crime committed, the race of the perpetrator(s) and other interested parties, and other assorted factors. To use the criminal context as an example, in general, the federal government has the authority to prosecute Natives for "major" crimes and non-Natives for any crime that occurs in "Indian Country" under various federal statutes. *See* Major Crimes Act, Act of Mar. 3, 1885, ch. 341, § 9; 23 Stat. 362, 385 (1885) (codified at 18 U.S.C. § 1153); Indian Country Crimes Act, Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. § 1152). However, if the reservation upon which the crime occurred is a "Public Law 280" state, then the state will likely have the same criminal jurisdiction that the federal government otherwise would have had. *See* Public Law 280, 18 U.S.C. § 1162, 25 U.S.C. §§ 1321—1326, and 28 U.S.C. § 1360. Nonetheless, Public Law 280 exempts certain tribal nations from the statute, thus maintaining federal jurisdiction on those reservations. Tribal nations have concurrent jurisdiction over Natives, subject to some limitations on sentencing that will be discussed later in this paper, and no jurisdiction over non-Natives, which will also be discussed later in this paper. *See* Indian Civil Rights Act, 25 U.S.C. §§ 1301-03, and Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). For a concise analysis that offers some guidance through the jurisdictional maze of criminal law in Indian Country *see* DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR., MATTHEW L.M. FLETCHER, CASES AND MATERIALS ON FEDERAL INDIAN LAW 483-487 (6th ed. 2011). Civil jurisdictional questions involve a slightly different analysis that is nonetheless confusing in its own right.

many groups of peoples within a wide geographic area with quite a bit of diversity among themselves. Nonetheless, some generalizations are reasonably applicable to the many groups.

Before contact with Europeans, tribal nations resolved disputes within the nations through their own processes, and many tribal nations continued to engage in their own dispute resolution for some time after contact. While many of the numerous treaties in the long history of relations between tribal nations and the United States contained some language—often referred to as "bad men" clauses—as to who had the authority to punish wrongdoers, in general tribal nations punished their own, and the federal government was authorized to punish non-Indians who committed wrongful acts on tribal lands or toward tribal peoples. A brief example of one tribal adjudicative process is illustrative of not only the tribal system but of the purposes and goals of that system.

In the summer of 1881, Crow Dog, a leader among the Brule Lakota, killed Spotted Tail, another member of the Brule Lakota. Although it is likely impossible to ever know exactly why Crow Dog took this action, internal tribal politics were undoubtedly involved. Crow Dog was a leader among the Brule, having arrived at his position among the community through traditional means. Spotted Tail, on the other hand, had been appointed by the federal government as a tribal leader and enjoyed the spoils of a relationship with the federal government.[2] The two men were political rivals who looked to disrupt each other's authority and were potentially at odds for personal reasons as well.[3]

The Brule Lakota community moved quickly to address the crime and resolve the dispute among the families. While it was the federal Indian agent on the reservation who called the tribal council the day after the killing, the council proceeded under Brule law.[4] Peacemakers were sent to both families to negotiate a settlement, to restore Spotted Tail's family to as near to whole as could be accomplished, and to return the greater community to a position of balance and harmony. Crow Dog and his family agreed to give $600, eight horses, and a blanket to the family of Spotted Tail—an astounding sum in the 1880s, and a show of respect and deference for the slain man.[5]

It is perhaps easy to misunderstand the arrangement between the families of Spotted Tail and Crow Dog that was facilitated by the leaders of the Brule Lakota, and that misunderstanding may help to explain at least some of the federal government's insistence in interjecting itself ever more deeply into internal tribal affairs. The negotiated settlement was not a payment of hush money or an example of a privileged member of a society buying his way out of justice. Rather, it was reflective of the restitutive nature of Brule Lakota society, and many tribal societies. The purpose of criminal justice was not offender-and-punishment focused; instead, the focus was on the victim's family, the community, and the offender's responsibility to make restitution to the best of his or her ability. In general, traditional tribal communities were focused less on the crime itself and more on how to correct the ill effects of the crime. Writing about Crow Dog's family's payment to the family of Spotted Tail, one commentator noted that it was not "blood money," but rather the payment was "an offer of reconciliation and a symbolic commitment to continuation of tribal social relations."[6] This is just one example of the community-centered vision of crime, law, and restitution within tribal communities, as the Brule were hardly the only tribal nation with a deep and sophisticated appreciation for jurisprudential reasoning.[7]

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Yet, by the late nineteenth century, the federal government was rethinking and reconfiguring its political relationship with Native peoples, and began engaging in a concerted effort to destroy tribalism in both the quest for tribal lands and in the name of civilization. The period of time from the early 1870s to the early 1930s is often dubbed the "Allotment Era" after the Allotment Act,[8] or Dawes Act, the major piece of congressional legislation that divested tribal nations of approximately ninety million acres of land (roughly equivalent to the state of Montana) and symbolized a new era of federal policy of forced assimilation toward Native peoples.[9] The general tenor of the times for the politicians, bureaucrats, reformers of the era, and other "friends of the Indian" was perhaps best summed up by one of the major figures of the time and the man most responsible for the proliferation of Indian boarding schools, Richard Henry Pratt. Succinctly describing the second biggest goal of the Allotment Era (behind acquiring additional tribal lands), Pratt claimed that

2. SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 108 (1994).
3. *Id.* at 108-09.
4. *Id.* at 110.
5. *Id.*
6. *Id.* at 105.
7. For example, in their classic text *The Cheyenne Way*, legal philosopher Karl Llewellyn and anthropologist E. Adamson Hoebel studied the legal structure and reasoning of the Cheyenne. Although the text is burdened by language and assertions that many would find troubling today, the two scholars nonetheless detail a complex and reflective system of law that they appear to have anticipated their readers would find unfathomable. "It might bear a surface appearance of romanticizing for us to attribute legal genius to a people of those aboriginal American Plains which have long been thought to be so relatively barren of legal culture, if the data has not been laid before the reader." K. N. LLEWELLEN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 310 (1941). For an enlightening reflection on how tribal visions of law, peace, and commitment affected early treaty negotiations, see ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800 (1999).
8. Indian General Allotment Act of Feb. 8, 1887, ch. 119, § 1, 24 Stat. 388 (1887) (codified at 25 U.S.C. § 331), *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. 106-462, § 106, 114 Stat. 1991, 2007 (2000).
9. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04, at 77-79 (Neil Jessup Newton ed., 2012) [hereinafter, COHEN'S HANDBOOK].

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he wanted to "[k]ill the Indian and save the man."[10]

True to the spirit of the Allotment Era, the federal government sought to replace traditional tribal methods of adjudication with a Western model under the guise of bringing civilization to the supposedly simple savages. In the late nineteenth and early twentieth centuries, Indian agents on a number of reservations established tribal courts based on an American model. The earliest efforts to establish these courts were spearheaded by Secretary of the Interior Henry M. Teller, who saw them as a tool to disrupt the supposedly heathenish ways of tribes and to diminish the influence of tribal leaders, especially medicine men, who resisted the efforts of the federal government.[11] These early tribal courts, called the Court of Indian Offenses or sometimes CFR courts (in reference to their establishment through the Code of Federal Regulations[12]), were staffed by either members of the Indian police—another weapon wielded by Indian agents to destroy tribalism—or by an influential member of the community who had gained enough of the agent's trust to be appointed with the task of spreading civilization by punishing those who continued to practice traditional ways or who otherwise caused disruption within the tribal community. Put simply by one commentator, "A major goal for these courts was the destruction of tribal law."[13] A number of CFR courts continue to operate on reservations today, although their purpose and scope have been amended to benefit the administration of tribally generated law, rather than to purposefully destroy it.[14]

In the wake of the Allotment Era, particularly at points when Congress has been more supportive and receptive of tribal governments, many tribal nations developed their own Western-influenced court systems. Again, the diversity of experiences among tribal nations makes it difficult to generalize about these courts. For instance, although some of these tribal-court systems are relatively new, many are now decades old with a growing body of caselaw to draw upon. And while some were established through the acts of tribal legislatures and exist as part of a tribal code, others are established as a separate branch of government guaranteed through a tribal constitution. Today it is estimated that there are over three hundred tribal courts currently operating in Indian Country.[15]

Perhaps the most sophisticated, well-rounded court system in Indian Country belongs to the Navajo. The "modern" Navajo court system began in 1892 with the establishment of a CFR court on the reservation.[16] Like any other Native community, the Navajo had a system for resolving disputes before the influence of Western forces and were forced to adapt to their circumstances when the CFR court was established. Nonetheless, the Navajo rid themselves of the CFR court and established a tribal court under their own authority in 1958,[17] established an appellate court in 1978,[18] and engaged in reforms in 1985 that led to the current Navajo Supreme Court, the highest court in the Navajo Nation.[19]

The reforms of the 1980s were responding both to a political crisis within the Navajo Nation and to, as former Navajo Supreme Court Associate Justice Raymond D. Austin has put it, a "general consensus among Navajo judges that the Navajo Nation needed an alternative to the Western form."[20] During this period, the Navajo court system began a concerted and deliberate effort to re-infuse the law of the nation—mostly found in the tribal code and through the structures of tribal government that mimicked an American model—with the precepts of Navajo common law, which were more suited to the needs of the community.

By deciding that they were going to "empahsiz[e the] use of Navajo normative precepts,"[21] the Navajo courts did not reject, dismantle, or discard the laws, procedures, or rules that appeared to be "Western" or that had been established by the duly elected tribal council. Rather, the court began reading those rules in a manner in accordance with the foundational, traditional law of the Navajo. A deep examination of Navajo common law is beyond the scope of this article. (For those who are interested, Associate Justice Austin's book, *Navajo Courts and Navajo Common Law*, offers an exceedingly clear detailing.) However, it suffices to note that one of the primary goals of the Navajo worldview is to achieve a place where all things are at balance and working in harmony with one another.[22] Not unlike reading state and federal law against the backdrop of the American constitution, Navajo courts have steadily built a caselaw that reintroduces this foundational law into contemporary cases and settings and reads "modern" law in accordance with Navajo common law. Other tribal courts have also followed this model and are reading their "modern" law in accordance with their "traditional" law.

Another more modern rearticulation of tribal common law has been what are generally called peacemaker courts. These tribal courts generally operate in a different process whereby the adversarial system is eschewed in favor of a more integrative event where a community leader or mediator brings a victim, offender, and family and friends of the parties together to discuss the offending behavior, to give all parties a chance to speak, and to come to a consensual result in the dispute. Meetings of peacemaker courts might be preceded with a meal

10. *Quoted in id.* at 76.
11. Francis Paul Prucha, The Great Father: The United States Government and the American Indians 646-47 (1984).
12. Cohen's Handbook § 4.04, at 266.
13. Harring, *supra* note 2, at 186.
14. Cohen's Handbook § 4.04, at 266.
15. Getches et al., *supra* note 1, at 410.
16. Raymond D. Austin, Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance 19 (2009).
17. *Id.*
18. *Id.* at 29.
19. *Id.* at 31.
20. *Id.* at 39.
21. *Id.* at 37.
22. *Id.* at 54.

and a prayer to emphasize both the communal and spiritual aspects of the event that is about to take place.[23] As part of its reforms in the 1980s, the Navajo court system created peacemaker courts,[24] but they have hardly been the only tribal communities to do so.[25] Peacemaker courts not only more closely align with more traditional tribal adjudicative systems (as was employed in the Crow Dog/Spotted Tail incident), but they also often generate a greater sense of involvement and engagement for the offender, victim, and other interested parties that can be missing in the more formal processes found in American courts.

The Navajo court system's adoption of Navajo common law and peacemaker courts are just two quick examples of the means through which tribal courts are contributing ever more to their nations and are becoming significant pillars of the community. Tribal courts do still face a number of practical challenges, including financial difficulties and a small pool of legal talent. But they are beginning to meet those challenges in new and necessary ways and are establishing themselves as innovative forces for the greater good. By interjecting tribal common law into modern settings and by creating processes that fit the community, tribal courts are doing the practical work of not only resolving disputes among the community but keeping the traditions and spirit of the people alive.

AMERICAN PERCEPTIONS OF TRIBAL ADJUDICATION

Despite their increased importance, tribal courts continue to face a number of obstacles not faced by other American courts—some more surmountable than others. Perhaps the biggest hurdle that tribal courts and other forms of tribal dispute resolution have traditionally faced is a lack of faith in the process, and often outright scorn, from non-Native peoples and institutions. Tribal forms of dispute resolution, whether they be the more contemporary tribal courts of today or older systems employed by tribal nations in the past, have been routinely derided as inadequate or otherwise inappropriate. Quite often, the strongest criticism has come from Supreme Court justices, both in the past and more contemporarily. The lack of faith that American officials have shown tribal courts—not to mention tribal societies, ways of thought, and world views—throughout the years has been one of the biggest roadblocks to establishing and maintaining the authority of tribal adjudication.

The federal government began seriously interjecting itself in the tribal adjudicative process in the late nineteenth century during the Allotment Era. Two cases from the 1880s that surrounded another major piece of federal legislation perhaps best exemplify the distrust the federal government and the general American populace held for tribal adjudicative methods in the Allotment Era, the legacy of which continues to influence non-Native attitudes about tribal courts.

In 1883, the Supreme Court handed down *Ex Parte Crow Dog*,[26] a case that, on the surface, looked like a victory for tribal interests, but that nonetheless paved the way for further congressional intrusions into Indian Country. The facts of the case have already been described in this article, with the family of Crow Dog offering restitution to the family of Spotted Tail under Brule Lakota law. The issue was resolved peaceably within the community.

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The federal government read the situation much differently, and members of the Office of Indian Affairs (the precursor to today's Bureau of Indian Affairs) saw the incident as an opportunity to extend their influence over tribal life and further the mission of "civilizing" Native peoples.[27] Conceived as a test case, the Indian agent on the Brule reservation had Crow Dog arrested even though the agent was aware that the matter had been settled within the tribal nation.[28] In the spring of 1882, Crow Dog was tried and convicted in a federal court[29] in a case that everyone anticipated was headed to the Supreme Court.[30]

The High Court did hear the case and rendered a decision in 1883.[31] While the Court ruled in favor of tribal interests in the case, stating that there was no federal statue or treaty provision that gave the federal government jurisdiction over Indian-on-Indian crime in Indian Country, the opinion was as friendly to the losing side as one could imagine. Justice Stanley Matthews' opinion either showed no knowledge of the Brule system of justice that had already resolved the matter or no regard for it in suggesting the unfairness of subjecting supposedly simple savages such as Crow Dog to the legalities of a higher civilization. Justice Matthews stated:

"[Our system] tries them not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality."[32]

Despite his seeming (and condescending) concern for the fate of tribal peoples, Justice Matthews nonetheless characterized the issue as one of jurisdiction, as opposed to morality, noting that

23. James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55, 78 (1997).
24. *Id.* at 39.
25. *See* John M. Ptacin, Jeremy Worley, & Keith Richotte, *The Bethel Therapeutic Court: A Study of How Therapeutic Courts Align with Yup'ik and Community Based Notions of Justice*, 30 AM. INDIAN L. REV. 133 (2005-2006).
26. 109 U.S. 556 (1883).
27. HARRING, *supra* note 2, at 115.
28. *Id.* at 110.
29. *Id.* at 124-25.
30. *Id.* at 118.
31. *Crow Dog*, 109 U.S. 556.
32. *Id.* at 571.

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federal jurisdiction, "in such a case, requires the clear expression of Congress, and that we have not been able to find."[33] Justice Matthews' implication was clear: were Congress to act, then the Court was likely to rule differently in the future.

Congress accepted Justice Matthews' invitation a year later and passed the Major Crimes Act[34] in 1885. The law extended federal jurisdiction to Indian Country over seven "major" crimes (and remains good law today, with additional crimes enumerated since its original passage). Armed with this congressional blessing, federal prosecutors began trying Native peoples for activities that originated on reservations, further implicitly rejecting tribal methods for dispute adjudication.

One year later, in 1886, the Supreme Court was presented with a constitutional challenge to the Major Crimes Act. Although subsequent scholarship has revealed that the crime did not actually take place on the reservation,[35] two Native men were nonetheless brought to trial for the murder of another Native man under the Major Crimes Act. In an astounding opinion that not only remains good law but is regularly cited for its central proposition, the Supreme Court ruled against the tribal members and upheld the constitutionality of the law.[36] Straining for constitutional authority for the federal law, lawyers for the United States argued in their brief before the Supreme Court that the Indian Commerce Clause[37] authorized the legislation because if Native peoples were allowed to kill one another, then there would be fewer with whom to engage in commerce.[38]

Unsurprisingly, the Supreme Court rejected this argument, noting that "it would be a very strained construction"[39] of the Indian Commerce Clause. While this should have been the end of the analysis, Justice Samuel Freeman Miller continued:

> "But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States, or of the states of the Union. There exists within the broad domain of sovereignty but these two."[40]

Reflecting on the often contentious relationship between the states and tribal nations, and declaring that states are often the "deadliest enemies"[41] of tribal nations, Miller concluded that the authority to enact the Major Crimes Act "must exist in [the federal] government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes."[42] Still regularly cited, *United States v. Kagama* essentially stands for the proposition that congressional authority over Native peoples is unconstrained by the Constitution.

Although somewhat implicit, the opinion makes clear that Justice Miller, as well as many others involved at various levels of Indian affairs, had little to no regard for tribal methods and systems of justice. Stating that the power to punish tribal criminals must exist in the federal government "because it has never existed anywhere else," and that the United States "alone can enforce its law on tribes," evidenced a true indifference to the practices of tribal peoples, the methodologies that they employed, and the goals they sought to accomplish for their communities through their various dispute-resolution systems.

When tribal nations began developing their own Western-influenced courts during the twentieth century, Congress also began to take a greater interest. Responding to the perceived problem of tribal governmental abuses on reservations—at a point in American history when civil rights were a topic of considerable national discussion—Congress passed the Indian Civil Rights Act of 1968.[43] The Indian Civil Rights Act imposed a number of guarantees from the Bill of Rights upon tribal governments, while also seeking to balance those impositions with respect for tribal traditions and the severe economic difficulties that were facing tribal nations. For example, tribal nations are required to allow lawyers into their courts if those under its jurisdiction so request, but they are not required to provide counsel for indigent clients[44] (although many today do so[45]). The Indian Civil Rights Act also limited the criminal punishments to which a tribal nation could sentence a defendant. Originally set at six months in jail and a $500 fine, the statute was amended in 1986 to increase the penalties to one year and a $5,000 fine. Tribal reaction to the Indian Civil Rights Act was mixed, with some arguing that it was fine in principle but that it was unnecessary, others arguing that it was an unwarranted intrusion into tribal sovereignty, and most arguing that the real threat to the civil rights of individuals on reservations was not from tribal governments but from the federal and state governments.[46]

33. *Id.*
34. Major Crimes Act, 18 U.S.C. § 1153 (2006).
35. *See* Sidney L. Harring, *The Distorted History that Gave Rise to the "So Called" Plenary Power Doctrine: The Story of* United States v. Kagama *in* INDIAN LAW STORIES (Carole Goldberg, Kevin K. Washburn, & Philip P. Frickey eds., 2011).
36. United States v. Kagama, 118 U.S. 375 (1886).
37. U.S. CONST. art. I, § 8, cl. 3.
38. DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 70-71 (1997).
39. *Kagama*, 118 U.S. at 378.
40. *Id.* at 379.
41. *Id.* at 384.
42. *Id.* at 384-85.
43. Indian Civil Rights Act, Pub. L. 90-284, §§ 201-03, 82 Stat. 73, 77-78 (1968) (codified at 25 U.S.C. §§ 1301-03); *see also supra* text accompanying note 6.
44. 25 U.S.C. § 1302(6) (2006).
45. For another example, the Indian Civil Rights Act does not contain an equivalent to the First Amendment establishment clause out of deference to the generally conflated nature of traditional tribal governance and religious beliefs. The Indian Civil Rights Act, however, does contain First Amendment protections for speech. *Id.* at § 1302(1).
46. GETCHES ET AL., *supra* note 1, at 380.

The Indian Civil Rights Act is undoubtedly a limitation on tribal governmental authority, at the very least akin to the way that the federal Constitution is a limitation on the authority of the federal government. Nonetheless, the Indian Civil Rights Act marked a divergence of paths between Congress and the Supreme Court. Beginning in the 1970s Congress began offering greater support to tribal courts in what has become termed the Self-Determination Era of federal policy.

Perhaps the greatest example of Congress's commitment to tribal courts and sovereignty over the last forty years has been the Indian Child Welfare Act of 1978.[47] The federal legislation allowed tribal courts to assume child-custody proceedings for children who are tribal members or who are eligible to become tribal members. Occasionally misunderstood in the media,[48] the Indian Child Welfare Act does not automatically divest non-Indian adoptive or foster parents of their children. Rather, it simply gives tribal courts the authority to make the determinations of the best interests of the child. Congress has also passed other legislation in the furtherance of tribal courts and justice in Indian Country[49] as well as other significant pieces of legislation to foster tribal self-governance in the Self-Determination Era. This includes the recently passed Tribal Law and Order Act.[50] Signed into law in 2010, the Tribal Law and Order Act extends the potential reach of tribal courts in a number of significant ways, including better training for tribal law enforcement, the capacity for stronger criminal sentencing for tribal courts in compliance with certain standards, and requirements for federal prosecutors to explain why they declined to prosecute crimes in Indian Country. Although it is too early to tell if the Tribal Law and Order Act is having its intended effect, it nonetheless holds much promise and is reflective of the general congressional policy toward tribal nations and their courts.

Yet, while Congress has moved since the 1970s to strengthen tribal courts and increase their jurisdiction, the Supreme Court has moved completely in the opposite direction. Beginning with *Oliphant v. Susquamish Indian Tribe*[51] in 1978 and steadily continuing into the present day, the Supreme Court has adopted the practice of defining and limiting the scope of tribal-court jurisdiction, interjecting the judicial branch into the federal government's relationship with tribal nations in an a previously unprecedented manner.

The Court in *Oliphant* decided that tribal nations did not have criminal jurisdiction over non-Natives because it was "inconsistent with their status."[52] This watershed case marked the moment when the Supreme Court began to make clear that it would hold what has become an ever-increasing role in defining the "status" of tribal nations. Certainly in contradistinction to, and perhaps in response to, Congress's increasing support for tribal nations and their courts, the Supreme Court has announced a number of cases that have limited the scope of tribal authority, particularly in respect to tribal jurisdiction.[53]

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The Supreme Court's divergent path from Congress and its increasing willingness to define the metes and bounds of tribal jurisdiction according to the eminently pliable standard of the "status" of tribal nations has, on principle, been deeply disconcerting to tribal nations and others concerned with tribal sovereignty. And yet, the level of tribal trepidation has only been compounded by the type of language that the justices often employ to describe tribal courts, much of which is not particularly discernible from the earlier nineteenth-century precedents that first engaged with tribal adjudication. In some cases, the Court has used the exact language of the cases from the nineteenth century. For example, then-Associate Justice William Rehnquist's opinion in *Oliphant* quoted extensively from Crow Dog—albeit carefully removing the more clearly racist portions of the excerpt, some of which can be seen earlier in this article—to essentially assert the proposition that since it was unfair to subject Indians to the white man's law nearly a century previous, it was conversely unfair to subject non-Indians to tribal law in the contemporary setting. One scholar writing about Rehnquist's opinion in *Oliphant* has stated that it, "unembarrassedly perpetuates [the] overarching principle of white racial supremacy"[54] found in nineteenth-century cases and that, "it does so through a particularly virulent mode of rights-destroying, jurispathic transmission."[55] The same scholar also notes that Rehnquist's opinion "cites, quotes, and relies upon racist nineteenth century beliefs and stereotypes to justify an expansive, rights-destroying, present-day interpretation of [tribal rights]."[56]

Those without even a passing knowledge of Indian law might be able to compartmentalize the opinion in *Oliphant* as the likely last gasp of a dying attitude toward minorities during

47. Indian Child Welfare Act of 1978, Pub. L. 905-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901-23).
48. Campbell Brown, *Commentary: Law Lets a Little Boy Down*, CNN.COM, Dec. 6, 2008, http://articles.cnn.com/2008-12-16/politics/campbell.brown.utah_1_indian-child-welfare-act-tribe-care?_s=PM:POLITICS.
49. The Indian Law Enforcement Reform Act of 1990, 25 U.S.C. §§ 2801-09 (2006); Indian Tribal Justice Act, 25 U.S.C. §§ 3601-3631 (2006); Indian Tribal Justice Technical and Legal Assistance Act of 2000, 25 U.S.C. §§ 2651-81 (2006).
50. Tribal Law and Order Act, Pub. L No. 111-211, § 202 (a)(4)(A), 124 Stat. 2258, 2262 (2010) (codified at 25 U.S.C. §§ 2801-15 (2006).
51. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
52. *Id.* at 208.
53. *See, e.g.*, Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008); Nevada v. Hicks, 533 U.S. 121 (2001); Strate v. A-1 Contractors, 520 U.S. 438 (1997); Montana v. United States, 450 U.S. 544 (1981).
54. Robert A. Williams, Jr., Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America 97 (2005).
55. *Id.*
56. *Id.* at 97-98.

a period of social change. However, those with even a cursory knowledge of Indian law (or of Rehnquist's tremendous influence over the Court for that matter) know better. The Supreme Court's seeming wariness, if not outright hostility, toward tribal courts has grown, and is little changed in terms of justifications from those of the nineteenth-century courts. For example, Associate Justice David Souter's concurrence in *Nevada v. Hicks*,[57] a case decided in 2001 that again limited the authority of tribal courts, was perhaps a little more telling than even he fully understood when he noted, "Limiting tribal-court civil jurisdiction . . . not only applies the animating principle behind our precedents, but *fits with historical assumptions about tribal authority* . . . ."[58] (Emphasis added.) Souter also stated that it was important to know the boundaries of tribal court jurisdiction because tribal courts "differ from traditional American courts in a number of significant respects."[59] Conceding that many of the important guarantees in the Bill of Rights were applied to tribal nations through the Indian Civil Rights Act, Souter nonetheless noted, by quoting *Oliphant*, that tribal courts were able to define for themselves how to apply concepts such as due process and equal protection.[60] Souter also showed hesitance toward tribal common law, stating that "the resulting law applicable in tribal courts is a complex mix of tribal codes, and federal, state, and traditional law," which he claimed, "would be unusually difficult for an outsider to sort out."[61]

The clear implication of the totality of Souter's concurrence is that tribal courts, which are "different" from American courts, are unwilling or incapable of protecting the rights of individuals simply because they are tribal courts. The underlying presumption that tribal courts are incapable of being fair (and more specifically that tribal conceptions of due process and equal protection will inherently be lesser than their American counterparts) is perhaps unlikely to withstand any serious scrutiny and has already been called into serious question with respect to at least one prominent tribal court.[62] Maybe more importantly, it shows little discernable difference from the assumptions made about tribal nations, peoples, and adjudicatory systems from over a hundred years ago. Unfortunately Justice Souter is not alone in his assumptions about tribal courts, as seemingly every decision concerning tribal-court jurisdiction since *Oliphant* evidences the type of skepticism of tribal courts that was not uncommon in the decisions of the Allotment Era over a hundred years ago.

CONCLUSION

The Supreme Court has not always been hostile to tribal court interests,[63] but it has generally only ruled in the favor of tribal courts when their proceedings concerned tribal members. Whenever non-Native interests have been at stake, the Supreme Court has shown little, if any, respect toward tribal courts. This disregard for tribal courts has changed little, if at all, since the nineteenth century and has trickled down to the lower American courts.

This disregard is quite possibly the greatest obstacle that tribal courts have historically faced and face today. Constantly challenged by their American counterparts, tribal courts face the uphill battle of establishing their legitimacy. While there has been some movement, particularly on the state level,[64] to give some effect to tribal-court decisions and orders, a general hostility remains and is spearheaded by the Supreme Court. Despite the innovation of tribal courts and their ability to serve not only their own communities but the greater good as well, they have been consistently curtailed by the Supreme Court and state courts. While Congress has given greater sanction to tribal courts and their jurisdiction, the American judiciary has generally moved in the opposite direction. One of the driving forces behind this resistance is the same perspective about tribal nations and adjudicatory methods that existed in the 1880s.

The time has come for American judges to examine their own attitudes about tribal courts. Perhaps unreflectively, many American judges appear to assume the worst about tribal courts and are fearful of what they imagine tribal courts to be without truly examining them for what they are, perpetuating notions about tribal nations, governance, and judicial proceedings that are rooted in the nineteenth century. Like any human institution, tribal courts are capable of mistakes and abuses (not unlike the American political system itself). But the "on the ground" activities of tribal courts strongly suggest that they operate with at least the same level of fairness, thought, and balance as other American courts and that they are succeeding in the difficult task of functioning for those whose cases are before them under the types of stresses no other court system faces. By examining tribal courts and their decisions for what they are, and not for what they have been imagined to be for well over a hundred years, state and federal court judges could go a long way in establishing the legitimacy of their tribal brethren and solving the continuing problems of law enforcement in Indian Country.

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57. 553 U.S. 353 (2001).
58. *Id.* at 382.
59. *Id.* at 383.
60. *Id.* at 383-84.
61. *Id.* at 384-85.
62. *See* Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L. J. 1047 (2005).
63. *See* Talton v. Mayes, 163 U.S. 376 (1896); Williams v. Lee, 358 U.S. 217 (1959); United States v. Wheeler, 435 U.S. 313 (1978); Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845.
64. See MINN. GEN. R. PRAC. 10.01 and 10.02