

# RESISTING FEDERAL COURTS ON TRIBAL JURISDICTION

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*This Paper is part of a call for a paradigm-shifting re-examination by Indian tribes and Indian people about their place in the American constitutional structure. For tribal advocates to prevail in the federal judiciary, they must force federal judges to rethink everything they know about federal Indian law. There are at least two ways to do this. Tribal advocates and American Indian law scholars must first establish a baseline of knowledge and information about the realities of Indian country in the twenty-first century. This work is nascent and ongoing, if not burgeoning, but frankly is far from enough. A second strategy must be a strategy itself, litigation with an eye toward presenting the best cases before the federal judiciary and the Supreme Court. As any litigator knows, facts win a case, not general truths.*

*In this Paper, I argue for a theory of tribal consent and resistance to federal government control embodied in the Supreme Court's assertion of federal court supervision of tribal court civil jurisdiction. The pure federal common law cause of action expounded by the Supreme Court in 1985's National Farmers Union v. Crow Tribe is ripe for re-examination, if not outright reversal. Tribes never consented to such a broad-based assertion of federal court jurisdiction, although tribes could consent if asked. I propose methods by which tribes and their appellate counsel can resist such jurisdiction and perhaps in the same breath establish a meaningful recognition by the Supreme Court of the legitimacy of tribal justice systems.*

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## INTRODUCTION

Assume for a moment that a federal court issues an order enjoining an American Indian tribal court from exercising jurisdiction in a civil matter where the defendant is not a member of the Indian nation because the federal court, applying federal law, concludes that the tribal court does not have jurisdiction.<sup>1</sup> Assume further that the tribal court, stuck with a choice between dismissing the civil action against the non-member or complying with tribal statutory law requiring the court to assert jurisdiction, chooses to disregard the federal court order.

What then? The answer is not so obvious. Can the federal court hold the tribal court in contempt? Can the federal court issue a writ of mandamus compelling the tribal court to dismiss the civil action?<sup>2</sup> Can the federal court send in the United States Marshal to shut down the tribal court? Would a federal judge issue an order for the arrest of a tribal judge?

The answer is uncertain (at least from the point of view of tribal interests) because the authority of the United States over Indian nations is uncertain. As Robert Clinton famously demonstrated, there is no supremacy clause for Indian nations.<sup>3</sup> As the Supreme Court has reiterated again and again, the Constitution does not bind Indian nations.<sup>4</sup> They are separate sovereigns—domestic and dependent, perhaps, but still sovereigns drawing sovereignty from a source independent from federal and state sovereigns.<sup>5</sup> Moreover, except in the context of criminal law,<sup>6</sup> Congress has *not* seen fit to grant federal courts power to review tribal court determinations. If federal courts

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1. This is a common occurrence. *E.g.*, *Water Wheel Camp Recreation Area v. LaRance*, No. CV-08-0474-PHX-DGC, slip op. at 23 (D. Ariz. Sept. 23, 2009), available at <http://turtletalk.files.wordpress.com/2009/09/order-ww-v-larance-d-ariz.pdf> (“Defendants [tribal court judges] are directed to vacate the judgment and to cease any litigation concerning [plaintiff] personally.”).

2. Maybe not. *See Chippewa v. Shoshone-Bannock Tribes*, No. CV-09-57-E-BLW, slip op. at 6 (D. Idaho Nov. 9, 2009), available at <http://turtletalk.files.wordpress.com/2009/11/chippewa-dct-order.pdf> (asserting that federal courts are not authorized under the All Writs Act to issue writs of mandamus to Indian tribes).

3. Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 37 ARIZ. ST. L.J. 113 (2002).

4. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008); *see also Talton v. Mayes*, 163 U.S. 376 (1896).

5. *See United States v. Wheeler*, 435 U.S. 313 (1978).

6. 25 U.S.C. § 1303 (2006) (authorizing those convicted of crimes in tribal courts to petition for a writ of habeas corpus in federal court).

are courts of limited jurisdiction, from where does the jurisdiction to determine tribal court authority derive? Most importantly, have Indian nations ever *consented* to federal court authority over tribal justice systems?

In reality, there is almost never a need for anyone to find the answer to the above hypothetical question. Until recent years, tribal courts and Indian law practitioners uniformly deferred to federal court orders enjoining the civil actions before them.<sup>7</sup> Most everyone—from tribal legislators to tribal courts to tribal members—starts their Indian country jurisdictional analyses with reference to what the United States Supreme Court has held, subjugating local tribal law in favor of outsider federal law.<sup>8</sup> While many tribal judges have issued opinions and made decisions that attempt to expand the boundaries of tribal court jurisdiction,<sup>9</sup> they tend to do so within the context, background, and restrictions of *federal* Indian law, not *tribal* law. That is changing, slowly, as Indian nations like the Navajo Nation generate statutes codifying their courts' jurisdictional boundaries relying more on tribal law, finally favoring local (tribal) law over outsider law.<sup>10</sup> But because the vast majority of federal and tribal courts assume that federal courts have plenary authority over tribal courts, the Navajo Nation appears to be more of an outlier than a doctrinal leader.<sup>11</sup>

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7. See, e.g., *In re Pamame*, No. 00-12-707-CV, 2000 WL 35749804 (Grand Traverse Band of Ottawa & Chippewa Indians Tribal Ct. Dec. 21, 2000) (complying with federal bankruptcy court orders).

8. Examples abound that incorporate federal law into tribal constitutions, e.g., CONST. OF THE LITTLE RIVER BAND OF OTTAWA INDIANS art. I, § 2, available at <https://www.lrboi-nsn.gov/council/ordinances.html> (“The Tribe’s jurisdiction over its members and territory shall be exercised to the fullest extent consistent with this Constitution, the sovereign powers of the Tribe, and federal law”); and tribal constitutional jurisprudence, e.g., *Lewis v. Ho-Chunk Nation Election Bd.*, 7 Am. Tribal Law 84, 101 (Ho-Chunk Nation Tribal Ct. 2007) (relying upon *Goldberg v. Kelly*, 397 U.S. 254 (1970), and other federal authorities).

9. E.g., *Wolf Point Org. v. Inv. Ctrs. of Am., Inc.*, 3 Am. Tribal Law 290 (Fort Peck Ct. App. 2001); *Smith v. Salish Kootenai Coll.*, 4 Am. Tribal Law 90 (Ct. App. Confederated Salish & Kootenai Tribes 2003).

10. See NAVAJO NATION CODE, tit. 7, § 253(a)(3) (2010) (recognizing tribal court jurisdiction over “[a]ll other matters provided by Navajo Nation statutory law, Diné bi beenahaz’áanii, and Navajo Nation Treaties with the United States of America or other governments” and “[a]ll causes of action recognized in law, including general principles of American law applicable to courts of general jurisdiction”).

11. The long-running case *MacArthur v. San Juan County*, 497 F.3d 1057 (10th Cir. 2007), *cert. denied*, 552 U.S. 1181 (2008), perhaps exemplifies the status of the Navajo judiciary as the leading tribal court asserting jurisdiction over non-members in the face of federal court orders denying its authority.

This Paper is not a call for a return to a time when the United States gave significant legal credence to whether an Indian tribe consented to the dispossession of its sovereignty (assuming such a time really existed). Instead, this Paper is part of a call for a paradigm-shifting re-examination by *Indian tribes and Indian people* about their place in the American constitutional structure. For tribal advocates to prevail in the federal judiciary, they must force federal judges to rethink federal Indian law. There are at least two ways to do this. Tribal advocates and American Indian law scholars must first establish a baseline of knowledge and information about the realities of Indian country in the twenty-first century. This work is nascent and ongoing, if not burgeoning, but is far from enough.<sup>12</sup> A second strategy must be a strategy itself, litigation with an eye toward presenting the best cases before the federal judiciary and the Supreme Court. As any litigator knows, facts win a case, not general truths.

In this Paper, I argue for a theory of tribal consent and resistance to federal government control embodied in the Supreme Court's assertion of federal court supervision over tribal court civil jurisdiction. The Court established the supervisory role of federal courts over tribal courts in 1985's *National Farmers Union Insurance Co. v. Crow Tribe of Indians*,<sup>13</sup> which established a pure federal common law cause of action to review the jurisdiction of tribal courts over nonmembers. *National Farmers* is ripe for re-examination, if not outright reversal. Tribes never consented to such a broad-based assertion of federal court jurisdiction, although tribes could consent if asked. I propose methods by which tribes and their appellate counsel can resist such jurisdiction and, perhaps in the same breath, establish a meaningful recognition by the Supreme Court of the legitimacy of tribal justice systems.

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12. The most obvious failure has been the concentrated effort of the tribal amicus briefs in the *Plains Commerce* litigation to demonstrate the fairness of tribal courts and tribal law to outsiders and to highlight the fact that the non-Indian-owned bank objecting to tribal court jurisdiction had previously relied upon the tribal court more than a dozen times in the past. See generally Jesse Sixkiller, *Procedural Fairness: Ensuring Tribal Civil Jurisdiction after Plains Commerce Bank*, 26 ARIZ. J. INT'L & COMP. L. 779 (2009). The Office of Solicitor General adopted the views of Indian law scholars on this point, see Brief for the United States as Amicus Curiae Supporting Respondents at 28 n.15, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008) (No. 07-411), but those views did not persuade a majority of the Court.

13. 471 U.S. 845 (1985).

In Part I, I note that Indian nations, for historical, political, and many other reasons, have offered their consent to the United States in many contexts, from land sales to governmental service provisions—usually in the context of a Senate-ratified, Presidentially-proclaimed treaty. A key foundational element of federal Indian law is that Indian tribes retain all elements of sovereignty except those that Congress has explicitly divested, or those elements that the tribes themselves expressly consented to be divested, or those elements that have succumbed to the Supreme Court’s assertion of the “overriding interests of the National Government.”<sup>14</sup> I note how the United States has repeatedly asserted more authority over Indian nations and Indian people than to which Indians and tribes ever consented.

In Part II, I describe in general terms a new theory of American Indian tribal consent and resistance to federal government control, borrowing from classical consent theory but deviating in important ways. In effect, I describe a theory of tribal consent that generates room for Indian nations to *resist* federal control over certain aspects of internal tribal governance.

In Part III, I offer an example of tribal resistance, in this instance, to federal control over the jurisdiction of tribal justice systems over nonmembers. The Supreme Court’s assertion of authority to determine the civil jurisdiction of tribal courts is based entirely on rules of its own creation that conflict with Congressional public policy favoring tribal courts.<sup>15</sup> I propose two means of resistance, one of which is based on persuading the Court to reverse its own rules, and the other based on active, strategic resistance to federal court orders enjoining the activities of tribal courts.

In Part IV, I suggest that successful tribal resistance to federal control is the core of preserving tribal sovereignty. It has been so in the past and will continue to be so. Unfortu-

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14. See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153–54 (1980) (“Tribal powers are not implicitly divested by virtue of the tribes’ dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the *overriding interests of the National Government*, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights.”) (emphasis added).

15. See Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 154–63 (2006).

nately, the key subject of tribal resistance is no longer Congress or the executive branch, but is now the United States Supreme Court. However, successful resistance can generate tribal investment in the American constitutional polity, hopefully infusing more fairness and legitimacy into the federal-state-tribal relationship.

#### I. THE DEARTH OF TRIBAL AND INDIVIDUAL INDIAN CONSENT TO AMERICAN INDIAN LAW AND POLICY

There is no serious doubt that Indian nations are now a part of the American constitutional polity. Yes, the states and the federal government are the government entities that form the backbone of American constitutional governance, but Indian nations have become the so-called “third sovereign.”<sup>16</sup> How did this happen? While the Constitution defines in relative detail the metes and bounds of federal and state sovereignty, it is silent as to tribal sovereignty. In fact, as the Supreme Court has noted, no one invited Indian tribes to the Constitutional convention or otherwise asked them to ratify the Constitution.<sup>17</sup> The Constitution has never been amended to include Indian tribes in the federal-state sovereign balance,<sup>18</sup> nor has the Supreme Court identified or adopted any common law incorporation theory that would have the same or similar effect, despite a number of theories available to accomplish this purpose.<sup>19</sup> Nor have any Indian tribes or Congress tried to expressly incorporate tribes into the American dual-sovereign constitutional polity.

And yet, somehow they are the “third sovereign.”

Tribal sovereignty arguably is at its strongest since prior to the establishment of non-Indian governments on Native soil, and certainly since the establishment of the American Republic in the late eighteenth century.<sup>20</sup> Indian nations are immune

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16. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L. REV. 1, 1 (1997).

17. See *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 782 (1991).

18. See FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 304–08 (2009).

19. E.g., Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. J. C.L. & C.R. 1 (2003); see also Carol Tebben, *An American Trifederalism Based upon the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318 (2003).

20. See generally CHARLES F. WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* (2005).

from suit in federal, state, and tribal courts,<sup>21</sup> as well as immune from state taxation and regulation inside of Indian country.<sup>22</sup> Indian nations retain important treaty rights to hunt, fish, and gather,<sup>23</sup> as well as land and water rights.<sup>24</sup> Indian nations have the authority to establish separate and independent governments,<sup>25</sup> to define their own citizenship requirements,<sup>26</sup> to regulate the activities of their own citizens,<sup>27</sup> and even to punish the crimes of their own citizens and the citizens of other Indian nations.<sup>28</sup> Indian nations even have some authority to tax and regulate the activities of non-Indians on Indian lands.<sup>29</sup> Tribal sovereignty, as defined and constrained by federal Indian law, is robust.

From the point of view of non-tribal outsiders, however, the authority of Indian nations is defined and confined by governmental entities—Congress, the executive branch, and the federal judiciary—that are acting under a written, organic document (the Constitution) to which Indian tribes never consented or ratified. Under fundamental tenets of federal Indian law articulated by these non-tribal outsiders, tribal sovereignty is retained absent one of three actions: (1) voluntary divestiture by the Indian tribe via treaty or other agreement; (2) involuntary divestiture by Act of Congress; or (3) involuntary divestiture by the Supreme Court, a process usually referred to as “implicit divestiture.”<sup>30</sup>

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21. *E.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Honyama v. Nuvamsa*, 7 Am. Tribal Law 320 (Hopi App. Ct. 2008).

22. *E.g.*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (state regulation); *In re Kan. Indians*, 72 U.S. (5 Wall.) 737 (1866) (state taxation).

23. *E.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1998); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979).

24. *E.g.*, *Winters v. United States*, 207 U.S. 564 (1908) (water rights); *Oneida Indian Nation of N.Y. v. County of Oneida, N.Y.*, 414 U.S. 661 (1974) (land claims).

25. *E.g.*, 25 U.S.C. § 476 (2006).

26. *E.g.*, *United States v. Quiver*, 241 U.S. 602 (1916).

27. *E.g.*, *Williams v. Lee*, 358 U.S. 217, 221–22 (1959) (Indians' right to make their own laws and be ruled by them).

28. *E.g.*, *United States v. Lara*, 541 U.S. 193 (2004) (nonmember Indians); *United States v. Wheeler*, 435 U.S. 313 (1978).

29. *E.g.*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

30. See generally DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 3 (5th ed. 2005) [hereinafter GETCHES ET AL., CASES AND MATERIALS]. On “implicit divestiture,” see David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1595–1618 (1996) [hereinafter Getches, *Conquering the Cul-*

Indian nations long have entered into give-and-take arrangements with outsider governments and individuals. For literally centuries before the establishment of the United States, Indian nations entered into treaties and land sale agreements with outsiders<sup>31</sup> and with each other.<sup>32</sup> In many treaties and agreements with the United States, Indian nations agreed to let go of their external sovereignty and to place themselves under the “protection” of the American government, with the preservation of their internal sovereignty guaranteed as a concomitant matter. In a classic example, the Cherokee Nation of Georgia did exactly that, agreeing to cede much of their traditional land base to the United States in exchange for the federal government’s promise to hold the borders of their remaining lands sacrosanct.<sup>33</sup> Justice Thompson’s dissenting opinion in *Cherokee Nation v. Georgia*,<sup>34</sup> coupled with Chief Justice Marshall’s majority opinion in *Worcester v. Georgia*,<sup>35</sup> established (for a short time) that Indian nations like the Cherokee Nation that had voluntarily placed themselves under the “protection” of the United States retained significant inherent sovereignty, much like a nation under international law that agreed to serve as a junior partner in a military or economic alliance. Justice Thompson invoked Emanuel Vattel’s *The Law of Nations* in opining that the Cherokee Nation, as a “[t]ributary and feudatory state[], do[es] not thereby cease to be [a] sovereign and independent stat[e], so long as self-government, and sovereign and independent authority is left in the administration of the [Cherokee Nation].”<sup>36</sup> A year later, in the second Cherokee case, the Supreme Court all but adopted Justice Thompson’s formulation, describing Indian nations as “distinct, independent political communities.”<sup>37</sup> Quoting Vat-

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*tural Frontier*]; Alex Tallchief Skibine, *The Court’s Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267, 270–80 (2000).

31. See FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 23–24 (1994) (treaties); STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005) (land sales).

32. See 1 VINE DELORIA, JR. & RAYMOND J. DEMALLIE, DOCUMENTS OF AMERICAN INDIAN DIPLOMACY: TREATIES, AGREEMENTS, AND CONVENTIONS, 1775–1979, at 6–7 (1999).

33. See JILL NORGREN, THE CHEROKEE CASES: TWO LANDMARK FEDERAL DECISIONS IN THE FIGHT FOR SOVEREIGNTY 26 (2004).

34. 30 U.S. 1, 49, 5 Pet. 1, 50 (1831) (Thompson, J., dissenting).

35. 31 U.S. (6 Pet.) 515, 515 (1832).

36. *Cherokee Nation*, 30 U.S. (5 Pet.) at 53 (Thompson, J., dissenting) (citing EMANUEL VATTEL, THE LAW OF NATIONS 16, 17 (1758)).

37. *Worcester*, 31 U.S. (6 Pet.) at 559.

tel, Chief Justice Marshall wrote that Indian nations do not “surrender [their] independence—[their] right to self-government, by associating with a stronger [nation], and taking its protection.”<sup>38</sup>

The United States primarily relied upon treaty-making with Indian nations—as opposed to mere conquest—to acquire lands and to settle the western borders of Indian country.<sup>39</sup> The key concomitant outcome of that political decision (as confirmed by the Cherokee cases) was the recognition of Indian nations as sovereign entities:

One of the ingredients of the process, however, was treatment of tribes as political entities to the extent necessary to procure their consent to cession of their right to occupy the land. The process of obtaining Indian lands and containing the tribes was largely done by recognizing them as sovereigns, then negotiating agreements with their representatives. The motive was as much to facilitate expedient colonization by the Europeans as it was to deal humanely with natives. It put the colonizing nation and its successors in the position of the exclusive purchaser of Indian title (as against other Europeans) and it limited that “title” to a right of occupancy. The legal legacy became a source of foundational principles that were incorporated in the law of the United States when it was founded and which persist today in federal Indian law.<sup>40</sup>

The common nomenclature for Indian nations now is “domestic dependent nations,” the term Chief Justice Marshall used in his lead opinion in *Cherokee Nation*,<sup>41</sup> but the difference between the two phrases is not terribly relevant here.<sup>42</sup>

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38. *Id.* at 561.

39. See Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of Indian Lands*, 148 U. PA. L. REV. 1065 (2000). But see Terry L. Anderson & Fred S. McChesney, *Raid or Trade? An Economic Model of Indian-White Relations*, 37 J.L. & ECON. 39 (1994) (implying that violence was the more efficient method, at least in lands west of the Mississippi River); Douglas W. Allen, *Homesteading and Property Rights, or, "How the West Was Really Won,"* 34 J.L. & ECON. 1 (1991).

40. GETCHES ET AL., CASES AND MATERIALS, *supra* note 30, at 2–3.

41. *Cherokee Nation*, 30 U.S. at 16, 5 Pet. at 17 (Marshall, C.J.).

42. It *would* be relevant if this Paper discussed Indian nations, for example, not as Indian governments under the plenary control of the federal government but as Westphalian *nations*, as perhaps contemplated by documents such as the United Nations Declaration on the Rights of Indigenous Peoples and many Indian treaties executed in the early years of the American Republic.

As such, the first prong of the divestiture of tribal sovereignty was—and continues to be—voluntary. Indian nations did not (and perhaps cannot, absent an express mechanism) ratify the American Constitution as their own, but they have a very real place in the American constitutional polity as partially independent sovereigns subject to laws of their own making and enforcement. And, of note, that place in the constitutional structure is a theoretical place Indian nations have *consented* to occupy, either through virtue of treaty or by virtue of the pursuit and acceptance of federal protection through what is now known as “federal recognition.”<sup>43</sup>

Congress ended the practice of making treaties with Indian nations by 1871 and instead opted to rely exclusively on legislation in its dealings with Indians and Indian tribes.<sup>44</sup> But in the latter half of the nineteenth century, Congress routinely asserted what would later be described as near-absolute “plenary power” over Indian affairs.<sup>45</sup> During this period, the second method by which tribal sovereignty would be divested—via unilateral Act of Congress—became the primary method. Tribal consent, which had been the nominally exclusive method of divestiture, became utterly subverted. The first significant instance of Congress affirmatively imposing federal control over Indian affairs without tribal consent is the Major Crimes Act, passed in 1885,<sup>46</sup> where Congress extended federal criminal jurisdiction over certain felonies to include Indian-on-Indian crime within Indian country.<sup>47</sup> The Supreme Court, in

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43. See generally Matthew L.M. Fletcher, Commentary, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487 (2006).

44. See George William Rice, *Indian Rights: 25 U.S.C. § 71: The End of Indian Sovereignty or a Self-Limitation of Contractual Ability?*, 5 AM. INDIAN L. REV. 239, 239–40 (1977).

45. See Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 258–64 (1986). See also Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 28–81 (2002) (discussing history and case law of the power over Indian affairs). Examples of “near-absolute plenary power” can be found in Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348 (1953). One egregious example noted there was federal officers mandating bedtimes for certain Indians. See *id.* at 360.

46. Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2006)).

47. The Supreme Court in *Ex parte Kan-gi-Shun-ca (Crow Dog)*, 109 U.S. 556 (1883), had held that federal criminal jurisdiction did not extend to Indian country crime, provoking Congressional action. See generally Kevin K. Washburn,

*United States v. Kagama*,<sup>48</sup> broadly swept aside the first challenge to the constitutionality of the statute on grounds that Congress, while not explicitly authorized under the Indian Commerce Clause to enact a general criminal law in Indian country, still had authority to do so by virtue of the extreme dependency of Indian people.<sup>49</sup> Whether a group of poor Indian people who could not vote but lived within the territorial borders of the United States consented to the imposition of outside criminal law was, for the Court, not even worth mentioning.

Perhaps the worst Supreme Court case affirming unilateral Congressional divestiture is *Lone Wolf v. Hitchcock*.<sup>50</sup> There, federal negotiators sought to reopen a settled Indian treaty, the Treaty of Medicine Lodge Creek, that established a reservation for Kiowa and Comanche people, later joined by Apache people.<sup>51</sup> Article 12 of that treaty prohibited the cession of any reserved lands absent the written consent of three-fourths of the adult males occupying the reserved lands.<sup>52</sup> After scouring the reservation seeking the necessary signatures to consent to the allotment of the tribal land base, federal officials reported to Congress that they had the necessary signatures, though in reality the number was well short of three-fourths.<sup>53</sup> Soon thereafter, hundreds of Indians published a memorial with Congress with an objection to the allotment of their lands, citing the treaty and alleging fraud on the part of the federal officials seeking consent.<sup>54</sup> After Congress chose to proceed anyway, the Indians sued and the case reached the Supreme Court, where the Court held: “Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of

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*Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 790–808 (2006) (discussing the Major Crimes Act and the history leading up to it).

48. 118 U.S. 375 (1886).

49. See *Kagama*, 118 U.S. at 379, 383–84.

50. 187 U.S. 553 (1903).

51. See DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE* 105–06 (1997); JOSEPH WILLIAM SINGER, *PROPERTY* 769–71 (3d ed. 2010); Kristen A. Carpenter, *Contextualizing the Losses of Allotment through Literature*, 82 N.D. L. REV. 605 (2006).

52. See *Lone Wolf*, 187 U.S. at 554 (quoting Treaty with the Kiowas and Comanches, U.S.-Kiowa & Comanche Tribes of Indians, art. 12, Oct. 21, 1867, 15 Stat. 581).

53. See WILKINS, *supra* note 51, at 106–07.

54. See *id.*

the government.”<sup>55</sup> In other words, Congressional power to dispose of Indian lands, what the Court called “full administrative power,”<sup>56</sup> would not be limited or even reviewed by the federal judiciary. As a result, tribal consent literally became irrelevant.

During this period, and well into the mid-twentieth century, the federal bureaucracy took Congress’s lead in undermining tribal governments. Without Congressional authorization, the Department of Interior authorized the creation of model law and order codes, to be enforced by “tribal police” in “tribal courts.”<sup>57</sup> Indians prosecuted under these federal codes who sought release via habeas writ in federal courts were faced with paternalistic, unsympathetic judges, as in *United States v. Clapox*.<sup>58</sup> Following the reasoning of *Lone Wolf*, the court there concluded that executive branch power to create the tribal courts and the tribal laws was implied from the federal duty to “civilize” reservation Indians: “[T]he reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.”<sup>59</sup>

Federal bureaucratic control over Indian communities from the last half of the nineteenth century into the later decades of the twentieth century was far more pervasive and insidious than Congressional control and served to unofficially (if not illegally) divest tribal governments of enormous authority, at least temporarily. Congress authorized much of this federal control over Indian Country, but the Bureau of Indian Affairs and others fervently throttled tribal governments and religion. Felix Cohen famously detailed the incredible and capricious iron hand that local federal officers used to dominate Indian communities in the early years of the Termination Era (1950s),<sup>60</sup> which included efforts to undermine Indian religions

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55. *Lone Wolf*, 187 U.S. at 565.

56. *Id.* at 568.

57. See VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 111–16 (1983); ORVILLE N. OLNEY & DAVID H. GETCHES, INDIAN COURTS AND THE FUTURE: REPORT OF THE NAICJA LONG RANGE PLANNING PROJECT 7–13 (1978).

58. 35 F. 575 (D. Or. 1888).

59. *Clapox*, 35 F. at 577.

60. During the Termination Era, Congress sought to terminate its relationship with Indian nations, succeeding in “terminating” over 100 tribes. See generally FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 1013–84 (1984).

and tribal economies, and virtually all other efforts at cultural preservation and self-governance.<sup>61</sup> Others have described how federal military officials perverted treaty-guaranteed education programs into boot camps designed to destroy tribal cultures and languages.<sup>62</sup> Still others have described how federal officials used federal law to dispossess Indian people of their land base.<sup>63</sup> Once again, tribal consent was irrelevant.

One little-known series of incidents involving Indian lands on South Fox Island in Lake Michigan<sup>64</sup> perfectly exemplifies the disconnect between Indian consent and federal government control. As a result of the failed implementation of mid-nineteenth-century treaties designed to reserve a land base for Odawa and Ojibwe people in northwest lower Michigan, Congress and the Department of Interior made land available on the island.<sup>65</sup> Twenty-two Grand Traverse Band of Ottawa and Chippewa families selected land on the island and lived there for decades, but in the 1950s the Department of Interior sought to sell the land to timber interests.<sup>66</sup> Since Indian people rarely executed wills during that time, by then each parcel had several owners after the original homesteaders passed away. The government officials engaged in what is now known as a Secretarial transfer, where “BIA officials approved sales of inherited allotments on reservations without the consent of all beneficial

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61. See Cohen, *supra* note 45, at 353–55 (interference with tribal elections), 356 (interference with freedom of speech), 359–61, 371–74 (freedom in Indian personal life, religion, and economies).

62. See, e.g., BILL DUNLOP & MARCIA FOUNTAIN-BLACKLIDGE, *THE INDIANS OF HUNGRY HOLLOW* 131–40 (2004) (describing life at the Holy Childhood of Jesus School in Harbor Springs, Michigan); LANNIKO L. LEE, FLORESTINE KIYUKANPI RENVILLE, KAREN LONE HILL & LYDIA WHIRLWIND SOLDIER, *SHAPING SURVIVAL: ESSAYS BY FOUR AMERICAN INDIAN TRIBAL WOMEN* (Jack W. Marken & Charles L. Woodard eds., 2002) (describing life at Bureau of Indian Affairs schools).

63. E.g., JANET A. MCDONNELL, *THE DISPOSSESSION OF THE AMERICAN INDIAN 1887–1934*, at 87–102 (1991) (describing federal agents’ use of “competency commissions” to impose fee patents on Indian allottees, thereby making the Indian allottees’ land alienable to non-Indians at an earlier time); Bruce A. Rubenstein, *Justice Denied: Indian Land Frauds in Michigan, 1855–1900*, 2 *THE OLD NORTHWEST* 131 (1976).

64. See Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 *TULSA L. REV.* 21, 28–33 (2005).

65. See Act of June 10, 1872, ch. 424, 17 Stat. 381; Act of June 10, 1875, ch. 188, 18 Stat. 516; Act of May 23, 1876, ch. 105, 19 Stat. 55.

66. James M. McClurken, *South Fox Island: Its Historical Importance to the Grand Traverse Band of Ottawa and Chippewa Indians* 42–43, 66–67 (Aug. 28, 2001) (unpublished draft report, on file with the *University of Colorado Law Review*).

heirs.”<sup>67</sup> In short, the government sent each heir a letter asking them to consent to sale. If they signed (and few did), they consented.<sup>68</sup> If they did not, the government declared them incompetent and, as guardian, consented to the sale on their behalf as nominal “trustee.”<sup>69</sup>

The historical practice on the part of Congress and the Executive branch of making and enforcing laws—and often purporting to own all Indian property—without the consent of Indian governments and Indian people perhaps contributed to the current views of the Supreme Court that the Court can decide federal Indian common law in accordance with the way “the current state of affairs ought to be.”<sup>70</sup> Since 1978, the Supreme Court has repeatedly invoked the Court-made doctrine of “implicit divestiture” to rework the “state of affairs” in cases where Congressional guidance is nonexistent or vague. It bears noting that prior to 1978 the Court had not applied the doctrine of implicit divestiture since 1823’s *Johnson v. M’Intosh*, where the Court held that Indian nations do not have the capacity to alienate aboriginal Indian title to anyone except the United States.<sup>71</sup>

In 1978, the Court decided *Oliphant v. Suquamish Indian Tribe*, holding that Indian nations do not have criminal jurisdiction over non-Indians.<sup>72</sup> Congress had expressly recognized ongoing and inherent tribal criminal jurisdiction for many tribes in numerous treaties<sup>73</sup> and had strongly implied its recog-

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67. *Covelo Indian Cmty. v. Watt*, No. 82-2377, 1982 U.S. App. LEXIS 23138, at \*8 n.9 (D.C. Cir. Dec. 21, 1982).

68. One consenter received a check for \$5 from the government, the value of their interest in the land. McClurken, *supra* note 66, at 74.

69. *Id.* at 71.

70. Getches, *Conquering the Cultural Frontier*, *supra* note 30, at 1575 (quoting Memorandum from Justice Antonin Scalia to Justice William J. Brennan, Jr., (Apr. 4, 1990) (Duro v. Reina, No. 88-6546), in *Papers of Justice Thurgood Marshall* (reproduced from the Collections of the Manuscript Division, Library of Congress)); David H. Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 268 (2001) (same).

71. 21 U.S. (8 Wheat.) 543, 574 (1823). Even that instance was merely the extension of an Act of Congress (the Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (codified as amended in part at 25 U.S.C. § 177 (2006))) to the period of time between the Founding of the American Republic to the date of the statute, 1790. *Cf.* LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* 19 (2005).

72. 435 U.S. 191 (1978).

73. *E.g.*, *Means v. Dist. Court of Chinle Judicial Dist.*, 7 Navajo Rptr. 383 (Navajo 1999), available at <http://www.tribal-institute.org/cases/navajo/means.htm> (describing the tribal criminal jurisdiction authority recognized in

dition of tribal criminal jurisdiction in all tribes in the Indian Civil Rights Act.<sup>74</sup> But Congress had never legislated in the context of tribal criminal jurisdiction specifically over non-Indians, despite open and notorious prosecutions of non-Indians by some tribes such as the Cherokee Nation.<sup>75</sup> In *Oliphant*, the Court went to great lengths to discern how Congress *would have* legislated on the question of tribal criminal jurisdiction over non-Indians in the absence of such legislation, relying upon an unusual collection of government documents, including legislative history of failed Congressional bills and an Interior Solicitor opinion that had been revoked by the Department.<sup>76</sup> The Court concluded that there was an “unspoken assumption” in Congress that tribes did not possess such jurisdiction.<sup>77</sup> In a second portion of the decision, the Court noted that the Suquamish Tribe had acknowledged a “dependence” upon the United States in the Treaty of Point Elliott,<sup>78</sup> and interpreted that language to mean that “the Suquamish were in all probability recognizing that the United States would arrest and try non-Indian intruders who came within their Reservation.”<sup>79</sup> This raises an important nineteenth-century understanding—that tribes must consent to divestitures of tribal sovereignty before they become effective. But unlike several other Indian treaties that went into some detail about which sovereign would have jurisdiction over Indian country crime,<sup>80</sup> the Point Elliott treaty was silent.<sup>81</sup> Perhaps the tribes and

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Treaty Between the United States of America and the Navajo Tribe of Indians, U.S.-Navajo, June 1, 1868, 15 Stat. 667).

74. Congress presumed extant tribal criminal jurisdiction in providing for federal habeas review of tribal criminal convictions in Civil Rights Act of 1968, Pub. L. No. 90-284, § 203, 82 Stat. 73, 78, (codified at 25 U.S.C. § 1303 (2006)).

75. See J. Matthew Martin, *The Nature and Extent of the Exercise of Criminal Jurisdiction by the Cherokee Supreme Court: 1823–1835*, 32 N.C. CENT. L.J. 27, 57–60 (2009).

76. See *Oliphant*, 435 U.S. at 197–206; ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 97–113 (2005); Ezekiel J.N. Fletcher, *Trapped in the Spring of 1978: The Continuing Impact of the Supreme Court's Decision in Oliphant, Wheeler, and Martinez*, FED. LAW., Mar.–Apr. 2008, at 36, 37–40.

77. *Oliphant*, 435 U.S. at 203.

78. Treaty of Point Elliot, U.S.-Allied Tribes of Wash. Territory, Jan. 22, 1855, 12 Stat. 927.

79. *Oliphant*, 435 U.S. at 207.

80. E.g., Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1190–91 (1990) (describing the Treaty of Fort Laramie of 1868, U.S.-Sioux Indians, Apr. 29, 1868, 15 Stat. 635).

81. *Oliphant*, 435 U.S. at 206.

the government never considered the question during treaty negotiations, or maybe they did consider the question and decided to leave it for another day. There is no way of knowing 155 years later. And so the Court's conclusion that the Suquamish Tribe was impliedly consenting to the divestiture cannot be taken seriously as valid tribal consent.<sup>82</sup>

Judicial divestiture of tribal sovereignty through an announcement of "unspoken" Congressional intent or assumed tribal consent creates a host of institutional problems for the Supreme Court. The strongest criticism of such decision-making is that the Court is undertaking a naked power grab—or, as Frank Pommersheim aptly puts it, asserting "judicial plenary power" in Indian affairs.<sup>83</sup> The Supreme Court is no policy maker; that's a job for the political branches.<sup>84</sup> Chief Justice Roberts' analogy that the job of a Supreme Court Justice is equivalent to being a baseball umpire<sup>85</sup> is belied by the Court's decisions in federal Indian law that serve to divest Indian nations of sovereignty on grounds similar to the *Oliphant* decision. And for a few years after the *Oliphant* decision, the Supreme Court appeared to struggle with how to cabin its rediscovered tool. In *United States v. Wheeler*, the Court noted that tribal government authority had been implicitly divested in only three areas: (1) the authority to freely alienate land; (2) the authority to enter into commercial or governmental relations with foreign nations; and (3) the authority to prosecute nonmembers (the Court had said "non-Indians" in *Oliphant*, but changed that to "nonmembers" in *Wheeler* without discussion or explanation) in tribal court.<sup>86</sup> The second example is not an example of *judicially*-divested authority because it is based on the Cherokee cases, where the Supreme Court identi-

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82. Even the Court acknowledged that the Tribe had not consented to the allotment of its reservation, suggesting that implied consent to the loss of criminal jurisdiction was invalid. *Id.* at 193 n.1; see also Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myth and Methods of Marbury v. Madison to Tribal Courts' Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77, 105–06 (2004).

83. Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 MONT. L. REV. 313, 328 (1997).

84. See generally Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1813–42 (2005); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 266–70 (2005).

85. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005), cited in Michael P. Allen, *A Limited Defense of (At Least Some of) the Umpire Analogy*, 32 SEATTLE U. L. REV. 525, 525 n.1 (2009).

86. *United States v. Wheeler*, 435 U.S. 313, 326 (1978).

fied language in the various treaties executed by the tribes (namely, “protection”) that served to divest the Cherokee Nation of external sovereignty. A few years later, in *Washington v. Confederated Colville Tribes*, the Court noted that only the “overriding interests of the National government” justified the implicit divestiture of tribal authority.<sup>87</sup>

But then in *Montana v. United States*, the Court held that Indian tribes do not have *civil* jurisdiction over nonmembers on reservation fee land either, with minor exceptions.<sup>88</sup> This outcome, of course, turned the foundational federal Indian law doctrine on its head, placing focus on what authority Congress sees fit to affirmatively *grant* to Indian tribes as opposed to the authority to which Indian nations had affirmatively agreed to divest. Tribal consent to divestitures of tribal sovereignty had further receded from the Court’s view.

In the decades following *Montana*, the Supreme Court rarely found an example suitable to justify tribal civil jurisdiction over nonmembers.<sup>89</sup> Justice Ginsburg’s damning opinion in *Strate v. A-1 Contractors* conclusively held that *Montana* is the “pathmarking” case when it comes to tribal jurisdiction,<sup>90</sup> and Justice Scalia’s opinion in *Nevada v. Hicks* concluded that tribal civil jurisdiction over nonmembers must fit within one of the *Montana* exceptions *even on trust land*.<sup>91</sup>

*Oliphant* and *Montana*, it is fair to say, are the cornerstones of current Supreme Court Indian law doctrines. Except in key areas involving the administration of federal programs benefitting Indian people,<sup>92</sup> Indian gaming,<sup>93</sup> and a few other

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87. 447 U.S. 134, 153 (1980).

88. 450 U.S. 544, 565–66 (1981).

89. The exceptions are *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (tribal tax on nonmember extraction of tribal natural resources); *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985) (same); and *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (plurality opinion) (regulatory jurisdiction over nonmembers in “closed” area of reservation). *Contra* *Nevada v. Hicks*, 533 U.S. 353, 360 (2001) (“[W]ith one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land.”) (citing *Merrion*, 455 U.S. at 137, 142) (emphasis added).

90. 520 U.S. 438, 445 (1997).

91. *Hicks*, 533 U.S. at 360.

92. *E.g.*, Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 to 458bbb-2 (2006); *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005).

93. See Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701 to 2721. (2006)); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

discreet areas of federal Indian policy,<sup>94</sup> Congress is slowly vacating the field of Indian affairs, rarely addressing important national Indian affairs issues and, with tribal support, leaving internal Indian affairs to tribes themselves. Despite efforts by Indian nations to persuade Congress to legislate in response to the Supreme Court's *Oliphant* and *Hicks* decisions,<sup>95</sup> as well as a recent statutory interpretation case going against both Indian nations and the United States,<sup>96</sup> Congress usually does not respond to tribal efforts to enact omnibus legislation.<sup>97</sup>

And so the Supreme Court is left to its own devices, which almost always means that the Court will limit tribal authority. Ironically, while the Supreme Court tends to ignore (or misstate) whether Indian nations have consented to the divestment of tribal sovereign authority, the Court has explicitly held that, in many contexts, tribal jurisdiction over nonmembers depends entirely on the express and written consent of those nonmembers.<sup>98</sup> Justice Kennedy has repeatedly articulated a position on tribal jurisdiction based on his notion of consent theory, finding that since nonmembers have not (and perhaps cannot) participate in the tribal political process, they have not *consented* to tribal law.<sup>99</sup> Some academic commentators have joined Justice Kennedy in his view of consent theory in relation to tribal jurisdiction over nonmembers.<sup>100</sup>

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94. *E.g.*, Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069, (codified as amended at 25 U.S.C. §§ 1901 to 1963 (2006)).

95. *E.g.*, D. Michael McBride III, *The FBA's Indian Law Section: Vetting the Important Issues Regarding Indian Country*, FED. LAW. Mar.–Apr. 2008, at 4, 4 (Apr. 2008) (describing efforts to persuade Congress to enact an “*Oliphant* fix”); Skibine, *supra* note 19, at 34 (noting effort of tribes to persuade Congress to enact a “*Hicks* fix”).

96. *See Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).

97. Thanks to Addie Rolnick for this observation. The main exception is the so-called *Duro* fix, enacted after the Supreme Court held that Indian nations do not have criminal jurisdiction over nonmember Indians in *Duro v. Reina*, 495 U.S. 676 (1990). *See United States v. Lara*, 541 U.S. 193 (2004).

98. *E.g.*, *Montana v. United States*, 450 U.S. 544, 565–66 (1981) (holding that Indian nations may not exercise civil jurisdiction over nonmembers unless the nonmembers enter “consensual relationships” with the tribe).

99. *E.g.*, *Lara*, 541 U.S. at 212 (Kennedy, J., concurring) (“The Constitution is based on a theory of original, and continuing, consent of the governed. . . . Here, contrary to this design, the National Government seeks to subject a citizen to the criminal jurisdiction of a third entity to be tried for conduct occurring wholly within the territorial borders of the Nation and one of the States.”); *Duro*, 495 U.S. at 693 (“The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members.”).

100. *E.g.*, T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 115–17, 146–47 (2002) (identifying a “democratic deficit” in relation to tribal governments and non-

The difficulty in Justice Kennedy's consent theory is exposed if one considers the modern, consensus understanding of consent theory—hypothetical consent.<sup>101</sup> Hypothetical consent theory asks whether a reasonable person subjected to government control would consent to such control.<sup>102</sup> As such, the question is whether a nonmember subject to tribal jurisdiction would be reasonable in rejecting tribal law. If the tribal law discriminates against nonmembers, then it would seem a reasonable nonmember would object. But if tribal law is nondiscriminatory, a reasonable nonmember should not object. Tribal laws at issue in Supreme Court cases involving tribal jurisdiction include, for example, bars on assaults on law enforcement officials;<sup>103</sup> tribal taxation of nonmember businesses relying upon tribal public services;<sup>104</sup> tribal taxation of nonmember extraction of natural resources from tribal lands;<sup>105</sup> and statutory and common law tort law applied to nonmember tortfeasors on tribal lands in claims brought by victims.<sup>106</sup> While closer cases might include tribal hunting and fishing regulations that appear to discriminate against nonmembers,<sup>107</sup> tribal statutes rarely are so unreasonable as to justify resistance by nonmembers under hypothetical consent theory.<sup>108</sup> As such, Justice Kennedy's rhetoric invoking the consent of the governed rings hollow at least in cases where a

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members); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996).

101. JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 335 (1994).

102. Cf. JOHN RAWLS, *A THEORY OF JUSTICE* 17–22 (1971) (describing the “original position”).

103. *Lara*, 541 U.S. at 196; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 (1978).

104. *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 647–48 (2001).

105. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 133 (1982).

106. See *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 128 S. Ct. 2709, 2714 (2008); *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997).

107. Cf. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 325 (1983); *Montana v. United States*, 450 U.S. 544, 547 (1981).

108. Consider, for example, the efforts by the tribe in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), to prevent non-Indians from using their land in ways that would fundamentally impact surrounding reservation land use; or, in Justice Blackmun's words:

And how can anyone doubt that a tribe's inability to zone substantial tracts of fee land within its own reservation—tracts that are inextricably intermingled with reservation trust lands—would destroy the tribe's ability to engage in the systematic and coordinated utilization of land that is the very essence of zoning authority?

*Id.* at 458 (Blackmun, J., concurring and dissenting).

reasonable person would not object to tribal laws. Instead, it would appear that Justice Kennedy's consent theory is based more on "literal consent," as expressed perhaps in one of the two circumstances the Supreme Court has held that nonmembers are subject to tribal civil jurisdiction—where they expressly consent in the context of a commercial relationship.<sup>109</sup>

One could argue that the United States (represented in these cases by the Supreme Court) is justified, even in the modern era, in not caring for the consent of Indian nations, and that the interests of the *nation* compel the federal government to exercise control over Indian nations regardless of tribal consent—a sort of pure utilitarian theory of Indian law. In fact, the Supreme Court has recognized in the legislative and the executive branch via delegation a form of plenary control over the internal *and* external affairs of tribal governments without clear (or perhaps even adequate) constitutional authority. In *United States v. Kagama*, for example, the Supreme Court affirmed the constitutionality of the Major Crimes Act,<sup>110</sup> Congress's effort to extend federal criminal jurisdiction into Indian country, despite holding that the Indian Commerce Clause—the only plausible source of legislative authority—was insufficient constitutional authority to do so.<sup>111</sup> Instead, the Court noted that Indian tribes resided on lands within the borders of the United States, asserted that Indians were utterly dependent upon the federal government for day-to-day survival, and implied that Indian people could not effectively govern themselves.<sup>112</sup> These factors alone, according to the Court, authorized Congress to assert federal criminal jurisdiction over Indian country.

The Supreme Court's Indian law jurisprudence long has taken on the harsh vagaries of utilitarian theory that manifested themselves strikingly in *Korematsu v. United States*.<sup>113</sup> Recall in *Korematsu* that the Court apparently weighed the perceived needs of a "community" (the United States as a

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109. See *Montana*, 450 U.S. at 565.

110. 118 U.S. 375 (1886).

111. See *Kagama*, 118 U.S. at 378–79. It bears mention that the Supreme Court could not rely upon tribal consent to federal criminal jurisdiction via treaty provisions because the Senate had never ratified the treaty executed by the Hoopa Valley Tribe, the local tribal entity at issue in *Kagama*. See *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1209 (9th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 927 (2002).

112. See *Kagama*, 118 U.S. at 383–84.

113. 323 U.S. 214 (1944).

whole), as understood in utilitarian theory, against the needs of a minority of individuals (Japanese-Americans), foreclosing any real chance that the minority group could prevail.<sup>114</sup> The resulting injustice continues to haunt American history to this day. Modern consent theory (with hypothetical consent theory part of this wave) arose as a counter to the harshness of utilitarianism,<sup>115</sup> ostensibly (and hopefully) putting future cases like *Korematsu* in a different light for the Court to analyze.

But in federal Indian common law, consent theory is conspicuously absent.<sup>116</sup> The Court assumes that tribal consent to the coercive authority of the federal government is irrelevant by simply refusing to address it. In a kind of vicious circle, since Indian nations are not parties to the Constitution, the Supreme Court will refuse to apply federal common law in their favor. And since they never consented, the response to the harsh utilitarianism of the Court—consent theory—is inapplicable, thereby seemingly justifying the application of the utilitarian analyses.<sup>117</sup>

The outcomes in Indian law cases decided by the Supreme Court are predictable under this regime. Consider statutory or treaty interpretation cases, where tribal interests prevail in a reasonable percentage of cases. There, Congress (or the Senate in a treaty case) has spoken on behalf of the American “community,” articulating an order of how the “community” (the people) has decided to deal with a particular Indian law issue or Indian nation. If the Supreme Court applied utilitarian analyses to these questions, the result would be more obviously an imposition of judicial policymaking, trumping the expressed

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114. See *id.* at 220–24.

115. See RAWLS, *supra* note 102, at 175–92.

116. Other scholars suggest in parallel theories that the legal rights of indigenous peoples may have been “superseded” by time and changed circumstances. *E.g.*, Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 20 (1992).

117. Frequently in recent decades, Congress has enacted legislation at the behest of Indian country (plainly satisfying tribal consent requirements), but that legislation often comes with important limitations and flaws vulnerable to federal and state court critique and even evisceration. *E.g.*, Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 to 2721 (2006), *abrogated in part by* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 47 (1996); Indian Child Welfare Act, 25 U.S.C. §§ 1901 to 1963 (2006), *called into question by* In re Santos Y., 112 Cal. Rptr. 2d 692, 727–31 (Cal. Ct. App. 2001); 25 U.S.C. § 1301(2) (2006) (reaffirming inherent tribal authority to prosecute nonmember Indians), *called into question by* United States v. Lara, 541 U.S. 193, 211–14 (2004) (Kennedy, J., concurring), 214–26 (Thomas, J., concurring).

will of the people.<sup>118</sup> But in federal Indian common law questions (that is, where Congress largely has not spoken), the Court exclusively applies its utilitarian analysis, resulting in exceptionally rare instances where tribal interests prevail in a common law case.<sup>119</sup>

What can tribes do in such a common law regime so patently hostile to tribal interests unprotected by the Constitution? Cooperate with each other? Indian nations have teamed together to support each other in litigation before the federal courts, but with largely negative results.<sup>120</sup> Open resistance? Indian nations, increasingly, are discussing active resistance to federal court pronouncements of law.

Federal Indian law is marked with frequent assertions of federal authority over Indian tribes without a source of authority traced to tribal consent.<sup>121</sup> But, assuming it is too late to reset the federal-state-tribal relationship, we must at least articulate and recognize a new theory of tribal consent.

## II. TOWARD A TRIBAL CONSENT THEORY

Consent theory in American political theory derives from the Declaration of Independence and the Constitution, but Indian tribes have never been a part of that political theory. The Declaration treats Indian nations as objects of fear and hatred, and the Constitution treats them as half-domestic, half-foreign governments. A realistic consent theory for Indian tribes, which I proffer as a desirable theory to consider, requires an

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118. Arguably, the Supreme Court has trumped the will of the “community” repeatedly in Indian law contexts. *E.g.*, *Carcieri v. Salazar*, 129 S. Ct. 1058, 1061 (2009) (striking down federal administrative practice after seventy-plus years of Congressional acquiescence); *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) (declining to give weight to Congressional statutes extending statutes of limitations in Indian land claims cases such as 28 U.S.C. § 2415(a)).

119. *E.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (holding that federal interests in a tribal business operation preempted state taxes).

120. The Tribal Supreme Court Project arose in late 2001 as a means to counteract the Supreme Court’s hostility to tribal interests, *see* Charles Wilkinson, *“Peoples Distinct from Others”: The Making of Modern Indian Law*, 2006 UTAH L. REV. 379, 384-85, with apparently no significant impact—tribal interests continue to lose Supreme Court cases at the same rate as before and have not prevailed in a case before the Court in the last six years, following *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005). *See* Turtle Talk, Supreme Court, <http://turtletalk.wordpress.com/resources/supreme-court-indian-law-cases/> (last visited August 25, 2010).

121. *E.g.*, *Lara*, 541 U.S. at 200 (citing multiple authorities unrelated to tribal consent).

examination of the treaties and other agreements between tribes and the federal government, rather than fruitless re-examination of American organic political documents. If Indian nations have not consented, then reasonable resistance to actions by government is justifiable.

### A. *Consent Theory and Indian Tribes*

The Declaration of Independence grounds American political thought in the consent of the governed, with a heavy emphasis on Locke, Rousseau, and Kant,<sup>122</sup> using language expressly invoking consent theory. The Constitution does not use the same language, but there can be little doubt the Framers and the Ratifiers understood that the Constitution, by the very act of breaking down the Articles of Confederation and reconstituting the government under the new document, fit within the Declaration's consent theory.<sup>123</sup>

But the Constitution, like consent theory itself, is not without powerful difficulties. The Constitution by its very terms excludes the vast majority of persons who would be governed by the United States—African-Americans,<sup>124</sup> women,<sup>125</sup> whites with little or no property,<sup>126</sup> and virtually all other people of color, including American Indians, especially those “Indians not taxed” considered by the Framers to be savages.<sup>127</sup>

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122. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. —That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .”); cf. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 283–84 (1972) (noting Locke’s importance to the American Revolutionaries after 1776).

123. See THE FEDERALIST NO. 85 (Alexander Hamilton) (noting “[t]he establishment of a Constitution, in time of profound peace, by the voluntary consent of a whole people . . . .”); GILLIAN BROWN, *THE CONSENT OF THE GOVERNED: THE LOCKEAN LEGACY IN EARLY AMERICAN CULTURE* 15–17 (2001).

124. See LAWRENCE GOLDSTONE, *DARK BARGAIN: SLAVERY, PROFITS, AND THE STRUGGLE FOR THE CONSTITUTION* 7 (2005); DAVID WALDSTREICHER, *SLAVERY’S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* 153–54 (2009).

125. Laurence H. Tribe, *Federal Judicial Power and the “Consent” of the Governed*, in *THE UNITED STATES CONSTITUTION: ROOTS, RIGHTS, AND RESPONSIBILITIES* 207, 209 (A.E. Dick Howard ed., 1992).

126. *Id.*

127. U.S. CONST. art. I, § 2, cl. 3. See also Ralph Lerner, *Reds and Whites: Rights and Wrongs*, 1971 SUP. CT. REV. 201, 203 (“Above all, there was the belief in the inevitability and rightness of the triumph of white civilization over red barbarism.”).

Later Amendments to the Constitution extending citizenship to African-Americans and suffrage to women brought more persons within the fold, but the Amendments to the Constitution are limited, and expressly excluded, once again, American Indians.<sup>128</sup> Acts of Congress (despite Constitutional language implying otherwise) have purported to fill some of the gaps in the Constitution, especially in regard to American Indians.<sup>129</sup> But as Rob Porter notes, in the 1920s many Indian people did not consent (and would not consent to this day) to becoming American citizens.<sup>130</sup>

Even assuming the Constitution provides for the inclusion of all persons, there are serious theoretical problems with consent theory as it might apply to the American polity. Early on, Jefferson argued that the American people needed to reassess the Constitution every nineteen years, in accordance with his understanding of consent theory.<sup>131</sup> For Jefferson, consent was more literal and express, meaning that the consent of the American people in their government had to be reaffirmed each generation in order to be valid.<sup>132</sup> But as we know from history, the American people have not reassessed the Constitution each generation and arguably have only amended the Constitution in a significant, fundamental manner once, during Reconstruction.<sup>133</sup> Jeffersonian consent may, in fact, be impossible, or even undesirable.

Key to consent theory is exit theory, the right to leave when one does not consent to the government.<sup>134</sup> Interestingly, Indian tribes both pre-contact and post-colonization provide important evidence on how exit works. Simple exit theory allows for the non-consenters to leave when the government

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128. See George Beck, *The Fourteenth Amendment as Related to Tribal Indians: Section I, "Subject to the Jurisdiction Thereof" and Section II, "Excluding Indians Not Taxed,"* 28:4 AM. INDIAN CULTURE & RES. J. 37, 40 (2004).

129. E.g., Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (1924); Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 117-18 (1999).

130. See Porter, *supra* note 129, at 126-27.

131. Louis Henkin, *The United States Constitution as Social Compact*, 131 PROC. AM. PHIL. SOC'Y 261, 264 (1987).

132. See *id.*

133. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 99 (1998); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

134. See Leslie Green, *Rights of Exit*, 4 LEGAL THEORY 165, 165-66 (1998); cf. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 106-19 (1970).

proceeds with a course of action to which these persons strongly disagree. It is often said that traditional tribal governments operated under a consensus form of government, wherein every person in the tribal community would have a say about a particular course of action, and the government would not act until each person in the government consented to the action.<sup>135</sup> Of course, this description is oversimplistic if applied to all Indian nations. Many times, non-consenters simply left and joined another community or started a new community.<sup>136</sup> Those remaining, by definition (one could argue), were a consensus. This is simple exit theory, wherein exit has relatively small costs.<sup>137</sup> The non-consenters could leave without being coerced to stay, had a place to go (often a similar and nearby tribal community, where they had relatives), and could even retain a connection to the community being left.<sup>138</sup> The door would be open, after a time, to return.

Complex exit theory as applied to modern nations involves far higher exit costs. Non-consenters might be put in a position where they cannot exit because of economic or legal limitations.<sup>139</sup> The average person residing in the United States in the twenty-first century likely has no practical means of exit as a way to reject the government. Americans often leave one state for another, but they rarely have the resources to leave the entire United States on a permanent basis and might lose all of their legal protections and property rights as an alien in

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135. *E.g.*, Russel Lawrence Barsh, *The Nature and Spirit of North American Political Systems*, 10 AM. INDIAN Q. 181, 185–89 (1986); Robert B. Porter, *Decolonizing Indigenous Governance: Observations on Restoring Greater Faith and Legitimacy in the Government of the Seneca Nation*, KAN. J.L. & PUB. POL'Y, Winter 1999, at 97, 114.

136. The histories of the three federally recognized Michigan Ottawa/Ojibwa tribes is instructive, as Indians from all three communities (and several others throughout Michigan and the entire Great Lakes region) would move from community to community dependent on their family or political interests. *See* Matthew L.M. Fletcher, *Race and American Indian Tribal Nationhood*, Mich. St. Univ. Legal Studies Research Paper No. 08-11, at 22–24 (2010), available at <http://ssrn.com/abstract=1620603>.

137. *Cf.* JOHN RAWLS, A THEORY OF JUSTICE 212 (1971) (“[P]articular associations may be freely organized as their members wish, and they may have their own internal life and discipline subject to the restriction that their members have a real choice of whether to continue their affiliation.”), *quoted in* Green, *supra* note 134.

138. *Cf.* HIRSCHMAN, *supra* note 134, at 98–99.

139. *See* Henkin, *supra* note 131 (“Many cannot in fact leave, and during some periods of war or emergency departure is forbidden by law. In any event, is consent present and authentic when there is only choice between departure and submission?”).

their new nation. Indian nations, who are literally grounded in their territorial homelands within the United States, cannot exit either. In this context, the failure of a non-consenter to exit is no evidence of consent.

Despite these limitations, political theorists take it as a given that some form of exit must exist for consent theory to function properly. While the practical right to exit in modern times might be extremely difficult to exercise, it remains critical. Even if the right to exit is, in some ways, fictional, without such a right, the governed are governed by coercion.<sup>140</sup> Or, in another word, to expand upon Robert Cover: violence.<sup>141</sup>

### B. *Hypothetical Consent, Indian Nations, and Resistance*

“Hypothetical consent” is a theory that helps to avoid the practical and logical problems of consent theory. This theory requires that governments, in order to be legitimate, must be governments that *earn* the consent of the people through time by governing in an acceptable manner, as Hannah Pitkin notes:

[A] legitimate government, a true authority, one whose subjects are obligated to obey it, emerges as being one to which they *ought to consent*, quite apart from whether they have done so. Legitimate government acts within the limits of the authority rational men would, abstractedly and hypothetically, have to give a government they are founding. Legitimate government is government which *deserves* consent.<sup>142</sup>

She adds:

[Hypothetical consent] teaches that your obligation depends not on any actual act of consenting, past or present, by yourself or your fellow-citizens, but on the character of the government. If it is a good, just government doing what a government should, then you must obey it; if it is a tyrannical, unjust government trying to do what no government may, then you have no such obligation. Or to put it another

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140. Cf. Frederick G. Whelan, *Citizenship and the Right to Leave*, 75 AM. POL. SCI. REV. 636, 641 (1981) (noting that the “feudal contract between vassal and lord” could not be dissolved unilaterally).

141. Cf. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1610 (1986) (“violence of judges”).

142. Hannah Pitkin, *Obligation and Consent—I*, 59 AM. POL. SCI. REV. 990, 999 (1965) (citing STANLEY I. BENN & R.S. PETERS, SOCIAL PRINCIPLES AND THE DEMOCRATIC STATE 323, 329 (1959)).

way, your obligation depends not on whether you have consented but on whether the government is such that you *ought* to consent to it, whether its actions are in accord with the authority a hypothetical group of rational men [and women] in a hypothetical state of nature would have (had) to give any government they were founding.<sup>143</sup>

Pitkin's model assumes a few baseline factors. First, the model presumes that a government has been formed in accordance with some original contract, likely in the form of a foundational document like the Constitution. Second, the model presumes that there is some manner by which the persons whom the government purports to govern can assess the performance of the government on a real-time basis so as to make informed judgments about the performance of the government. This, almost by definition, requires an open and transparent government. The United States government and the Constitution appear to fit the bill for these baseline factors. For Indian tribes, a treaty, or even the act of federal recognition could serve as the foundational document or moment.

Hypothetical consent is based on mere reasonability. Pitkin makes clear that the governed people's assessment and judgment of the government must be reasonable,<sup>144</sup> a useful theoretical twist. She asserts that the people must look inward on an individual basis to judge whether the government is worth the consent that it demands.<sup>145</sup> But her theoretical twist creates another problem—what is reasonable, and to whom? She offers the dichotomy of a just government and a tyrannical government as a means to define, broadly, what she means by reasonable. There are problems with the vagueness of this theory, most especially in regard to how far a government must go before consent is no longer earned. But for the purposes of this proposal, the “just” versus “tyrannical” dichotomy could suffice, given the extreme character of federal Indian law in some contexts.

Pitkin does offer several hypotheticals to flesh out what she means by a government that has earned the consent of its governed.<sup>146</sup> In doing so, she completes her theoretical

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143. Hannah Pitkin, *Obligation and Consent—II*, 60 AM. POL. SCI. REV. 39, 39 (1966).

144. *See id.* at 40–41.

145. *See id.* at 42.

146. *See id.* at 40 (listing several, including African-Americans in Mississippi, Blacks in South Africa, and “minor official[s] in Nazi Germany”).

groundwork by introducing the concepts of resistance to and revolution against an unjust government, grounded in no small way in the right to exit. At some point, once the scales of “just” versus “tyrannical” government have tipped far enough to the “tyrannical” side, the governed stop consenting because the government no longer deserves the consent of the governed. At that point, Pitkin raises the question of when a person has an affirmative obligation to resist the government.<sup>147</sup> She points to the example of a rank-and-file Nazi, who knows what the government is doing and knows that it is wrong on a fundamental level.<sup>148</sup> The Nazi hypothetical is an easy question, but she also raises the hypothetical of an African-American citizen in Mississippi during the 1950s and 1960s.<sup>149</sup> In this hypothetical, we can use Pitkin’s theory to create a nuance useful for our purposes. Herein lies the distinction between the duties to resist and the duties to revolt, though there are no exact lines. The Nazi has an obligation to revolt, because the national government is utterly and completely tyrannical and illegal. The African-American in the Jim Crow South is obligated to resist local and state government, but not necessarily national government, especially after 1954’s *Brown v. Board of Education*.<sup>150</sup> The 1950s and 1960s United States government still deserved, although perhaps only barely, the consent of its populace, while some local and state governments had likely lost that status.<sup>151</sup>

Developing and parsing Pitkin’s theory more, we reach the question of whether individual acts of the government may be resisted. Surely if the Supreme Court had decided *Brown v. Board of Education*<sup>152</sup> the other way, there would be a move to resist the outcome. However, consider *Roe v. Wade*,<sup>153</sup> a decision that many people feel deserves the resistance of the people, while many others just as strongly feel deserves the re-

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147. *See id.* at 40–41.

148. *See id.* at 41.

149. *See id.*; cf. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 110–11 (1975) (citing *Cooper v. Aaron*, 358 U.S. 1 (1958) (raising the same question from the point of view of the Southern states)).

150. 347 U.S. 483 (1954).

151. Cf. Pitkin, *supra* note 143, at 43–44 (describing how an individual could evaluate a government to determine the legitimacy of that government, and whether to consent to that government).

152. 347 U.S. 483 (1954).

153. 410 U.S. 113 (1973).

spect of the people.<sup>154</sup> Despite Pitkin's efforts to create a roadmap of consent and resistance to government usable for the common person, her theory breaks down here to some extent given the incredible and often illegal and violent resistance generated by cases like *Brown* and *Roe*. A new dichotomy arises involving the relative amount of resistance to an act of government that is valid and reasonable. Pitkin's articulation of hypothetical consent implies that the threat of literal resistance to government control is fundamental to her consent theory, but she does not articulate how any reasonable person could resist in a viable way. Hypothetical consent can be said, perhaps, like all consent theory derivations, to be a failure.

However, Pitkin's theory of hypothetical consent creates enough groundwork for the purposes of this project, which is to analyze and theorize the consent of Indian tribes to the United States government, and in particular the federal judiciary. A theory of tribal consent must be cognizant of the reality of the relationship between Indian nations and the federal government, one that is based heavily on *literal consent and reasonable resistance*.<sup>155</sup> There are at least three key reasons why unaltered hypothetical consent is simply insufficient in an analysis of tribal consent. First, unlike American citizens and even states, Indian nations (and individual Indians) have been subjected to a wide variety of federal government laws and control throughout American history to which no reasonable person or entity would consent.<sup>156</sup> Second, also unlike American citizens and states, who are parties to the Constitution, Indian nations have little or no remedy or protection in the Constitution from the ravages of government abuses. Finally, unlike American citizens and states, which consented to a small number of organic documents such as the Declaration of Independence and the Constitution, each Indian nation's consent manifests itself (if at all) in organic documents unique to each

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154. Cf. Kevin W. Saunders, *Privacy and Social Contract: A Defense of Judicial Activism in Privacy Cases*, 33 ARIZ. L. REV. 811, 818–19 (1991) (suggesting that the social contract may limit the authority of legislatures in privacy cases).

155. Cf. DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 245–46 (1989) (recognizing substance to consent); *id.* at 3 (noting difference between “choice” and “consent”).

156. *E.g.*, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (upholding sale of Indian land to non-Indians over opposition of Indian landowners); *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) (affirming money judgment relating to the taking of Black Hills without tribal consent).

Indian nation, such as treaties or other agreements and transactions.

Incidents in American history support the ongoing give and take between Indian nations and the United States. Without active and open resistance to federal (and state) government abuses, there would be no Indian nations in the United States today.<sup>157</sup> Tribal and individual Indian resistance to federal law often is reasonable and occasionally very successful. The next part details how Indian nations can and should resist federal courts in the context of tribal court jurisdiction over claims brought against nonmembers, one of the crisis points in modern federal Indian law jurisprudence.

### III. RESISTING FEDERAL COURT AUTHORITY OVER TRIBAL COURT CIVIL ACTIONS

Non-tribal member activity in Indian country is some of the least governed activity in the United States. State governments generally have no criminal jurisdiction over nonmembers in Indian country,<sup>158</sup> and even when they do their governance is weak and inefficient at best.<sup>159</sup> Tribal governments have *no* criminal jurisdiction over non-Indians<sup>160</sup> and severely circumscribed civil authority over nonmembers.<sup>161</sup> The federal government has plenary authority over nonmembers in Indian country but little capacity to exercise that authority. As a result, non-Indians are more likely to commit violent crimes against Indians (especially Indian women<sup>162</sup>), and nonmembers are more likely to engage in destructive and exploita-

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157. For example, recognition of treaty rights arose out of “fish-ins,” assertions of the right to fish without a state permit that technically violated state law. See, e.g., *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979). See generally Vine Deloria, Jr., *Alcatraz, Activism, and Accommodation*, in *AMERICAN INDIAN ACTIVISM: ALCATRAZ TO THE LONGEST WALK* 45, 47 (Troy R. Johnson, Joane Nagel, & Duane Champagne eds., 1997).

158. See *Negonsott v. Samuels*, 507 U.S. 99, 102–03 (1993) (citing cases); see also *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 359 (1962).

159. See Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 *CONN. L. REV.* 697, 698 (2006).

160. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

161. See, e.g., *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997).

162. See AMNESTY INTERNATIONAL, *MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA* 1–2 (2007), available at <http://www.amnestyusa.org/women/maze/report.pdf>.

tive behavior in Indian country absent adequate civil controls over them.<sup>163</sup>

### A. *A Straight Challenge to National Farmers*

It is time for Indian tribes to actively and strategically resist the Supreme Court in the context of tribal court civil jurisdiction over nonmembers. The Supreme Court's authority to declare what authority an Indian tribe possesses, especially a tribal court, is doubtful.<sup>164</sup> The Court's authority to determine whether a tribal court has authority over a nonmember in a civil action is based on a federal common law cause of action that the Court itself created in 1985.<sup>165</sup> Once a nonmember invokes the federal cause of action, the Court applies the two *Montana* exceptions,<sup>166</sup> which are very limited exceptions to a general rule barring tribal civil jurisdiction over nonmembers that frequently forecloses tribal civil jurisdiction over nonmembers, no matter how terrible and destructive their behavior. Even tribal courts apply the *Montana* rubric (or at least review whether *Montana* is consistent with the tribe's exercise of jurisdiction), often limiting themselves by preemptively applying the Court's judge-made test first<sup>167</sup>—a task many tribal

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163. See N. BRUCE DUTHU, *AMERICAN INDIANS AND THE LAW* 6–7 (2008) (cavassing several cases involving torts of non-Indians against Indian people).

164. This frequently overlooked point is far from a new observation. See *United States v. Kagama*, 118 U.S. 375, 378–79 (1886) (questioning Congress's authority under the Indian Commerce Clause); *United States v. Lara*, 541 U.S. 193, 215 (2004) (Thomas, J., concurring) (questioning Congress's authority under the Indian Commerce Clause and other constitutional provisions); VINE DELORIA, JR. & DAVID E. WILKINS, *TRIBES, TREATIES, & CONSTITUTIONAL TRIBULATIONS* 156–62 (1999); FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 120–22 (1995).

165. See *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853–54 (1985); see also *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987).

166. See *Montana v. United States*, 450 U.S. 544, 565–66 (1981).

167. *E.g.*, *Confederated Tribes of Grand Ronde v. Strategic Wealth Mgmt. Inc.*, 6 Am. Tribal Law 126, 134–36 (Grand Ronde Tribal Ct. 2005) (applying *Montana* to determine whether the court had jurisdiction over non-Indian financial advisors); *Smith v. Salish Kootenai Coll.*, 4 Am. Tribal Law 90, 96–99 (Salish-Kootenai Ct. of App. 2003) (applying *Montana* to decide whether the court had jurisdiction over non-Indian tortfeasor); *Lilly v. Davis*, 2 Am. Tribal Law 173, 175–78 (Fort Peck Ct. of App. 2000) (applying *Montana* to decide whether the court had jurisdiction over non-Indian law enforcement officers); *Ho-Chunk Nation v. Olsen*, 2 Am. Tribal Law 299, 305–06 (Ho-Chunk Nation Tribal Ct. 2000) (applying *Montana* to determine whether the court had jurisdiction over non-Indian property owners).

courts are not obligated to undertake. The first step in tribal resistance should be to apply a truly *tribal* jurisdictional test.

Many tribes have adopted constitutional provisions or statutes that articulate rules about tribal court jurisdiction that differ from *Montana* in fundamental ways, though many of these same tribes have adopted clauses noting that the tribe will not go further than “federal law” proscribes.<sup>168</sup> Other tribes, such as the Little Traverse Bay Bands of Odawa Indians, assert jurisdiction over all persons via the tribal constitution, even those beyond tribal lands in certain circumstances, *without* a federal law limitations clause.<sup>169</sup> Of note, the Navajo Nation Supreme Court’s jurisprudence recognizes the limitations of *Montana* while focusing more on the treaties establishing the Navajo reservation boundaries.<sup>170</sup>

But a second and more important step is to resist the federal judiciary’s assertion of jurisdiction to determine tribal court jurisdiction, a step which might include tribal court efforts to assert civil jurisdiction over nonmembers, perhaps even in the face of a federal order to halt. This is a more difficult step, but not if one recalls that Indian tribes never consented to the Constitution and hence never consented to Supreme Court judicial review or supervisory power. Moreover, Congress has never even purported to extend to the Supreme Court the general authority to decide questions of tribal court jurisdiction. Under its own principles of judicial authority, and its own interpretation of its Article III powers, the Supreme Court arguably has no such authority and would not have even the pretense of authority unless it simply arrogated to itself such authority. Federal and state courts *do* have authority to review tribal court civil judgments once the judgment winner appears in those courts to enforce the judgment, allowing for the necessary review of tribal court jurisdiction and public policy.<sup>171</sup> However, most Supreme Court cases in the area appear

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168. *E.g.*, CONST. OF THE LITTLE RIVER BAND OF OTTAWA INDIANS art. I, § 2.

169. CONST. OF THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS art. IV, § B, available at <http://www.narf.org/nill/Codes/ltraverse/t1.pdf>.

170. *Cf. generally* RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE 34–35 (2009) (discussing the Navajo Nation’s territorial jurisdiction statute).

171. *E.g.*, *MacArthur v. San Juan County*, 497 F.3d 1057, 1065–67 (10th Cir. 2007); *Wilson v. Marchington*, 127 F.3d 805, 807 (9th Cir. 1997); *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 665 N.W.2d 899, 916–17 (Wis. 2003).

to arise under the federal common law cause of action to discern tribal court jurisdiction.<sup>172</sup>

The Supreme Court's decision in *National Farmers* established the federal common law cause of action at issue.<sup>173</sup> There, the federal district court held that it had "acqui[red] jurisdiction . . . by way of federal common law" to enjoin a tribal court plaintiff from seeking to enforce a tribal court default judgment issued against the insurance company.<sup>174</sup>

The Ninth Circuit reversed 2–1 on grounds that no federal common law cause of action existed.<sup>175</sup> The majority opinion asserted that Congress, in enacting the Indian Civil Rights Act ("ICRA") with its habeas provision, intended to exclude a federal common law cause of action for persons challenging tribal court jurisdiction:

*Oliphant v. Suquamish Indian Tribe* . . . came to the federal courts by way of a petition for habeas corpus. . . . Congress, when it enacted the ICRA, purposefully restricted federal court interference with the proceedings of tribal courts to review on[ly] petitions for habeas corpus. . . . In asking that we recognize a civil cause of action arising under federal common law, National is requesting that we supplement a remedy Congress intended to be exclusive, and that we do so without statutory authority.<sup>176</sup>

The dissenting judge asserted that tribal courts not subject to federal court control or oversight might overreach, with their authority "limited only by the presence of seizable assets with-

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172. *E.g.*, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709, 2716 (2008); *Nevada v. Hicks*, 533 U.S. 353, 357 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438, 444 (1997).

173. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856–57 (1985).

174. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 560 F. Supp. 213, 215, 218 (D. Mont. 1983), *rev'd*, 736 F.2d 1320 (9th Cir 1984), *rev'd*, 471 U.S. 845 (1985). It is interesting that the court issued equitable relief, not against the tribal court or tribal court judge, but against the plaintiff. More recent cases in this area involve an order directing the tribal court or judge as the defendant to dismiss a claim, cease proceedings, or decline to enforce a judgment. *Cf. Strate*, 520 U.S. 438 (tribal judge as defendant); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, No. CV-08-0474-PHX-DGC, 2009 WL 3089216, at \*13 (D. Ariz. Sept. 23, 2009) (tribal judge as defendant). Perhaps choice of defendant appears to be irrelevant if the remedy sought is equitable.

175. *See Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 736 F.2d 1320, 1323 (9th Cir. 1984), *rev'd*, 471 U.S. 845 (1985).

176. *Id.* (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 67–70 (1978)).

in the reservation.”<sup>177</sup> The concern that tribal courts might (and perhaps do) overreach without a supervising court to restrain them is, of course, the dominant concern of federal judges when it comes to tribal court jurisdiction, especially over nonmembers.<sup>178</sup>

The majority opinion also cited Supreme Court precedent involving an area of law—water regulation—that was an area of federal common law until Congress enacted the Clean Water Act in 1972.<sup>179</sup> In *Milwaukee v. Illinois*, the Court held that it would not apply higher water pollution standards than those mandated by Congress in the Act on grounds that federal common law had been preempted.<sup>180</sup> The Court wrote that the adoption of federal common law was unusual to say the least, and especially disfavored where Congress had legislated in the field:

When Congress has not spoken to a particular issue, however, and when there exists a “significant conflict between some federal policy or interest and the use of state law,” the Court has found it necessary, in a “few and restricted” instances, to develop federal common law. Nothing in this process suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable. We have always recognized that federal common law is “subject to the paramount authority of Congress.” It is resorted to “[i]n absence of an applicable Act of Congress,” and because the Court is compelled to consider federal questions “which cannot be answered from federal statutes alone[.]” Federal common law is a “necessary expedient,” and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.<sup>181</sup>

The Court did cite to an older Indian law case, where it wrote, “Congress has not specifically provided for the present contingency. . . . It has left such . . . details to judicial implica-

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177. *Nat'l Farmers*, 736 F.2d at 1325–26 (Wright, J., dissenting).

178. *E.g.*, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709, 2724 (2009); *Nevada v. Hicks*, 533 U.S. 353, 383 (2001) (Souter, J., concurring).

179. *See Nat'l Farmers*, 736 F.2d at 1325–26 (Wright, J., dissenting).

180. *See Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981).

181. *Id.* at 313–14 (citations and footnotes omitted).

tions.”<sup>182</sup> This dictum set the stage for the Supreme Court’s decision in *National Farmers*.

*National Farmers* dramatically expanded the notion of federal common law in the Indian law context, holding in a simple syllogism that whether tribal courts have jurisdiction over nonmember civil defendants in a given case is a question arising under federal law, and therefore section 1331 of the Judicial Code authorizes federal courts to give an answer.<sup>183</sup> The Court had a long history of adopting federal common law causes of action in Indian law, but, in each instance, Congress had created a right without any specified remedy. For example, Congress had prohibited sales of Indian lands to anyone absent the consent of Congress, but did not create a cause of action in federal court to void such sales, and so the Supreme Court created one.<sup>184</sup> Similarly, when the United States sued a county on behalf of an Indian tribe for interest in back taxes illegally collected by the county, the Court applied federal common law to determine whether such interest was recoverable.<sup>185</sup> In none of these prior circumstances had the Court created a federal common law cause of action from scratch, by articulating a common law right *and* a federal court remedy.<sup>186</sup>

Ironically, in rejecting claims by the nonmember petitioners that exhaustion of tribal court remedies is unnecessary, the Court made the case for why no federal common law cause of action should exist:

If we were to apply the *Oliphant* rule here, it is plain that any exhaustion requirement would be completely foreclosed because federal courts would always be the only forums for civil actions against non-Indians. For several reasons, however, the reasoning of *Oliphant* does not apply to this case. First, although Congress’ decision to extend the criminal jurisdiction of the federal courts to offenses committed by non-

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182. *Bd. of Comm’rs of Jackson County v. United States*, 308 U.S. 343, 349 (1939).

183. *See Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985).

184. *See Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 237–39 (1985). The Court cited to numerous other instances where the Court assumed that a federal common law cause of action existed allowing suit to recover Indian lands. *See id.* at 235–36 (collecting cases).

185. *See Bd. of Comm’rs of Jackson County*, 308 U.S. at 349.

186. Even in the classic Supreme Court case creating a federal common law cause of action, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971), the Court recognized the cause of action to enforce federal constitutional rights against federal officials.

Indians against Indians within Indian country supported the holding in *Oliphant*, *there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation*. Moreover, the opinion of one Attorney General on which we relied in *Oliphant*, specifically noted the difference between civil and criminal jurisdiction. Speaking of civil jurisdiction, Attorney General Cushing wrote:

“But there is no provision of treaty, and no statute, which takes away from the Choctaws jurisdiction of a case like this, a question of property strictly internal to the Choctaw nation; nor is there any written law which confers jurisdiction of such a case in any court of the United States.

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*“The conclusion seems to me irresistible, not that such questions are justiciable nowhere, but that they remain subject to the local jurisdiction of the Choctaws.*

\* \* \*

“Now, it is admitted on all hands . . . that *Congress* has ‘paramount right’ to legislate in regard to this question, in all its relations. It has legislated, in so far as it *saw fit, by taking jurisdiction in criminal matters, and omitting to take jurisdiction in civil matters.* . . . By all possible rules of construction the inference is clear that jurisdiction is left to the Choctaws themselves of civil controversies arising strictly within the Choctaw Nation.”<sup>187</sup>

In other words, the Court in *National Farmers* somewhat casually assumed that federal courts have jurisdiction to hear challenges to tribal court jurisdiction over nonmembers, despite an Attorney General opinion explicitly rejecting such a conclusion—an Attorney General opinion the Court itself had relied upon in *Oliphant*.<sup>188</sup>

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187. *Nat'l Farmers*, 471 U.S. 854–55 (quoting 7 Op. Atty. Gen. 175, 179–81 (1855)) (emphasis added; Court's emphasis omitted).

188. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 199 (1978) (citing 7 Op. Atty. Gen. 174 (1855)).

*National Farmers* appears to be an example of what one distinguished commentator describes as “pure federal common law.”<sup>189</sup> “Pure” federal common law exists where the Supreme Court identifies a right as a matter of federal common law and then identifies a cause of action under federal common law.<sup>190</sup> The Court’s simple syllogism in *National Farmers* has not been followed by the Court in recent years, where the Court has rejected federal court jurisdiction over asserted federal causes of action. It has held, for example, that it “will create pure federal common law only when the issue at hand is uniquely federal and the application of state law would create a significant conflict with an identifiable federal policy or interest.”<sup>191</sup>

The holding in *National Farmers* is water under the bridge, although parts of it are subject to rigorous scholarly criticism,<sup>192</sup> and it is possible that the tribal court exhaustion doctrine will be distinguished out of existence by the Supreme Court.<sup>193</sup> For now, the common law cause of action allowing federal courts to accept challenges by nonmembers to tribal court civil jurisdiction appears to be bedrock law.

Or is it?

There are really two kinds of cases in which nonmembers challenge the civil jurisdiction of tribal courts over them. The first kind is where the tribal court has issued a judgment and perhaps a money award against the nonmember defendant, and the plaintiff seeks to enforce the award in federal court. One recent important case is *Wilson v. Marchington*,<sup>194</sup> where the Ninth Circuit refused to enforce a tribal court judgment awarding \$246,100 against a nonmember tortfeasor.<sup>195</sup> This is a perfectly legitimate form of federal jurisdiction, regardless of whether one agrees with the result. Courts have every right to

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189. Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. § 1331 Jurisdiction*, 61 VAND. L. REV. 1667, 1716 (2008).

190. *See id.* at 1716–21.

191. *Id.* at 1717–18 (citing *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006)).

192. *E.g.*, Robert N. Clinton, *Comity & Colonialism: The Federal Courts’ Frustration of Tribal↔Federal Cooperation*, 36 ARIZ. ST. L.J. 1, 30–34 (2004); Frank Pommersheim, “Our Federalism” in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts’ Teaching and Scholarly Community, 71 U. COLO. L. REV. 123, 174 (2000) (“Without much concern for this issue, federal courts have routinely, if not blithely, assumed jurisdiction to review tribal court jurisdiction without any constitutional or statutory mandate to do so.”).

193. *See, e.g.*, *Strate v. A-1 Contractors*, 520 U.S. 438, 449–53 (1997) (noting that the tribal court exhaustion doctrine may be excused in some circumstances).

194. 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

195. *See id.* at 813.

determine whether to enforce foreign judgments, and this Paper does not challenge that authority.

The second kind of federal jurisdiction is by far the more common case, where the nonmember has lost a tribal court judgment (or merely has been sued in tribal court) and seeks injunctive relief from the federal court declaring that no tribal court jurisdiction exists and an order forcing the tribal court from either continuing with the case or preventing it from enforcing the judgment. In fact, all of the Supreme Court cases addressing tribal court civil jurisdiction over nonmembers are this kind of case. *Strate v. A-1 Contractors*,<sup>196</sup> the first Supreme Court case passing explicit judgment on tribal court jurisdiction, reached the federal courts after the tribal court of appeals held that it had jurisdiction over the nonmember defendants on an action for a declaratory judgment and before any tribal court judgment on the merits had been reached.<sup>197</sup> *Nevada v. Hicks*<sup>198</sup> similarly reached the federal courts on Nevada's claim for declaratory relief after the tribal court of appeals held it had jurisdiction but before a judgment on the merits had been reached.<sup>199</sup> The most recent Supreme Court case passing judgment on tribal court jurisdiction, *Plains Commerce Bank v. Long Family Land and Cattle Co.*,<sup>200</sup> involved the same claim by the nonmember defendant, though in that case the tribal court had reached a money judgment against the defendant.<sup>201</sup>

This second kind of case is the sort authorized by *National Farmers'* establishment of a pure federal common law cause of action—something the Supreme Court simply doesn't do anymore in any other context.<sup>202</sup> *National Farmers* is an outlier in that the Court would have been unlikely to adopt such a common law rule and remedy in any other context besides Indian law.

Here is where tribal resistance can and must flourish. There are at least three means of resisting federal court supervision of tribal courts as established in *National Farmers*. The first line of resistance is to refuse recognition of the legitimacy of federal court jurisdiction over *National Farmers* suits. Re-

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196. 520 U.S. 438 (1997).

197. *See id.* at 447.

198. 533 U.S. 353 (2001).

199. *See id.* at 357.

200. 128 S. Ct. 2709 (2008).

201. *See id.* at 2716.

202. *See* Mulligan, *supra* note 189, at 1721–26 (offering examples).

sistance here is legally easy (though not politically, perhaps)—tribal courts and tribal judges sued in federal court for declaratory and injunctive relief simply need not appear.<sup>203</sup> Of course, this is what the State of Georgia did in the Cherokee Cases—refuse to appear. They lost on the merits, but won on the political stage, forcing the Cherokee Trail of Tears.<sup>204</sup> Georgia is no perfect analogy, given that the state government there was a bad actor, trying to take Indian lands and protect its interest in slavery by resisting the federal government.<sup>205</sup> But there are lessons to learn from that story.

The second means of resistance is for the tribal parties in interest to litigate aggressively against the *National Farmers* precedent, relying upon the more recent Supreme Court cases disfavoring pure federal common law actions. There are risks, to be sure, for the lawyers making these claims, but they are likely minimal.<sup>206</sup> Perhaps, somehow, a federal circuit will be persuaded that the foundations of *National Farmers*' federal common law cause of action are no longer viable and hold that there is no federal court jurisdiction to entertain challenges to tribal court civil jurisdiction absent an Act of Congress.<sup>207</sup>

An additional mode of resistance (noted in the introduction to this Paper) involves a refusal to comply with a federal court order.<sup>208</sup> As one of my colleagues at Michigan State Law

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203. Over the decades since *National Farmers*, there seems to have been confusion as to who the proper defendant in the federal case should be. In *National Farmers*, the defendant was the Crow Tribe. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 845 (1985). In more recent cases, the defendant typically is the tribal court or the tribal judge in his or her official capacity. *E.g.*, *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 845 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 624 (2009); *BNSF Ry. v. Ray*, 297 Fed. App'x. 675, 2008 WL 4710778 (9th Cir. Oct. 22, 2008). In some cases, bafflingly, the tribal court judge herself appears to defend tribal court jurisdiction. *E.g.*, *Acosta-Vigil v. Delorme-Gaines*, 672 F. Supp. 2d 1194 (D.N.M. 2009); *Azure v. Turtle Mountain Tribal Court*, No. 4:08-cv-095, 2009 WL 113597 (D.N.D. Jan. 15, 2009).

204. *See* 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 729–71 (rev. ed. 1926).

205. *See id.*

206. *See generally* Matthew L.M. Fletcher, *The Ethics of Pushing the Envelope in Indian Law Cases*, MSU Legal Studies Research Paper No. 07-01 (Feb. 20, 2009), available at <http://ssrn.com/abstract=1346938> (surveying cases and finding that many Indian law-related arguments are protected efforts to impose law reform).

207. *Cf.* *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60–70 (1978) (holding that no implied cause of action exists to enforce the civil provisions of the Indian Civil Rights Act).

208. *Cf.* EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP* 61 (2010) (discussing how “local courts simply ignored the high

School kindly informed me, any tribal court judge refusing to comply with a court order should expect to be introduced to a cell at Leavenworth. That may be true, especially considering the federal judiciary's embrace of the "Courts of the conqueror" mantle.<sup>209</sup>

But the federal courts' efforts (assuming they go this route) call into direct question the authority of an Article III judge to issue a contempt citation against the judiciary of the third sovereign without express authorization from Congress, and where the cited party is not a party to the Constitution. Recall that classic consent theory demonstrates that government authority absent the consent of the governed, which can be memorialized and perhaps even established by legislation or constitutional provision, is government by *violence*.<sup>210</sup>

Resistance in this vein requires an examination of the practical consequences to the parties (assuming the tribal judge avoids a federal prison cell). Likely, after a tribal court continues to proceed in a civil action with a nonmember defendant despite a contrary federal court ruling, one would expect the defendant simply not to appear. This is an all-too-frequent occurrence in Indian country courts, despite *National Farmers'* warning to exhaust tribal court remedies before accessing the federal courts to complain about tribal jurisdiction. These cases typically end in a default judgment, often unenforceable by the tribal court due to the lack of assets housed in the court's jurisdiction. One might think that such resistance, culminating in an unenforceable default judgment, is useless.

However, it might not be. Over a decade ago, the St. Regis Mohawk tribal court issued a default judgment against Harrah's, which simply had refused to appear before a tribal court.<sup>211</sup> The tribal court, as it must, proceeded to analyze the

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court's ruling [in *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823)] and continued to enforce . . . popular state law.").

209. *E.g.*, *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 280 (1955) (quoting *Johnson v. McIntosh*, 21 U.S. 543, 588 (1823)); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 58 (1946).

210. *Cf. Cover, supra* note 141, at 1617 ("Legal interpretation must be capable of transforming itself into action; it must be capable of overcoming inhibitions against violence in order to generate its requisite deeds; it must be capable of massing a sufficient degree of violence to deter reprisal and revenge."); H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION* 15 (2008) (discussing the U.S. constitutional system's apparent allowance of a "judicial oligarchy" in the form of the Supreme Court).

211. *See Arquette v. Park Place Entm't Corp.*, No. 00CI0133 (St. Regis Mohawk Tribal Ct. Mar. 20, 2001). This case is excerpted in chapter 12 of my forth-

merits of the claims against Harrah's, largely based on an alleged interference with a gaming development contract. Because Harrah's did not defend, the court accepted the reasonable theory of liability and damages for the contract interference and awarded a multi-billion dollar judgment against Harrah's. Harrah's counsel likely believed that a tribal court judgment in that amount was preposterous and vigorously defended efforts by the plaintiffs to enforce the judgment in state and federal courts.<sup>212</sup> But Harrah's moment of defiance cost the company dearly. It carried the multi-billion dollar judgment in its SEC EDGAR filings<sup>213</sup> for years while the enforcement actions proceeded in various courts.<sup>214</sup> The value of the company took a serious hit during a time when it was for sale—a real-world consequence of the tribal court judgment (later held unenforceable for various reasons).<sup>215</sup>

In less dramatic financial circumstances, tribal courts have imposed civil fines and enforced civil forfeiture laws against nonmembers who allegedly harvested illegal tribal timber,<sup>216</sup> brought guns and drugs onto Indian trust lands,<sup>217</sup> and committed civil traffic offenses.<sup>218</sup> Nonmembers faced with these citations routinely pay them, sometimes to avoid the hassle of carrying a civil court judgment against them, and sometimes to avoid possible federal prosecution. Finally, it is becoming routine for state courts to enforce tribal court judgments in non-controversial cases.<sup>219</sup>

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coming casebook, MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW (forthcoming 2012).

212. See *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 547 F.3d 115 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1908 (2009); *Vacco v. Harrah's Operating Co.*, 661 F. Supp. 2d 186 (N.D.N.Y. 2009).

213. The U.S. Security and Exchange Commission posts all required filings of corporate financial information on its EDGAR database online. See <http://www.sec.gov/edgar.shtml>.

214. Harrah's Entm't, Inc., Current Report, (Form 8-K) Exhibit. 99.1, at 21 (Mar. 25, 2008), available at <http://www.sec.gov/Archives/edgar/data/858339/000119312508064598/0001193125-08-064598-index.htm>.

215. E.g., Ryan Nakashima & William Kates, *A Tribe, a Casino, a \$2.8B Headache: Deal by its Predecessor May Hurt Harrah's Buyout*, STAR-LEDGER (Newark, N.J.), Oct. 28, 2007, at B1.

216. See *Moore v. Nelson*, 270 F.3d 789 (9th Cir. 2001).

217. See *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007).

218. See SKOKOMISH TRIBAL CODE, tit. 8, available at <http://www.narf.org/nill/Codes/skocode/8-64.pdf>.

219. E.g., *Mashantucket Pequot Gaming Enter. v. Yau*, No. 11789/2009 (N.Y. Sup. Ct., Feb. 17, 2010), available at <http://turtletalk.files.wordpress.com/2010/02/mashantucket-pequot-v-yau.pdf>.

Each example above is a case of tribal resistance to federal law. Does speeding on tribal roads constitute activity that meets the difficult burden of the *Montana* case? Well, if a nonmember tortfeasor that negligently kills tribal members is not subject to tribal jurisdiction, then probably not. The same might even be true for a drug-running nonmember or a nonmember carrying concealed firearms. And so tribal assertions of jurisdiction over these nonmembers are bold steps generating serious consequences. If nothing else, through lack of use or success, the federal common law cause of action created in *National Farmers* could become a dead letter.<sup>220</sup> At some point, the Court's pronouncements on tribal court jurisdiction will become largely irrelevant.

*B. A Reboot of the Federal Common Law of Tribal Court Jurisdiction*

An additional strategic means of resistance is through a careful litigation strategy to force certain fact patterns before the federal judiciary with the goal of securing a Supreme Court decision accepting tribal civil jurisdiction over nonmembers. It likely will take only one Supreme Court case to establish tribal civil jurisdiction over nonmembers, but the strategy to generate that one case involves thoughtful tribal government resistance to federal courts.<sup>221</sup>

Unlike criminal jurisdiction over non-Indians, the Supreme Court (and Congress) has grudgingly left open the question of tribal civil jurisdiction over nonmembers.<sup>222</sup> Amici supporting the non-Indian petitioner in *Plains Commerce Bank v. Long Family Land & Cattle Co.* invited the Supreme Court to eliminate the possibility that tribes could ever assert civil jurisdiction over nonmembers.<sup>223</sup> Each new tribal court jurisdic-

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220. Cf. generally Robert Odawi Porter, *The Inapplicability of American Law to Indian Nations*, 89 IOWA L. REV. 1595 (2004).

221. See Matthew L.M. Fletcher, *Rebooting Indian Law in the Supreme Court*, 55 S.D. L. REV. 510 (2010).

222. It is important to note the distinction between tribal criminal jurisdiction, which covers both tribal members and nonmember Indians, and tribal civil jurisdiction, which covers tribal members only. Compare, e.g., *United States v. Lara*, 541 U.S. 193 (2004) (nonmember Indians), and *United States v. Wheeler*, 435 U.S. 313 (1978) (tribal members), with, e.g., *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (referencing "nonmembers" in this context), and *Montana v. United States*, 450 U.S. 544 (1981) (same).

223. See Brief of Mountain States Legal Found. as Amicus Curiae Supporting Petitioner at 2, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S.

tion case reaching the Supreme Court is another opportunity for the Court to end all possibility of tribal court jurisdiction.

But it is also an opportunity for tribal interests to succeed, assuming the right vehicle reaches the Court. Efforts by tribal law enforcement to enforce civil offenses and civil forfeiture on trust lands, and especially at a tribal business enterprise, might suffice. Some tribes, such as the Pokagon Band of Potawatomi Indians<sup>224</sup> and the Muscogee (Creek) Nation,<sup>225</sup> have begun to enforce civil offense ordinances against non-Indians coming onto the reservation for business purposes. In essence, the non-Indians cited have committed criminal acts, and the tribal government proceeds with asserting civil jurisdiction consistent with the Supreme Court's rulings. The enforcement of tribal civil offenses against non-Indian perpetrators can be said to be the only conceivable remedy for the tribe, because state law enforcement has no jurisdiction and federal law enforcement is not guaranteed, given the disproportionate levels of federal prosecution declinations.<sup>226</sup> Upon review under *National Farmers*, a federal court would then presumably apply the federal common law rules limiting tribal civil jurisdiction over nonmembers. Any court would be hard-pressed to rule against a tribe in favor of a non-Indian criminal perpetrator in circumstances where the non-Indian is free to commit misdemeanors without any chance of federal or state prosecution. At Muscogee, the non-Indian brought guns and drugs to the casino.<sup>227</sup> At Pokagon, a non-Indian brought a gun inside the casino and accidentally discharged it.<sup>228</sup> The only remedy availa-

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Ct. 2709 (2008) (No. 07-411) ("MSLF and its members believe that the only proper forum in which to litigate legal disputes between tribal members and non-members is State and federal courts, which apply law to all citizens, tribal members and non-members alike, in accordance with the federal and State constitutions and pursuant to well-established, documented, and verifiable law and procedure.").

224. See POKAGON BAND OF POTAWATOMI INDIANS CODE OF OFFENSES § 1(B) (2008). See also NOTTAWASEPPI HURON BAND OF POTAWATOMI INDIANS CIVIL INFRACTIONS CODE (2009).

225. See *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1008 (10th Cir. 2007).

226. See *Examining Federal Declinations to Prosecute Crimes in Indian Country: Hearing Before the Comm. on Indian Affairs*, 110th Cong. 42–45 (2009) (Statement of M. Brent Leonhard, Deputy Att'y Gen., Confederated Tribes of the Umatilla Indian Reservation).

227. See *Miner Elec.*, 505 F.3d at 1008.

228. Pokagon Band Tribal Court, *Fee Account Funds Received and Expended Report Log* (Feb. 26, 2010) (noting that Raymond Harris was charged with carrying a concealed weapon onto tribal lands on June 11, 2009).

ble in these cases (not just a select few the federal government can prosecute) is a tribal civil fine. All of the factors point toward recognizing tribal jurisdiction to enforce the civil fine in tribal courts and in other courts as well.

If the Court rejects the above analysis, it will be elevating the interests of worse and worse non-Indian actors over those of Indian people. In *Montana* and *Brendale*, the Court saw innocent non-Indian property owners challenging tribal regulatory authority.<sup>229</sup> In *Bourland*, the Court saw innocent non-Indian hunters.<sup>230</sup> In *Strate*, the Court saw a negligent non-Indian tortfeasor.<sup>231</sup> In *Atkinson Trading*, the Court saw a non-Indian business accepting a windfall in Navajo public services without paying taxes.<sup>232</sup> In *Plains Commerce*, the Court saw a non-Indian bank that refused to fulfill a promise to supply capital to an Indian rancher during a brutal winter, culminating in the death of the rancher's entire herd.<sup>233</sup> If the next case is a violent, intoxicated, drug-running or gun-smuggling non-Indian who has avoided federal and state prosecution, how can the Court still refuse to recognize tribal jurisdiction?

#### IV. TOWARD CONSENT AND RESISTANCE

The lack of valid consent has not prevented the United States from imposing plenary, exclusive, and at times absolute governmental authority over Indian tribes and Indian people. As consent theory suggests, without valid consent there is tyranny.<sup>234</sup> Federal-tribal relations throughout much of American history are marked with the characteristics of tyranny. Congress and the President—with the Supreme Court's passive compliance—undermined Indian tribal governance, alienated the vast majority of Indian land and assets for the benefit of

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229. See *Montana v. United States*, 450 U.S. 544, 547 (1981); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 417–19 (1989).

230. See *South Dakota v. Bourland*, 508 U.S. 679, 685 (1993).

231. See *Strate v. A-1 Contractors*, 520 U.S. 438, 442–43 (1997).

232. See *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647–48 (2001).

233. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2715–16 (2008).

234. See JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT paras. 199–210 (1690), reprinted in SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU 1, 116–22 (Ernest Barker ed., Oxford Univ. Press 1962) (1947).

non-Indian Americans, and reduced Indian people to a shell of their former cultural existence.<sup>235</sup>

The federal government utilized the flawed consent of tribal governments to enact laws and regulations that devastated individual Indian people and tribal political communities. In the past few decades, as Congress and the executive branch have turned toward Indian self-determination, many of the abuses have ceased or abated.<sup>236</sup> But some critical elements of tyranny remain. Congress jealously guards its plenary power over Indian affairs but also asserts power over internal Indian governance, with executive branch compliance. Worse, the Supreme Court asserts a form of judicial dominance over a wide variety of Indian affairs—including jurisdiction questions and states' authority over Indian tribes—and sets the metes and bounds of tribal authority. As the policymaking branches of the federal government slowly vacate the field of Indian affairs, the Supreme Court has stepped in as the primary policymaker, an unusual role for the judiciary.<sup>237</sup>

Now the Supreme Court takes affirmative steps to undercut tribal government authority, even as Congress and the executive branch begin to recognize and encourage tribal governance. For example, the Supreme Court has severely undercut the ability of Indian tribes *and* the executive branch to restore Indian property by adopting crabbed interpretations of statutory tools provided by Congress.<sup>238</sup> As Justice Scalia wrote to Justice Brennan in a private memorandum written two decades ago, the Court audaciously decides Indian cases in accordance with the way the law “ought to be” as opposed to the way the law is.<sup>239</sup>

Under this American power structure, it is too late to return much of the lost Indian property to their rightful heirs, and to return much of the destroyed Indian culture to its for-

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235. See WILCOMB E. WASHBURN, *RED MAN'S LAND / WHITE MAN'S LAW: A STUDY OF THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN* (1971).

236. See Fletcher, *supra* note 15, at 130–54.

237. See generally Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 460 (2005) (“Concerns about the exceptionalism of Indian law have even led some Justices to suggest that the Court, not Congress, should have the *final* say about some matters.”).

238. See *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009). For an early critique of *Carcieri*, see G. William Rice, *The Indian Reorganization Act, The Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri “Fix”: Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575, 592–608 (2009).

239. See Getches, *Conquering the Cultural Frontier*, *supra* note 30, at 1575 (quoting Justice Scalia).

mer place, but it is not too late to restore and validate tribal governance. The restoration of tribal governance is the first step in restoring Indian property and reviving tribal cultures. In the past, Congress and the President stood in the way, but now the Supreme Court itself is the major barrier. And yet, as the “least dangerous branch,”<sup>240</sup> the Supreme Court is the lesser long-term threat to tribal interests.

Indian nations must act on the reality that the Supreme Court’s federal common law decisions are out of step with Congress, the executive branch, and the law of tribes themselves. Indian nations must selectively resist the federal judiciary’s assertion of authority and jurisdiction and the Supreme Court’s pronouncements of national Indian affairs policy. Continued tribal resistance in the subject areas discussed within this Paper must be careful, reasonable, and strategic. Justice Brennan’s dissent in a key American Indian religious freedom case, which worried that the Supreme Court’s holdings on whether federal government action substantially burdens Indian religions actually would encourage Indian people to engage in criminal activity in order to protect religious practices, informs this thesis to some extent.<sup>241</sup> But resistance need not involve criminal activity. Resistance can and should be lawful

American history is replete with individual citizen resistance to government control. In fact, individual American resisters jump-started the American Revolution by objecting to English taxation and military prerogatives. American abolitionist citizens resisted southern states during pre-Civil War times,<sup>242</sup> and then Americans famously opposed the governments of the Jim Crow South in the 1950s and 1960s.<sup>243</sup> Americans have resisted the draft.<sup>244</sup> But Americans have also refused to pay federal taxes or recognize government law

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240. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (Yale Univ. Press 1986).

241. See *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988); Kristen A. Carpenter, Assoc. Professor of Law, Univ. of Colo. Law Sch., Address at the *University of Colorado Law Review* Symposium: “The Next Great Generation of American Indian Law Judges” (Jan. 29, 2010). Consider also that the parties most successful in challenging prosecutions under the Eagle Act are non-Indians arrested for illegally taking eagles.

242. See DWIGHT LOWELL DUMOND, *ANTISLAVERY ORIGINS OF THE CIVIL WAR IN THE UNITED STATES* (1959).

243. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

244. See HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES: 1492–PRESENT* 75, 78, 187, 409 (rev. and updated ed. 1995).

enforcement authority—movements often spearheaded (and perhaps sullied) by white supremacists and survivalists.<sup>245</sup> in other words, unreasonable people.<sup>246</sup> Moreover, the State of Georgia refused to appear in the Cherokee cases, asserting that state sovereignty foreclosed federal court jurisdiction over it.<sup>247</sup> In the decades leading up to the Civil War, many southern states engaged in efforts to nullify federal law, either by enacting legislation competing with Congressional acts or by refusing to comply with federal court orders.<sup>248</sup> After the Civil War, the southern states were so successful in resisting the Reconstruction Amendments that the resulting federal civil rights statutes remained unenforced for nearly a century after the end of the Civil War.<sup>249</sup> But states have something that Indian tribes do not: explicit constitutional protection, express language strongly preserving state sovereign authority, and a federal judiciary very respectful of states' rights. State resistance to federal control is *protected*, so long as it does not (as a general matter) significantly interfere with national interests. States have a direct line to the national government.<sup>250</sup>

Critical to this argument is historical Indian tribal and individual Indian resistance to government control. Given the absence of constitutional protections, it can be said without much exaggeration that without Indian resistance, there would be no Indian law and policy at all. Frankly, there would be no

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245. *E.g.*, S. Poverty Law Ctr., *Intelligence Report: Movement at Root of Recent Police Murders Growing* (Aug. 12, 2010), available at <http://www.splcenter.org/get-informed/news/intelligence-report-movement-at-root-of-recent-police-murders-growing-rapidly>.

246. See Angela P. Harris, *Vultures in Eagles' Clothing: Conspiracy and Racial Fantasy in Populist Legal Thought*, 10 MICH. J. RACE & L. 269, 312 (2005).

247. See 1 WARREN, *supra* note 204, at 745 (discussing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831)), and 754 (discussing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)).

248. American Indian law is famous for such state resistance to federal law. *E.g.*, *Washington v. Wash. State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 672–74 (1979) (noting that state supreme court had ordered state agencies not to comply with federal court orders); TIM ALAN GARRISON, *THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS* 119–24 (2002) (describing how the State of Georgia executed a Cherokee Indian, George Tassel, after the United States Supreme Court had granted leave for Tassel to appeal and stayed the execution in *Georgia v. Tassel*, 1 Dud. 229 (Ga. 1830)).

249. See generally ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 248–50 (3d ed. 2006).

250. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547–54 (1985) (detailing the advantages states enjoy in the federal constitutional structure).

Indians. From the framing of the Constitution until probably 1934, American Indian law and policy *assumed* that Indians would “vanish.”<sup>251</sup> American Indian resistance prevented the assumption from becoming reality. The modern examples of resistance leading to legitimate and significant change in the American Indian law context are fishing rights, smokeshops, and gaming.<sup>252</sup> In those instances, Indian people resisted state government discriminatory behavior and facially discriminatory laws. Such resistance is reasonable in the context of the consent theory propounded here.

Indian tribal consent to American governance may be impossible to generate; individual Indian consent may be similarly impossible to generate. However, building upon Pitkin’s conception of consent theory by allowing for some form of resistance, there is hope for legitimizing much of the structure of American Indian affairs.

Resistance is the foundation of Indian tribal existence to this day.<sup>253</sup> Indian tribes have resisted the United States from the beginning, and their resistance has taken every conceivable form. Indians and tribes have responded to their adversaries by establishing constitutional forms of governments,<sup>254</sup> by fighting wars,<sup>255</sup> by engaging in (mostly) nonviolent disobedience during the fishing wars,<sup>256</sup> by exploiting their immunity to state regulation and taxation,<sup>257</sup> by taking control of state

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251. See Lerner, *supra* note 127, at 203; see also BRIAN W. DIPPIC, *THE VANISHING AMERICAN: WHITE ATTITUDES & U.S. INDIAN POLICY* (1982).

252. See generally WILKINSON, *supra* note 20, at 150–73 (discussing fishing rights), 329–51 (discussing gaming); Robert B. Porter, *Building a New Longhouse: The Case for Government Reform within the Six Nations of the Haudenosaunee*, 46 *BUFF. L. REV.* 805, 897 (1998).

253. See generally Robert Odawi Porter, *Tribal Disobedience*, 11 *TEX. J. C.L. & C.R.* 137, 156–62 (2006).

254. See generally DAVID E. WILKINS, *DOCUMENTS OF NATIVE AMERICAN POLITICAL DEVELOPMENT: 1500S TO 1933* (2009).

255. See JENNINGS C. WISE, *THE RED MAN IN THE NEW WORLD DRAMA* 96–299 (Vine Deloria, Jr. ed. 1971).

256. See VINE DELORIA, JR., *INDIANS OF THE PACIFIC NORTHWEST: FROM THE COMING OF THE WHITE MAN TO THE PRESENT DAY* 145–76 (1977); ROBERT DOHERTY, *DISPUTED WATERS: NATIVE AMERICANS & THE GREAT LAKES FISHERY* (1990).

257. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (resisting state regulation); *In re Kan. Indians*, 72 U.S. (5 Wall.) 737 (1866) (resisting state taxation); *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968) (resisting state regulation of hunting and fishing rights).

highways on Indian lands,<sup>258</sup> by establishing progressive non-adversarial dispute resolution systems,<sup>259</sup> and so on. Paradoxically, given the Supreme Court's current self-adopted role, the Court once served as an important, but limited, counterpoint to the policymaking branches' assertion of plenary control.

Tribes remain under the "protection" of the United States and strive to observe and protect treaty and statutory rights and duties, while at the same time developing into modern American governments under the Self-Determination Era of federal policy.<sup>260</sup> Tribes are now able to resist the worst of congressional and executive branch law and policy by participating in the federal political process, utilizing lobbyists and regulatory experts to shape federal Indian policy as co-partners in the process.<sup>261</sup>

Tribes also now have the capacity to engage in strategic litigation to further discreet goals. However, unlike the law- and policy-making process, tribal interests are systematically thwarted in this arena. The Supreme Court appears to erect case-specific common law barriers to tribal claims as they arise,<sup>262</sup> generating confusion in an area of law that had been moving toward a semblance of stability in the 1980s. The Court's ad hoc approach to deciding Indian cases has begun to severely undermine the advances Indian tribes and policymaking branches of the federal government have made in progressing toward establishing Indian tribes in their rightful place as the third sovereign.

Resistance accomplishes at least two goals. First, it gives teeth and practical legitimacy to the consent theory proposed

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258. See Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 290 (1997).

259. See JUSTICE AS HEALING: INDIGENOUS WAYS 345–407 (Wanda D. McCaslin ed., 2005).

260. See DEAN HOWARD SMITH, MODERN TRIBAL DEVELOPMENT: PATHS TO SELF-SUFFICIENCY AND CULTURAL INTEGRITY IN INDIAN COUNTRY 33–37 (2000).

261. See Steven Andrew Light & Kathryn E. Rand, *The "Tribal Loophole": Federal Campaign Finance Law and Tribal Political Participation after Jack Abramoff*, 10 GAMING L. REV. 230, 234 (2006); see also Michael D. Oeser, *Tribal Citizen Participation in State and National Politics: Welcome Wagon or Trojan Horse?*, 36 WM. MITCHELL L. REV. 793, 797, 808, 809, 835 (2010) (describing tribal lobbying).

262. E.g., *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (rewriting Indian law preemption doctrine so as to deny its applicability in facts presented); *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) (creating laches doctrine that applies only to Indian claims).

here.<sup>263</sup> Ironically, resistance will help to vest Indian tribes in the American constitutional structure by providing Indian tribes a productive voice in the government. Tribes already have a voice, some would argue, by hiring powerful and well-connected lobbyists and influential Supreme Court litigators, but that is the same voice that any non-sovereign interest can purchase. Indian tribes are more than merely corporations or special interests, and if they are to be vested in the American constitutional structure, they must have the active ability to resist in a manner that a recognized sovereign entity should be able to pursue.

Second, resistance may actually undo some of the damage done by the Supreme Court in recent decades. Much of the Court's recent Indian law jurisprudence is built upon cases arising in areas where the Court would have no jurisdiction but for its own decisions, and involves application of federal common law that flies directly in the face of prevailing federal Indian policy.<sup>264</sup> Additionally, resistance to the Court's orders may force the Court to fundamentally reexamine its own jurisdiction to issue those orders.

A possible analogy here would be to Mark Tushnet's theory of "weak-form judicial review."<sup>265</sup> According to Tushnet, the American constitutional structure allows for a "strong-form" of judicial review, where the constitutional decisions of the Supreme Court are not reversible through ordinary legislative processes.<sup>266</sup> "Weak-form" judicial review allows for major constitutional decisions to be overridden through simple legislative enactments, something not available in the United States. Tushnet argues, however, that the Court already recognizes "weak-form" judicial review within the American "strong-form" structure—in the "area of economics and social welfare."<sup>267</sup> There are good reasons for the Court to follow a similar course

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263. Cf. PEÑALVER & KATYAL, *supra* note 208, at 169–226 (arguing that legal responses to property rights resisters can generate more clarity and fairness in property law).

264. *E.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008).

265. See Mark Tushnet, *Weak-Form Judicial Review and "Core" Civil Liberties*, 41 HARV. C.R.-C.L. L. REV. 1 (2006); see also MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 23 (2008) (defining "weak form systems of judicial review").

266. See TUSHNET, *WEAK COURTS, STRONG RIGHTS*, *supra* note 265, at 33–34, 37.

267. *Id.* at 37 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

in federal Indian law by giving deference to Congress and the executive branch in Indian affairs. There is no special institutional capacity within the Supreme Court to make policy or to reject the trends in Congressional policy in Indian affairs. Ironically, that is exactly what the Court *used* to do in Indian affairs, treating many, many cases as “political questions” in deferring (almost criminally) to Acts of Congress which abrogated Indian rights in the nineteenth and twentieth centuries.<sup>268</sup>

Asserting that Indian nations never consented to federal government supervision and therefore can claim a blanket exemption from federal control is not a new argument, and it is very likely a disingenuous one now that federally recognized tribes have so much invested in the dynamic federalism-style structure that dominates federal Indian law involving states, localities, and the federal government.<sup>269</sup> This Paper does not argue in favor of a blanket exemption and does not argue in favor of a careless disregard for federal control,<sup>270</sup> just as it does not argue in favor of reasserting wholesale tribal *criminal* jurisdiction over non-Indians—something many Indian nations themselves are not necessarily ready to handle.<sup>271</sup> As Amartya Sen recently noted, it is worth theorizing a system of justice attainable from the current state of affairs.<sup>272</sup> The theory of consent propounded here is useless without a corresponding theory of resistance, a theory of resistance that results in a form of legitimate tribal investiture into the American constitutional polity. Successful tribal resistance forces a response. In the kind of resistance contemplated in this Paper, successful tribal resistance may persuade the Supreme Court to reconsider its own precedents and *defer* to tribal court judgments and

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268. *E.g.* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). *See also* Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN'S L. REV. 153, 178 n.131 (2008) (collecting cases).

269. For a survey of tribal-state agreements, and how to negotiate one (from a non-tribal perspective), *see* CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 620–60 (4th ed. 2008). *See also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.05, at 589–94 (Nell Jessup Newton et al. eds. 2005).

270. *See* LOCKE, *supra* note 234, at para. 243 (142–43) (noting that once “consent” has been given validly, it cannot be withdrawn easily).

271. *Cf.* Matthew L.M. Fletcher, *Addressing the Epidemic of Domestic Violence in Indian Country by Restoring Tribal Sovereignty*, 3:1 ADVANCE 31, 39 (2009) (recommending Congressional restoration of tribal criminal justice authority over non-Indians in a piecemeal fashion).

272. *See* AMARTYA SEN, THE IDEA OF JUSTICE 8–12 (2009).

processes, something the Court itself said it would do in *National Farmers*: “Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of judicial review.”<sup>273</sup> Tribal courts have met the first part of this agreement,<sup>274</sup> and maybe it will take tribal resistance to persuade the Court to meet its self-imposed obligation.

Tribal resistance to the federal government is only the first step. A second and equally important step involves the recognition of individual Indians to resist their own tribal governments in the same manner. Tribal resistance rings hollow if the tribal government that presses the resistance refuses to recognize the right of its citizens to resist, as many tribal governments do in the form of tribal sovereign immunity and other legal and political mechanisms. And, in many Indian communities, the pressure to resist the federal government *must* come from individual Indians, as the tribal governments may have too much of a stake in its relationship with the federal government to resist successfully.<sup>275</sup>

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273. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985) (citing *North Dakota ex rel. Wefald v. Kelly*, 10 Indian L. Rep. 6059 (Standing Rock Sioux Tribal Ct. 1983) and *Crow Creek Sioux Tribe v. Buum*, 10 Indian L. Rep. 6031 (Intertribal Ct. App. 1983)).

274. See William C. Canby, Jr., *Commentary: Treatment of Tribal Court Convictions*, 17 FED. SENT'G. REP. 220, 220 (2005) (“Tribal courts have made great strides in recent years.”). Cf. Catherine T. Struve, *How Bad Law Made a Hard Case Easy: Nevada v. Hicks and the Subject Matter Jurisdiction of Tribal Courts*, 5 U. PA. J. CONST. L. 288, 303 (2003) (noting that the same critiques of tribal courts have been made of state courts, and “state courts are presumed to be competent to hear cases arising under federal law”).

275. There are two main problems in individual American Indian consent to American government that will be addressed in my later work. The first is whether Indian tribes have consented, either literally in the form of a treaty, or implicitly through history and practice, to American governance. The problem here is that Indian treaty-making typically was far from consensual. At a baseline, the United States recognized that Indian tribes had sufficient sovereignty to qualify as an entity eligible for treaty-making but used coercion, duress, fraud, and multiple other tools to force Indian tribes into most of these oft-unconscionable treaties. Non-treaty tribes were in an even worse position, typically having to exist in an underground status until modern federal recognition elevated the lucky ones to a level akin to treaty-tribes. Indian treaties tied Indian tribes to the United States in ways analogous to a form of physical, political, and economic bondage not unlike apartheid.

The second problem of Indian consent involves the relationship between Indian tribes and individual Indians. Traditional American Indian governance was not centralized, meaning that no individual or small group of individuals governed the Indian tribe (which itself is a misnomer). Indian leaders typically governed by literal consent, not theoretical consent. Indian leaders had no more au-

## CONCLUSION

Let us return to the hypothetical that drives this Paper—whether federal courts truly have valid, constitutional authority to order a tribal judge to dismiss a civil contract or tort claim against a nonmember. It is the hope of the author that this Paper establishes the uncertainty of the proposition that federal courts can boss around tribal courts absent express congressional authority. Tribal judges, in carefully chosen instances, can and should resist such federal court decrees by simply refusing to comply.

Likely due to the perceived radicalness of such a suggestion, tribal resistance to federal court jurisdiction over tribal court authority is long overdue. Under a long-settled principle of federal Indian law, Indian nations retain all aspects of national sovereignty except those that affirmatively have been divested by consent, by Congress, or by the Supreme Court. As Congress has never affirmatively acted to divest Indian nations of civil jurisdiction over nonmembers,<sup>276</sup> one would expect that tribes *retain* such authority. But despite significant congressional and executive branch support for tribal justice systems,<sup>277</sup> the Supreme Court has repeatedly intervened on behalf of non-Indian civil defendants and held that tribal courts do not have jurisdiction to adjudicate claims against them. This result is an oddity under any conception of the federal judicial power since no Act of Congress granted the Court such authority, and nothing in the Constitution requires such authority. Tribal resistance to this authority is justified under this regime.

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thority than their own ability to persuade Indian people to follow them at any given time. Additionally, in the post-treaty era, the United States established, terminated, and re-established Indian tribal governments again and again, with rarely even a semblance of consent. As such, it could be said that individual Indians have not consented to their own government, let alone the American government.

276. See *Nat'l Farmers*, 471 U.S. at 855, n.17.

277. See Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113 (1995); see also Mary Clare Jalonick, *Justice to Boost Effort to Combat Tribal Crime*, ASSOCIATED PRESS, Aug. 20, 2009, available at <http://abcnews.go.com/Politics/wireStory?id=8370374>.