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CHARLES WILKINSON, *Hero for the People, Hero for the Land and Water: Reflections on the Enduring Contributions of David Getches*, is Distinguished Professor and Moses Lasky Professor of Law at the University of Colorado. He serves as Board Chair of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment, and his teaching and research interests relate to law, history, and society in the American West. His fourteen books include: 1982 COHEN TREATISE (Managing Editor); AMERICAN INDIANS, TIME, AND THE LAW (1987); CROSSING THE NEXT MERIDIAN (1992); THE EAGLE BIRD (1992); FIRE ON THE PLATEAU (1999); BLOOD STRUGGLE (2005); THE PEOPLE ARE DANCING AGAIN (2010); and CASES AND MATERIALS ON FEDERAL INDIAN LAW (6th ed. 2011) with Getches, Williams, and Fletcher.

DAVID H. GETCHES, *Remarks of Dean David H. Getches: Federal Bar Association Indian Law Conference*, was Dean of the University of Colorado Law School from July 2003 until his untimely passing in July 2011. Before that, Dean Getches was a long-time and beloved faculty member and the Rafael Moses Chair in Water law. In his more than three decades at Colorado Law, Dean Getches became a national authority on

natural resources and Indian law issues. His academic interests were prompted by his experience; prior to joining the faculty of Colorado Law School in 1979, he was the founding Executive Director of the Boulder-based Native American Rights Fund and spent several years in private practice. Dean Getches had a prolific academic career. He wrote casebooks, books intended for a more general audience, and numerous articles and book chapters, including some written in Spanish and French. He took two leaves from the University of Colorado, first to serve as the Executive Director of the Colorado Department of Natural Resources from 1983 to 1987, and then to serve as a special consultant to the Secretary of the Interior in 1996. Dean Getches's research had most recently focused on the United States Supreme Court's Indian law decision-making, changing patterns of governance in water law, the law of the Colorado River, and indigenous and water law issues in Latin America. His last projects involved finding solutions to the ecological problems of the Colorado River Delta in Mexico, studying acquisitions of rights to instream flows, and supporting federal legislation on tribal governance of Indian reservations.

BILL HEDDEN, *A Just and Healthy Future for the 100 Percent*, is the Executive Director of the Grand Canyon Trust, a regional conservation group working to protect and restore the Colorado Plateau. Under Mr. Hedden's leadership, the Trust helped clean up emissions from coal fired power plants, remove radioactive wastes from the bank of the Colorado River, protect the Grand Canyon from uranium mining, and reduce grazing damage on public lands. The Trust is leading the largest forest restoration program in U.S. history, and its Native American program is convening the region's tribes around a shared conservation agenda. Hedden has a B.A. and Ph.D. in biology from Harvard University.

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TIMOTHY E. WIRTH, *Remarks of the Honorable Timothy E. Wirth: Symposium in Honor of David H. Getches*, was a Representative of the Second Congressional District and Senator representing all of Colorado. Mr. Wirth worked closely with Dean Getches throughout his career in elective office. They worked together throughout the 1980s and 1990s to protect Colorado's natural resources, including crucial collaborations on the Animas-La Plata project and enactment of the Colorado Wilderness Act of 1993.

FOREWORD

It is a tradition of the University of Colorado Law Review to publish, in each new volume, one issue comprised of articles, essays, and speeches presented at our annual symposium. We select a theme for each year's symposium to reflect a topic of importance to the legal community, and the symposium issue has become a vibrant and important component of each new volume of the Colorado Law Review. This year our symposium—and, consequently, our symposium issue—took on a unique format, which bears some explanation.

In July 2011, David H. Getches, former Dean of the University of Colorado Law School, passed away after serving Colorado Law and the Colorado legal community for more than thirty years. The Colorado Law Review chose to honor Dean Getches and his invaluable contributions to the legal profession by dedicating our 2012 symposium to his memory. Thus, the articles, essays, and speeches published in this issue represent the many areas of legal study to which Dean Getches contributed: American Indian law, water law, environmental law, and natural resources law. The authors of the articles each knew Dean Getches, and the symposium provided Dean Getches's colleagues the opportunity to share some of their memories.

Two of the pieces in this issue delve into one of Dean Getches's primary areas of interest: American Indian law. Richard Collins, a professor at the University of Colorado Law School who also taught during Dean Getches's tenure, discusses the judicial canons of construction used for American Indian treaties and statutes. Matthew Fletcher also analyzes Dean Getches's work with American Indians by revisiting the 1978 report drafted by Dean Getches, *Indian Courts and the Future*. Professor Fletcher explains that American Indian courts require a solid legal infrastructure to ensure fundamental fairness individuals under tribal government authority. Rebecca Tsosie, professor at the Sandra Day O'Connor College of Law, also writes about Dean Getches's work in this area. She discusses Dean Getches's efforts to establish "a philosophy of hope and a landscape of principle" for American Indian law.

In his article Justice Gregory Hobbs of the Colorado Supreme Court examines the development of Colorado water law from its originating principles to present day. Dean Getches was known not only for his impressive scholarship on the topic of water law, but also for his abiding love of Colorado's rivers and streams. Justice Hobbs's article provides a comprehensive overview of an area of law that inspired much passion in Dean Getches. Additionally, Charles Wilkinson, a professor at the University of Colorado Law School who also worked with Dean Getches in many other arenas, explores the lasting impression Dean Getches left on the people, land, and water of the West.

Both John Leshy, of the University of California Hastings College of Law, and Timothy E. Wirth, a former United States Senator and Representative, spoke at the symposium. In their speeches they revisited the lasting and expansive impact Dean Getches had on different areas of the law, showing how many diverse interests Dean Getches had and how dedicated he was to each and every one. We have also included a speech by Bill Hedden, the Executive Director of the Grand Canyon Trust, who spoke at the symposium about climate change and how to address the world's most pressing environmental issues. During his life, Dean Getches never shied from the most difficult challenges facing the legal profession. Mr. Hedden's speech continued Dean Getches's tradition of facing these difficult challenges and tackling them head-on.

Lastly, we include Dean Getches's speech delivered on April 7, 2011 at the Federal Bar Association Indian Law Conference. We include these remarks to provide just one small example of how inspiring Dean Getches was to all those around him. In his remarks, he discussed the past and future of American Indian law and the essential elements for the survival of all tribal nations.

The University of Colorado Law Review is proud to honor Dean Getches and the immeasurable impact he had on the University of Colorado Law School, the Colorado legal community, and the legal profession in general. We dedicate this issue of the Law Review to his memory.

JESSICA J. SMITH
Editor-in-Chief

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NEVER CONSTRUED TO THEIR PREJUDICE: IN HONOR OF DAVID GETCHES

RICHARD B. COLLINS*

This article reviews and analyzes the judicial canons of construction for Native American treaties and statutes. It discusses their theoretical justifications and practical applications. It concludes that the treaty canon has ready support in contract law and the law of treaty interpretation. Justification of the statutory canon is more challenging and could be strengthened by attention to the democratic deficit when Congress imposes laws on Indian country. Applications of the canons have mattered in disputes between Indian nations and private or state interests. They have made much less difference, and have suffered major failings, in disputes with the federal government. Recent Supreme Court decisions restricting tribal sovereignty show significant weakening of the canons.

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INTRODUCTION

Numerous judicial opinions recite that ambiguities in treaties with Indian nations and in federal statutes relating to Indians and tribes should be interpreted in their favor.[1] Can these canons be justified? If they can, have they mattered?

The treaty canon has strong theoretical support in contract law and the law of treaty interpretation, domestic and international.[2] By resolving unclear wording in tribes' favor, the rule has effectively helped tribes to preserve their resources and sovereignty over their members against opposing private and state interests.[3] However, the Supreme Court has ignored the canon in recent rulings divesting tribes of jurisdiction over nonmembers in tribal territory.[4] In addition, the treaty rule has been much less effective in disputes between tribes and the federal government. The Supreme Court dishonored it in major decisions denying constitutional protection of tribal land

1. *See* NELL JESSUP NEWTON ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1] (2005) [hereinafter 2005 COHEN].
2. *See infra* Part II.A and text accompanying notes 24–38.
3. *See infra* Part II.B.
4. *See infra* Part IV.B.

ownership.[5]

Theoretical grounding for the statutory canon is less clear. The statutory rule is supported by the trust relationship between the United States and the Indian nations arising from treaties, but the extent of the government's trust duties is contested and uncertain.[6] The canon is also supported by democratic theory. Until recently, when Congress imposed laws on Indian country, it lacked any normal political restraint. However, application of general federal laws to Native Americans may differ according to context. Some laws uniquely impact Indians and Indian tribes and thus lack political restraint. Other laws apply alike to Indian interests and to those of other citizens and governments and are subject to normal democratic forces.[7]

Like its treaty counterpart, the statutory canon has effectively helped tribes in disputes against private and state interests.[8] But again, the rule has been much less effective against the federal government. Decisions defining remedies for taking tribal land and other resources have often been stingy or nonexistent.[9]

The next section is a brief history of the two canons. The two sections that follow discuss the origins, theory, and applications of both canons, first the treaty rule, then its statutory counterpart. To highlight significant differences, discussions of the canons' applications address disputes between Native Americans and state or private interests separately from disputes between Indians and the federal government. The article's fourth section addresses the canons' deteriorating force in Supreme Court decisions since 1975.

I. A BRIEF HISTORY

Native American rights and obligations arise from treaties, federal statutes, and the Constitution itself.[10] It follows that

5. *See infra* Part II.C.
6. *See infra* Part III.A and text accompanying notes 130–44.
7. *See infra* Part III.A and text accompanying notes 145–61.
8. *See infra* Part III.B.
9. *See infra* Part III.C.
10. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. amend. XIV, § 2; 2 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES (1904); 25 U.S.C. §§ 1–4307 (2006). Early Supreme Court opinions applied international law to interpret Indian treaties, and in recent years, Native Americans have made modern international law claims. *See* 2005 COHEN, *supra* note 1, §

interpretation of federal laws is a paramount concern of Indians and tribes, and of others who interact with them. Prior to 1959, interpretation was mostly administrative, left to the Bureau of Indian Affairs and other federal agencies, and in some contexts to the tribes themselves.[11] But occasional judicial opinions since the Marshall Court have reasoned that ambiguous treaties with tribes should be interpreted in their favor.[12] When Felix Cohen and his Interior team organized federal Indian law in 1941, they generalized the treaty cases into a "cardinal rule."[13] The Cohen Handbook applied the same rule to federal statutes that ratify agreements with tribes made after treaty making ended.[14] The treatise did not address whether ambiguities in other federal statutes should be interpreted in favor of Indian rights; at the time it was published, only one important Supreme Court decision had relied on such a rule.[15] When the Interior Department published its vulgate version of the treatise in 1958, its statement of the interpretive rule for treaties and treaty equivalents was unchanged, and nothing was added on statutory interpretation.[16] Thereafter, judicial opinions that recited a statutory rule became more common, and by the time

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5.07. The early decisions are sound precedents, but neither the Supreme Court nor Congress appear likely to embrace the modern movement for the foreseeable future. For discussion of the subject, compare Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 78–79 (1996) (advocating reliance on international law), with 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, 43 (2003) (doubting the efficacy of Frickey's approach).

11. The year 1959 is often recited as the onset of significant modern renewal of Indian rights. *See, e.g.*, CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 1 (1987).

12. *See infra* text accompanying notes 21–23.

13. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 37 (1941) [hereinafter 1941 COHEN]. On Cohen's importance to federal Indian law, see *Symposium in Honor of Felix S. Cohen*, 9 RUTGERS L. REV. 355, 356 (1954).

14. *See* 1941 COHEN, *supra* note 13, at 37 n.45. Recent agreements between tribes and the government are made under very different conditions. Tribal parties are now versed in English and represented by lawyers. But most agreements contested at law were made long before these changes. *See infra* notes 59–88, 147–48 and accompanying text.

15. *See infra* text accompanying notes 122–25 (discussing United States v. Reily, 290 U.S. 33, 39 (1933)); Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918); United States v. Celestine, 215 U.S. 278, 290–91 (1909).

16. U.S. DEP'T OF THE INTERIOR, HANDBOOK OF FEDERAL INDIAN LAW 145–48 (1958). Scholars consider this edition heavily biased in favor of the federal government's interests. *See, e.g.*, RENNARD STRICKLAND ET AL., FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at ix (1982) [hereinafter 1982 COHEN].

the 1982 revision of Cohen's Handbook was published, the treatise rightly stated the statutory rule to be an established canon of interpretation.[17] The 2005 revision of Cohen's treatise further elaborated and solidified the statutory canon's place as an established rule of interpretation.[18] However, modern Supreme Court decisions against Indian interests have caused a number of scholars to assert both canons' demise.[19] The next two sections expand this history to analyze each canon's origin, theory, and applications.

II. THE TREATY CANON

This section discusses the treaty canon in depth. Its first part relates the canon's origin in nineteenth century Supreme Court decisions and identifies the canon's strong support in legal theory based on both treaty and contract law. The section's second part discusses the canon's major applications to disputes between Native Americans and state and private interests. It concludes that the canon has been important in decisions protecting Indian resources and sovereignty. The third part addresses the canon's application to disputes between Indians and the federal government. It concludes that the canon has been much less effective in these matters and was dishonored by the Supreme Court's failure to accord timely constitutional protection to tribal land ownership.

A. Origin and Theory

The Court's 1832 decision in *Worcester v. Georgia* is the bedrock of the Indian sovereignty doctrine, and Chief Justice Marshall's opinion for the Court is one of his crowning achievements.[20] Justice M'Lean's concurring opinion is commonly cited as the point of origin for the treaty canon. M'Lean wrote:

> The language used in treaties with the Indians should never

17. 1982 COHEN, *supra* note 16, at 223–25.
18. 2005 COHEN, *supra* note 1, §§ 2.02–.03.
19. *See infra* notes 77, 87, 280, 312–13, 324, 341 and accompanying text (citing articles by symposium honoree David H. Getches and by Nell Jessup Newton, Matthew L.M. Fletcher, Bethany R. Berger, Sarah Krakoff, Samuel E. Ennis, Alex Tallchief Skibine, Philip P. Frickey, Joseph William Singer, and Peter C. Maxfield).
20. 31 U.S. 515 (1832). *See infra* text accompanying notes 40–47.

> be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.[21]

Later opinions of the full Court adopted Justice M'Lean's statement, making it into Cohen's "cardinal rule" of treaty interpretation.[22] A variation on the rule that appears in many decisions requires that treaty terms be interpreted as the Indians understood them because treaties were written only in English, so that Indian parties' understanding depended on oral interpreters who had to render legal concepts.[23] The precedents do not support a significant difference in the two formulations. Both look for a plausible interpretation favorable to the Indian party.

The treaty canon has strong theoretical backing. A fair case can be made that requiring interpretation in the Indians' favor is simply shorthand for applying contract and treaty rules of interpretation to the context of Indian treaties. The actual agreements were oral, negotiated through interpreters hired by the United States.[24] The agreements were memorialized in writing in a language understood only by the government side.[25] The rule that ambiguities in writings be construed against the drafter, however controversial in some situations, should surely apply.[26] And there can be no doubt

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21. *Id.* at 582 (M'Lean, J., concurring). My title cribs him.

22. *See, e.g.*, Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Choate v. Trapp, 224 U.S. 665, 675 (1912); Minnesota v. Hitchcock, 185 U.S. 373, 396 (1902); Jones v. Meehan, 175 U.S. 1, 11 (1899); *In re* Kansas Indians, 72 U.S. 737, 760 (1867). The latter opinion mistakenly attributed the quote to Marshall, and the error was repeated by reference in *Carpenter* and *Choate*. Other notable opinions relying on the rule include *Winters v. United States*, 207 U.S. 564, 576–77 (1908) and *United States v. Winans*, 198 U.S. 371, 380–81 (1905). *Carpenter, Choate*, and *Winters* involved statutes ratifying agreements with tribes, that is, treaty equivalents. The others interpreted treaties.

23. *E.g.*, Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 675–76 (1979); Choctaw Nation of Indians v. United States, 318 U.S. 423, 431–32 (1943); Jones v. Meehan, 175 U.S. 1, 10–11 (1899). *See also Worcester*, 31 U.S. at 551 ("There is the more reason for supposing that the Cherokee chiefs were not very critical judges of the language, from the fact that every one makes his mark; no chief was capable of signing his name. It is probable the treaty was interpreted to them.").

24. For extensive description of the process, see FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES (1994).

25. *See id.*

26. *See* RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981). On controversy about the rule, see, for example, Michael B. Rappaport, *Ambiguity Rule and Insurance Law: Why Insurance Contracts Should Not Be Construed against the*

that parol evidence should be freely admitted; the treaty texts recorded agreements that were essentially oral, and they never purported to be integrations.[27] As the Supreme Court has observed, Indian treaties resembled international protectorate treaties, and there is authority for interpretation to favor the weaker party.[28] Modern treaty and contract rules of interpretation demand good faith.[29] Considered together, these rules require an effort to ascertain and honor the reasonable expectations of the Indian parties.

Because of the language advantage enjoyed by the United States, reasonable expectations of the treaty parties cannot rest on technical parsing of treaty terms.[30] Rather, expectations must be deduced from context. Tribal understandings can be determined from pre-existing tribal ownership. Tribes always sought to retain their land, sovereignty over retained territory, and rights to continue traditional economic activities that depended on natural resources: hunting, fishing, farming, and gathering.[31] The United States always sought to take away part of what the tribal party had.[32] In exchange, it offered payment for ceded

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Drafter, 30 GA. L. REV. 171 (1995–1996). *See generally* Péter Cserne, *Policy considerations in contract interpretation: the contra proferentem rule from a comparative law and economics perspective*, *in* CONTRACT THEORY - CORPORATE LAW 66, 66–104 (Gavvala Radhika ed., 2009), *available at* http://works.bepress.com/peter_cserne/28.

27. *See* RESTATEMENT (SECOND) OF CONTRACTS § 212 (1981). Treaty law has not observed a formal parol evidence rule, but it requires interpreting terms "in their context and in light of [the treaty's] objects and purpose." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325(1) (1987). Parol evidence is admitted for these purposes. *See generally* MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 421–49 (2009); RICHARD K. GARDINER, TREATY INTERPRETATION 301–50 (2008).

28. *Worcester*, 31 U.S. at 560–61 ("the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state."). *See also* D. P. O'CONNELL, INTERNATIONAL LAW 256–57 (2d ed. 1970).

29. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325(1) (1987); RESTATEMENT (SECOND) OF CONTRACTS §§ 201(2), 205 (1981). For discussion in the international context, see GARDINER, *supra* note 27, at 147–61.

30. International treaty law has extensive precedents and literature on the problem of treaties written in more than one language. For discussion of the problem of translating technical terms, see GARDINER, *supra* note 27, at 369–75.

31. *See* PRUCHA, *supra* note 24.

32. *See id.*

lands and protection of territory that tribes retained.[33]

Other basic rules of treaty and contract law provide that no valid agreement results from fraud or coerced consent.[34] Tribal consent to treaties was at times impaired by fraud and often involved at least some degree of coercion from the implied threat that settlers would otherwise overwhelm tribes. An Indian Service veteran observed, "The method of making the treaties varied according to the character of the commissioners negotiating for them. Some were manifestly fraudulent . . . . Others were signed by the Indians practically under duress."[35]

These factors alone would not always be enough to vitiate consent, but they are reason enough to interpret ambiguities in favor of Indian expectations. At times, outright coercion was manifest, particularly when treaties were imposed on tribes following their military defeat.[36] Agreements based on fraud or coercion are not enforceable, but that remedy is useless for tribes.[37] The best a court can do to protect Indian rights is to resolve ambiguities in an imposed treaty against the United States.

The treaty canon should not be jettisoned simply because

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33. *See id.*

34. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 331(1)(b), (2)(a) (1987); RESTATEMENT (SECOND) OF CONTRACTS §§ 174–175 (1981). In international law, see generally STUART S. MALAWER, IMPOSED TREATIES AND INTERNATIONAL LAW (1977).

35. LAURENCE F. SCHMECKEBIER, THE OFFICE OF INDIAN AFFAIRS, ITS HISTORY, ACTIVITIES, AND ORGANIZATION 59 (1927), *quoted in* 1941 COHEN, *supra* note 13, at 37 (describing an 1808 Osage treaty); *see also* David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 452 (1994) ("The history of United States-Indian relations thus reveals very few occasions in which treaties were negotiated under market-like conditions. As soon as the Bluecoats' propensity for violence became known, it served as the background to every treaty. Every tribal leader knew that if negotiations fell through, the most likely alternative was war.") (citation omitted).

36. Notable examples are treaties imposed on midwestern tribes following the 1794 Battle of Fallen Timbers and treaties imposed on the Five Civilized Tribes after the Civil War, each of which included at least factions that sided with the South. *See* PRUCHA, *supra* note 24, at 91–93, 264–68. Another notorious incidence of coercion was the process of removal of southeastern tribes in the 1830s. *See* Choctaw Nation v. Oklahoma, 397 U.S. 620, 631–32 (1970) ("[T]reaties were imposed upon them and they had no choice but to consent."); Choctaw Nation v. United States, 119 U.S. 1, 37 (1886) ("It is notorious as a historical fact, as it abundantly appears from the record in this case, that great pressure had to be brought to bear upon the Indians to effect their removal . . . ."). Yet another was the imposed agreement that took the Black Hills. *See* United States v. Sioux Nation, 448 U.S. 371, 382 n.13 (1980).

37. The principal obstacle to a judicial remedy would be statutes of limitations. *See infra* notes 105, 202, 214, 224, 269 and accompanying text.

general rules of treaty and contract interpretation may theoretically be adequate to the just resolution of contests about treaty meaning. The canon is a core part of the trust relationship that is firmly established as federal policy.[38] Moreover, it is often difficult to prove the particular circumstances of a treaty's negotiation over a century after its making. The effect of the canon is to place the burden on opponents of Indian claims to prove uncoerced Indian consent to yield the asset at issue. This is an appropriate rule in light of the language barrier and the prevalence of at least some degree of duress. The canon also forces courts to try to understand the unfamiliar, Indian side of a case, and it stiffens the spines of uncertain judges when prevailing politics run against Indian interests.

B. Applications to Disputes with State and Private Interests

The treaty canon has often been effective when Indian interests conflicted with those of states or private parties.[39] But it has had significant failures when tribes challenged federal authority. One might say that the Supremacy Clause has been an Indian ally against state and private interests, but a liability against the feds.

Worcester v. Georgia[40] remains the most important and impressive decision interpreting treaties to carry out the Indians' understanding. Georgia had aggressively tried to impose state laws on Cherokee treaty territory in the state.[41] But the Court held that the Cherokee treaties preserved Cherokee sovereignty over tribal territory, in which "the laws of Georgia can have no force."[42] Marshall's opinion relied almost exclusively on the earliest of thirteen Cherokee treaties, made when the Cherokees had bargaining power as potential allies of American enemies and thus the most freely made.[43] It

38. *See infra* text accompanying notes 130–44.
39. *See infra* text accompanying notes 40–57.
40. 31 U.S. 515 (1832).
41. *Id.* at 521–28.
42. *Id.* at 520.
43. *Id.* at 551–55 (interpreting the 1785 Treaty of Hopewell). The 1791 Treaty of Holston, second of the thirteen, was discussed at 555–56. No later treaty was cited. For a list of Cherokee treaties, see *Cherokee Treaties*, WIKIPEDIA, http://en.wikipedia.org/wiki/Cherokee_treaties (last updated May 28, 2012). The list includes treaties with colonies, the British Crown, American states, and other

then meticulously analyzed possible meanings of every relevant treaty term and construed all in favor of tribal authority.[44] It crucially read the treaties as self-executing, that is, directly enforceable by courts.[45] All this was done in the teeth of the political winds of the day. Andrew Jackson had been elected on an anti-Indian platform and had dedicated himself to tribes' removal from proximity to white settlers.[46] Justice Baldwin's banal dissent shows how easily a politically compliant Court could have decided otherwise.[47]

Worcester's interpretation of the Cherokee treaties to retain tribal sovereignty was extended by political action and judicial decision to all recognized tribes, including those with less favorable treaty terms or with no treaty at all.[48] Thus,

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parties, as well as many United States treaties dated after *Worcester*. The count of thirteen includes only treaties with the United States predating the *Worcester* decision.

44. *Worcester*, 31 U.S. at 551–55; *see also* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 398–405 (1993) (reviewing the Court's analysis).

45. English law required and requires an Act of Parliament for judicial enforcement of treaties. *See* 8(2) HALSBURY'S LAWS OF ENGLAND ¶ 236 n.2 (4th ed. reissue 1996). By contrast, the Supreme Court interpreted our Constitution to permit direct judicial enforcement so long as treaty terms are suitable, which the Court calls self-executing terms. Foster v. Neilson, 27 U.S. 253, 314 (1829); Ware v. Hylton, 3 U.S. 199 (1796). The *Worcester* Court did not discuss the point but assumed that Indian treaties were subject to the same rule by its conclusion that the laws of Georgia at issue were "repugnant" to the Cherokee treaties. 31 U.S. at 561–62. (Counsel for Worcester and Butler did cite *Ware*. *Id.* at 535.) Had American courts adopted the English rule, American Indian treaties would likely have become a dead letter, at least after the election of President Jackson. On direct enforcement generally, see D. P. O'CONNELL, *supra* note 28, at 54–65.

46. *See* ROBERT V. REMINI, ANDREW JACKSON: THE COURSE OF AMERICAN FREEDOM, 1822–1832 117, 200 (1998); Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L .REV. 500, 528–29 (1969).

47. *Worcester*, 31 U.S. at 562. Justice Baldwin dissented by reference to his prior opinion in *Cherokee Nation v. Georgia*, 30 U.S. 1, 31 (1831), in which he opined that the Cherokee Nation had no status as a government. Justice Johnson wrote a similar opinion in the earlier case, 30 U.S. at 20, but did not dissent in *Worcester*.

48. *See* 1982 COHEN, *supra* note 16, at 224. Federal statutes relating to tribal sovereignty, such as §§ 16–17 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 476–477 (2006), have never differentiated between treaty tribes and others. Numerous modern statutes continue this policy. *See* 2005 COHEN, *supra* note 1, § 1.07. However, tribal ownership based on treaties and statutes has better legal protection than that based on original title or executive orders. *See infra* text accompanying notes 233–63. *But see* Ezra Rosser, *Ambiguity and the Academic: The Dangerous Attraction of Pan-Indian Legal Analysis*, 119 HARV. L. REV. F. 141 (2005); Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004) (both advocating departure from the policy). Alaska and Hawaii are exceptions to the policy described here; each has a distinct legal history. *See* Rice v. Cayetano, 528 U.S. 495 (2000) (state law preferring Native Hawaiians unconstitu-

while tribal sovereignty has been restricted in various ways, its dimensions have not depended on having a treaty or on particular treaty terms.[49] The Supreme Court also reasoned that the tribal sovereignty doctrine includes tribal immunity from suit, similar to the sovereign immunity of the federal government.[50]

A remarkable application of the treaty canon to disputes with state and private interests arose in the Supreme Court's 1908 *Winters* decision recognizing Indian water rights.[51] A federal statute ratified an agreement with a tribe; neither the text of the agreement nor that of the statute said anything about water, but the Court inferred reservation of water rights to carry out Indian expectations.[52] Other prominent decisions that relied on the treaty canon were lawsuits defining treaty provisions that retained Indian rights to hunt and fish on former tribal land. Though results are mixed and decisions cannot be reconciled, tribes won most cases and all of the important ones, and decisions often relied on the treaty canon.[53] Most notable were the northwestern fishing rights decisions. Treaties with Washington tribes ceded most of their land but retained explicit rights to fish off-reservation at usual and accustomed sites in common with settlers.[54] The Supreme Court successively interpreted these provisions to imply easements of access to the sites,[55] immunity from state regulations other than those necessary to preserve fish species,[56] and Indian entitlement to a generous fixed share of

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tional racial discrimination); Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998) (Alaskan Native Villages not Indian country as dependant Indian communities); Alaska v. Native Village of Tanana, 249 P.3d 734 (Alaska 2011) (history of native village sovereignty); Heather Kendall-Miller, Alaska v. Native Village of Tanana: *Enhancing Tribal Power by Affirming Concurrent Tribal Jurisdiction to Initiate ICWA-Defined Child Custody Proceedings, Both Inside and Outside of Indian Country*, 28 ALASKA L. REV. 217 (2011) (same).

49. *See supra* note 48 and accompanying text.

50. *See* 2005 COHEN, *supra* note 1, § 7.05[1]. The treatise opines that tribal sovereign immunity derives from federal common law and the Constitution rather than *Worcester*. *See id.* A full analysis needs all sources: federal sovereign immunity rests on federal common law and the Constitution; *Worcester* attaches that theory to tribal sovereignty.

51. Winters v. United States, 207 U.S. 564, 576–77 (1908) (interpreting statute ratifying agreement with tribe, that is, a treaty equivalent). On Indian water rights generally, see 2005 COHEN, *supra* note 1, §§ 19.01–.06.

52. *Winters*, 207 U.S. at 576–77.

53. *See generally* 2005 COHEN, *supra* note 1, § 18.04.

54. Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 661–62 (1979).

55. United States v. Winans, 198 U.S. 371, 384 (1905).

56. Tulee v. Washington, 315 U.S. 681 (1942) (Indians do not need state li-

up to half the catch.[57]

The treaty canon's most important application today is in major disputes about the scope of tribal sovereignty. These issues command a full discussion later in this paper.[58]

C. Applications to Disputes with the Federal Government

In contrast to the treaty canon's support for Indians' rights in their disputes with state and private parties, the Court has honored the canon much less often when reviewing Native American claims against the federal government. The Court's clearest failure to honor Indians' reasonable treaty expectations was its refusal to accord tribal land ownership constitutional protection against federal takings until it was too late to have much beneficial effect. Until 1887, tribal land cessions were nominally consensual, by treaty or other agreement.[59] Some deals involved enough coercion to support a takings claim, and much land was simply seized,[60] but no suit was filed, or at least none that generated a reported decision. In lawsuits relating to present or former tribal land, Supreme Court opinions recited conflicting dicta on the nature of tribal land ownership.[61] At various times, tribal ownership was ambiguously called a "right of occupancy" with "a legal as well as just claim to retain possession of it, and to use it according to their own discretion;" or robustly characterized to be "as |sacred as the fee simple of the whites;" or dismissed as no ownership at all.[62] No decision had raised a takings issue.

From 1880, Congress passed a series of so-called allotment laws whose purpose was to eliminate tribal common land by

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cense); Dep't of Game v. Puyallup Tribe, Inc., 414 U.S. 44 (1973) (states can regulate tribal fishing when necessary to preserve species, but regulations may not discriminate against Indians).

57. *Fishing Vessel Ass'n*, 443 U.S. at 690.

58. *See infra* Part IV.

59. *See* 2005 COHEN, *supra* note 1, § 1.03[1].

60. *See* FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 108–14 (1984). At times the Senate refused to ratify treaties of cession, resulting in seizure. *See* PRUCHA, *supra* note 24, at 558 (index entry for unratified treaties citing numerous entries).

61. *See* United States v. Rogers, 45 U.S. 567, 572 (1846) ("The native tribes . . . have never been . . . regarded as the owners of the territories they respectively occupied."); Mitchel v. United States, 34 U.S. 711, 746 (1835); Johnson v. M'Intosh, 21 U.S. 543, 574 (1823). *Mitchel* was authored by Justice Baldwin and quoted from his prior opinion that had denied tribal sovereignty. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 48 (1831).

62. *See supra* note 61.

conveying some to tribal members individually and selling the rest to settlers.[63] Most important was the General Allotment Act of 1887, which mandated allotment of most tribal land.[64] The Act provided for individual Indians to choose their allotments, so common practice was to seek tribal consent to an allotment scheme, then to have Congress ratify each agreement.[65] But some schemes were simply imposed, and others included altered provisions inflicted on unconsenting tribes.[66]

While allotment injustices simmered, the Supreme Court rendered its first opinion on tribal land ownership and the Takings Clause in a case unrelated to allotment. An 1884 statute granted a railroad the power to condemn a right-of-way across Cherokee territory upon payment of just compensation.[67] The Cherokee Nation sued the railroad, claiming that the United States lacked power to condemn its treaty land and, in the alternative, that the statute's procedures did not adequately guarantee payment of just compensation as the Constitution required.[68] The Supreme Court upheld federal power of eminent domain.[69] But the Court interpreted the statute to assure just compensation to the Cherokees, and Justice Harlan's opinion for a unanimous Court clearly assumed that tribal ownership was protected by the

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63. *See* 1982 COHEN, *supra* note 16, at 130–34, 612–14. From 1854, many treaties had provided for voluntary allotment. *See, e.g.*, Lykins v. McGrath, 184 U.S. 169 (1902). The first allotment statute appears to be the Act of June 15, 1880, ch. 228, 21 Stat. 199, 200 (Ute tribes).

64. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (formerly codified as amended at 25 U.S.C. §§ 331–33). Some tribes were excepted from the statute but brought under the policy separately; some tribes avoided allotment altogether. *See* 2005 COHEN, *supra* note 1, § 16.03[2][b].

65. Act of Feb 8, 1887, ch. 119, § 2, 24 Stat. 388 (formerly codified at 25 U.S.C. § 332); *see* 1982 COHEN, *supra* note 16, at 613. The wholesale nature of the process is shown by several statutes passed in the 1890s that ratified numerous allotment agreements. *E.g.*, Act of Mar. 3, 1891, ch. 543, §§ 8–31, 26 Stat. 989, 1016–43 (seven agreements).

66. *See infra* text accompanying notes 73–74, 293, 301–02, 304, and 306; WILCOMB E. WASHBURN, THE ASSAULT ON INDIAN TRIBALISM: THE GENERAL ALLOTMENT LAW (DAWES ACT) OF 1887 49–60 (1975); DELOS SACKETT OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 82–97 (reprint 1973).

67. Act of July 4, 1884, ch. 179, 23 Stat. 73.

68. Cherokee Nation v. S. Kans. Ry. Co., 135 U.S. 641 (1890).

69. *Id.* at 653–57. The Cherokees' case was based on the general concept of retained tribal sovereignty rather than on any specific treaty provision, and on the claim that Congress cannot override a treaty. *See id.* at 648–49. It thus depended on inferring constitutional status to tribal sovereignty, a claim beyond the scope of the treaty canon. *See* text accompanying notes 77 and 250.

Takings Clause.[70]

In 1903, the allotment laws at last generated a decision on constitutional protection of tribal land ownership. The prominent decision in *Lone Wolf v. Hitchcock* dishonored the treaty canon.[71] In 1900, Congress ratified a purported 1892 agreement with Kiowa, Comanche, and Apache Tribes that provided for conveyance of reservation common land to individual tribal members as allotments and for sale of most of the rest at a set price.[72] However, the agreement was apparently made in violation of the 1867 treaty that established the reservation.[73] The tribes also claimed that consent to the agreement had been obtained by fraud, and the set price for land sale was much too low.[74] They sued to enjoin implementation, but a unanimous Supreme Court rejected their claim outright.[75]

Lone Wolf's holding had two parts: first, that Congress had power to override the Indian treaty, and second, that it could do so without complying with the Fifth Amendment.[76] Modern critics argue that the Court should have implied a constitutional barrier to congressional power to override Indian treaties.[77] That is a difficult claim because congressional power to override foreign treaties was and is well-established,[78] the Court had previously sustained overrides of Indian treaty

70. *Cherokee Nation*, 135 U.S. at 657–61.

71. 187 U.S. 553 (1903).

72. Act of June 6, 1900, ch. 813, § 6, 31 Stat. 672, 676–81.

73. The treaty required tribal approval of allotment or other conveyance by at least three-fourths of eligible voters. The federal negotiators reported that three-fourths had approved, but in 1899 the Senate asked the Interior Secretary to review the issue, and he reported that the vote taken had fallen short. Later that year the tribes voted to repudiate the 1892 agreement. *Lone Wolf*, 187 U.S. at 554–58. In any case, the Court proceeded on the assumption that Congress had acted without tribal consent.

74. *Id.* at 560–61.

75. *Id.* at 553.

76. *Id.* at 564.

77. *See, e.g.*, Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595, 1598–99 (2004); Robert N. Clinton, *There is no Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002); *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government,* 33 STAN. L. REV. 979 (1981); Frickey, *supra* note 10, at 55–56; Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 236–47 (1984); *cf.* Frickey, *supra* note 44, at 405–49 (arguing for a "quasi-constitutional" rule of clear statement in favor of tribal sovereignty); Frank Pommersheim, *Is There a (Little or Not so Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271, 285 (2003) (advocating adoption of a constitutional amendment).

78. *E.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 720 (1893).

rights several times,[79] and it has consistently reaffirmed those rulings.[80] Modern international law authorities reject legitimacy of overrides while acknowledging contrary national laws.[81] However, the Supreme Court has not been receptive to any claimed limit on the power, international or domestic.[82]

The *Lone Wolf* Court's failure to accord Fifth Amendment protection to tribal property was another matter. Because the tribes' claim sought to enjoin the scheme rather than recover damages for a taking, their counsels' arguments stressed the Due Process Clause rather than the Takings Clause, claiming both substantive and procedural violations.[83] Justice White's dreadful opinion for the Court referred only to the Fifth Amendment, citing neither clause.[84] The Court's first response was packed into the statement that "[p]lenary authority over the tribal relations of the Indians has been exercised by

79. Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902) (sustaining federal power to lease tribal land for oil extraction); Stephens v. Cherokee Nation, 174 U.S. 445, 483–86 (1899) (sustaining power to determine tribal membership); Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641 (1890) (sustaining power to take Cherokee land by eminent domain); The Cherokee Tobacco, 78 U.S. 616 (1871) (sustaining statute overriding treaty tax exemption). Treaty rights were also overridden in *Thomas v. Gay*, 169 U.S. 264, 270–72 (1897) (sustaining power to incorporate tribal land into Oklahoma Territory in violation of treaty); *Ward v. Race Horse*, 163 U.S. 504, 511 (1896) (sustaining repeal of treaty hunting right); *United States v. Kagama*, 118 U.S. 375 (1886) (sustaining federal power to prosecute tribal Indian); and *United States v. Rogers*, 45 U.S. 567, 572 (1846) (sustaining federal power to prosecute adopted Cherokee), although in none was a treaty tribe party to the case.

80. *E.g.,* United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2324 (2011).

81. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 332 & Reporters Note 1 (1987); VILLIGER, *supra* note 27, at 541, 547.

82. Justice Thomas questioned the extent of federal power over Indian affairs in *United States v. Lara*, 541 U.S. 193, 214–27 (2004) (Thomas, J., concurring). However, he almost surely favors curbing federal power in favor of state, not tribal, authority; in all divided decisions on states versus tribes during his tenure, he has voted against tribal sovereignty. *E.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 327 (2008); Idaho v. United States, 533 U.S. 262, 281 (2001); Minnesota v. Mille Lac Band of Chippewa Indians, 526 U.S. 172, 220 (1999); Hagen v. Utah, 510 U.S. 399, 421 (1994); South Dakota v. Bourland, 508 U.S. 679, 694 (1993).

83. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 564 (1903). Additionally, see the plaintiffs' argument in the decision below, Lone Wolf v. Hitchcock, 19 App. D.C. 315, 316–20 (1902), *aff'd*, 187 U.S. 553 (1903). Plaintiffs could not join a claim for injunction with one for damages. Cherokee Nation v. S. Kansas Ry. Co., 135 U.S. at 651–53 (discussed *supra* text accompanying notes 67–70). Moreover, a takings claim would have encountered sovereign immunity barriers. *See infra* text accompanying notes 202–12.

84. *Lone Wolf,* 187 U.S. at 564.

Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."[85] However, "always been deemed" was mostly invention. White's only citations to support this claim related to the power to override a treaty; none justified taking tribal property without compensation or even a hearing on the merits, and he carefully ignored the Court's opinion in the Cherokee railroad case.[86]

The opinion later stated that "the action of Congress now complained of was . . . a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government."[87] This ignored the forced sale of much tribal land at a specified price without determining whether it was the fair value demanded by the Constitution. It also ignored the possibility that allotment of arid, western Oklahoma land would seriously devalue it. Its invocation of guardianship failed even to attempt to determine whether the government had complied with a guardian's legal duties. A later Court pointed out that the government cannot hide an "act of confiscation" behind the cloak of guardianship.[88]

Any doubt that the *Lone Wolf* Court had denied constitutional protection to tribal land is dispelled by comparing its decision to the Court's opinion nine years later in *Choate v. Trapp*.[89] *Choate* involved another episode in the government's relentless allotment policy. To break up the tribal holdings of the Choctaw and Chickasaw Nations in what is now

85. *Id.* at 565.

86. *Id.* at 566. *See also supra* text accompanying notes 67–70. Denial of protection for tribal ownership had been hinted in Justice White's opinion for the Court a month earlier in *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307–08 (1902), but the focus of that case was on other issues.

87. *Lone Wolf,* 187 U.S. at 568. The mereness doctrine triumphed again. The lower court opinion was similarly vacant. *Lone Wolf*, 19 App. D.C. at 329–32. For criticism, see Joseph William Singer, Lone Wolf*, or How to Take Property by Calling it a "Mere Change in the Form of Investment"*, 38 TULSA L. REV. 37 (2002).

88. United States v. Creek Nation, 295 U.S. 103, 110 (1935). Ironically, this opinion was authored by the government's lawyer in *Lone Wolf*. *See infra* text accompanying note 173. Among pre-*Lone Wolf* dicta on tribal ownership, the *Lone Wolf* opinion recited the positive statement that tribal ownership is "as sacred as the fee of the United States in the same lands," 187 U.S. at 564, and ignored Chief Justice Taney's statement that tribes had no ownership rights. *See supra* note 61. Perhaps Justice White did not want to revive the ghost of *Dred Scott*. After the decision, the Indian Service followed through with allotment of the reservation. *See* Act of Mar. 20, 1906, ch. 1125, 34 Stat. 80.

89. 224 U.S. 665 (1912).

eastern Oklahoma, the government negotiated the 1897 Atoka Agreement providing for allotment and sale of "surplus" land owned by the tribes.[90] Allotments were to be exempt from taxation for up to twenty-one years, and the Agreement was ratified by Congress in 1898.[91] But in 1908, Congress purported to repeal the tax exemption.[92] The lawsuit by some eight thousand plaintiffs challenged the repeal, and the Court sustained their claim.[93]

The opinion's essential move was to interpret the tax exemption as a property right protected by the Fifth Amendment.[94] The decision granted injunctive relief, so the Court's focus was again on the Due Process Clause rather than on the Takings Clause.[95] The opinion expressly held that individual Indians are protected by the Bill of Rights,[96] but it cited *Lone Wolf* favorably.[97] The Court distinguished individual from tribal property, implying that the latter lacked constitutional protection: "there is a broad distinction between tribal property and private property."[98] It seems astonishing to treat a tax exemption as a constitutionally protected property right but to deny even minimal protection to the tribes' beneficial fee.

Apropos of this article, the *Choate* Court supported its decision by vigorously invoking the treaty canon of interpretation that it had ignored in *Lone Wolf*.[99] The issue

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90. *See id.* at 668–69.

91. *See id.* at 667 (citing Curtis Act of June 28, 1898, ch. 517, 30 Stat. 495, 507). The tax exemption was found in § 29 of the statute. Curtis Act of June 28, 1898, ch. 517, 30 Stat. 495, 507.

92. *See* Act of May 27, 1908, ch. 199, 35 Stat. 312, 313. The provision was explicit.

93. *Choate*, 224 U.S. 665.

94. *See id.* at 677–79.

95. *See id.*; *see also supra* note 83 and accompanying text (noting that the tribes' counsel in *Lone Wolf* used a parallel argumentative strategy).

96. *Choate*, 224 U.S. at 677–78. However, the year before *Choate*, the Court held that an allottee's right to sell his land was not constitutionally protected and could be removed by Congress's imposition of a twenty-year restriction on alienation. Tiger v. W. Inv. Co., 221 U.S. 286 (1911). In the same vein, the Oklahoma Supreme Court had called the tax exemption "a mere gratuity." Gleason v. Wood, 114 P. 703, 709 (Okla. 1911), *rev'd per curiam*, 224 U.S. 679 (1912). *Gleason* and *Choate* were companion cases with the same issues. The Oklahoma court issued its primary opinion in *Gleason*, and the Supreme Court its primary opinion in *Choate*, so *Choate* was in substance a review of *Gleason*.

97. *Choate*, 224 U.S. at 671.

98. *Id.*

99. *See id.* The 1898 statute ratified an agreement with a tribe, so it was a treaty equivalent. *See id.* at 668.

returned in the Court's 1930 decision in *Carpenter v. Shaw*,[100] a reprise of *Choate* that involved the same Atoka allotments. A 1928 federal statute subjected oil and gas royalties from restricted Indian allotments in eastern Oklahoma to state and federal taxes.[101] The Court enjoined the state tax on reasoning identical to *Choate*, including reliance on the treaty canon.[102]

The Supreme Court's failure to accord constitutional protection to tribal land allowed Congress's massively flawed policy of forced allotment to proceed unchallenged.[103] However, a decision recognizing tribal ownership in *Lone Wolf* would not likely have undone much of the allotment juggernaut. As the *Lone Wolf* tale illustrates, tribes wanted to keep their land, so lawsuits had to be timely. Damages claims faced federal sovereign immunity, which was then assumed to be a barrier even to claims under the Takings Clause, and consent to be sued in the Court of Claims excluded claims based on treaties.[104] By the time *Lone Wolf* was decided, the statute of limitations had run on most nineteenth century tribal claims.[105] Congress has waived the statute and consented to damages claims by tribes on a case-by-case basis, but consents were usually subject to conditions that fell short of just compensation.[106] Still another obstacle was the mistaken view of many that tribes lacked corporate capacity to sue unless specifically recognized by Congress.[107]

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100. 280 U.S. 363 (1930).

101. *See id.* at 366 (citing Act of May 10, 1928, ch. 517, § 3, 45 Stat. 495, 496).

102. *See id.* at 365–68. The *Carpenter* Court also rejected Oklahoma's claim that royalties were personalty and did not come within the Atoka tax exemption. *Id.* at 365, 368–69. Apparently, the federal tax collector had respected the exemption, which by that time applied only to some of the allotments. *See id.* at 365. The 1908 statute involved in *Choate* and the 1928 statute involved in *Carpenter* could have been read to exercise Congress's power of eminent domain, but the lawsuit for injunctive relief did not seek compensation, and the Court did not mention this possibility in either opinion.

103. For details of these laws' many defects, see Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1612–20 (2001); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

104. *See* Richard B. Collins & Karla D. Miller, *A People Without Law*, 5 INDIGENOUS L.J. 83, 112 (2006).

105. The statute of limitations for property claims against the government was and remains six years. Act of Mar. 3, 1887, ch. 359, § 1, 24 Stat. 505, 505 (codified as amended at 28 U.S.C. § 1491 (2006)).

106. *See* 2005 COHEN, *supra* note 1, § 5.06[2], [6][b]; *see also infra* notes 213–18 and accompanying text.

107. Lone Wolf's counsel thought it was a barrier, so they sued in the names of tribal leaders in a representative capacity. *See* Lone Wolf v. Hitchcock, 187 U.S.

Changing federal policy stopped further allotment and sale of tribal common land.[108] And in the 1930s, the Supreme Court at last recognized tribal ownership against the feds. The process began with *Creek Nation v. United States*, in which the Court rejected immunity for federal actions with the remark that the government cannot hide an "act of confiscation" behind the cloak of guardianship.[109] The constitutional issue was squarely resolved two years later when the Court held that tribal land had been taken in violation of the Constitution, requiring just compensation including prejudgment interest.[110] The next year, the Court rejected another stingy government claim, holding that tribal ownership included the land's timber and minerals.[111] In 1987, the Court held the Takings Clause to be self-executing, so that consents to sue for takings are no

553 (1903). The *Lone Wolf* Court said nothing about the question, and the Court had readily allowed the Cherokee Nation to sue several times. Indeed, no Supreme Court opinion ever suggested agreement with the claim, and in *Lane v. Pueblo of Santa Rosa*, the Court rejected the government's attempt to assert it. 249 U.S. 110, 112–14 (1919). However, Cohen's 1941 treatise stated it was a live issue. 1941 COHEN, *supra* note 13, at 283–85. Events thereafter resolved the issue conclusively in favor of tribal capacity. *See* Collins & Miller, *supra* note 104, at 112–17.

108. *See* 2005 COHEN, *supra* note 1, § 1.05 (describing the 1928 Meriam Report and the 1934 Indian Reorganization Act).

109. United States v. Creek Nation, 295 U.S. 103, 110 (1935). In *Yankton Sioux Tribe of Indians v. United States*, the Court held that an 1894 agreement had given the tribe fee title to a 648-acre tract that the government had seized without compensation. 272 U.S. 351, 354–58 (1926). The Court held this to be an exercise of eminent domain requiring just compensation. *Id.* However, the specific reference to fee title made the decision distinguishable until the broader holdings of the 1930s.

110. Shoshone Tribe of Indians v. United States, 299 U.S. 476, 498 (1937) ("Spoliation is not management."). In this and other decisions, courts interpreted statutes passed as early as 1920 consenting to claims against the government that silently allowed courts to find takings and award interest. *See* 299 U.S. at 497 and cases cited. A few Indian claims judgments prior to 1937 had awarded prejudgment interest based on agreement. *See* United States v. Cherokee Nation, 202 U.S. 101 (1906); United States v. Blackfeather, 155 U.S. 180 (1894); Pawnee Tribe of Indians v. United States, 56 Ct. Cl. 1, 15 (1920); Mille Lac Band of Chippewa Indians v. United States, 51 Ct. Cl. 400, 407–08 (1916).

111. United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938); *see also* United States v. Klamath & Moadoc Tribes of Indians, 304 U.S. 119 (1938) (sustaining judgment with interest for taking timber). A 1980 decision refined the boundary between federal authority to manage tribal land as trustee and federal liability for taking. United States v. Sioux Nation, 448 U.S. 371, 416–21 (1980) (affirming $100 million-plus judgment for taking the Black Hills). *See generally* Nell Jessup Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the Sioux Nation Rule,* 61 OR. L. REV. 245 (1982) [hereinafter Newton 1982] (criticizing the distinction).

longer needed.[112] Occurring long after Indian lands were taken, this was yet another ruling too late to aid tribes.[113]

Land under navigable water is a special category in both general law and Indian law. As a result, Indian claims to own submerged lands have generated mixed applications of the treaty canon. The general federal rule is that states own submerged land in trust for their people except to the extent that the federal government transferred interests prior to statehood.[114] There is a strong presumption against such transfers, and they must have been made for a proper public purpose.[115] Reserving land for Native Americans by treaty, statute, or executive order can qualify as a lawful purpose, but simply setting aside an Indian reservation is not, without more, sufficient to reserve submerged land to tribal ownership.[116] Tribes, usually with federal support, have gained ownership when their economies depended on fishing the disputed waters and under the special removal treaties applicable to eastern Oklahoma.[117] Otherwise, submerged land within reservations belongs to the state.[118] In other words, the treaty canon has helped protect submerged lands of fishing tribes and treaty lands in eastern Oklahoma, but it has failed to avoid loss of submerged lands on other reservations.

Complex issues about tribal sovereignty after 1975 involve both treaty and statutory canons. Application of the canons to these disputes is discussed separately below.[119]

III. THE STATUTORY CANON

This section provides a detailed account of the statutory canon. Its first part explains the canon's gradual emergence from early in the twentieth century until it was clearly established in the 1970s. It then reviews whether the canon

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112. First English Evangelical Lutheran Church v. Cnty. of L.A., 482 U.S. 304, 314–16 & n.9 (1987). *See generally infra* note 210.

113. *First English* mandates a damages remedy, but statutes of limitations are nevertheless valid. *See supra* note 105.

114. *See* 2005 COHEN, *supra* note 1, § 15.05[3][a].

115. *See id.* § 15.05[3][a] (citing United States v. Holt State Bank, 270 U.S. 49, 55 (1926); Martin v. Waddell, 41 U.S. 367 (1842)).

116. *See id.* § 15.05[3][b].

117. *E.g.*, Idaho v. United States, 533 U.S. 262 (2001); Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970); Alaska Pac. Fisheries v. United States, 248 U.S. 789 (1918).

118. *See* 2005 COHEN, *supra* note 1, § 15.05[3][b].

119. *See infra* Part IV.B.

has suitable support in legal theory. Emerging from dubious paternalism, its modern support is usually said to depend on the trust relationship between the United States and the Indian nations. However, the scope of that theory is contested and uncertain. The canon should have additional support in democratic theory when Congress imposes laws on Indian country because Indian votes have never been an important political check on congressional power. Application of the canon to general federal laws, however, is more complex and should depend on context.

This section's second part discusses the statutory canon's major applications to disputes between Native Americans and state and private interests. It concludes that, like the treaty canon, the statutory canon has helped to protect Indian resources and sovereignty. It also identifies the canon's unlikely creator, Justice Willis Van Devanter. The third part addresses the canon's application to disputes between Indians and the federal government. This involves complex issues about federal sovereign immunity that have been major barriers to justice for tribes.

A. Origin and Theory

Congress ended new Indian treaties in 1871, but the government continued to make formal agreements with Indian nations that were ratified by the full Congress rather than by two-thirds of the Senate.[120] These statutes are essentially treaty equivalents that should be subject to the treaty canon.[121]

The first Supreme Court opinion to suggest a rule for other federal statutes was little more than an aside in a context that likely disadvantaged the Indian party to the case.[122] In *United States v. Celestine*, the Court sustained federal jurisdiction to prosecute an Indian for murder on a reservation against counsel's argument that his citizenship implicitly divested federal authority. The Court stated:

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120. *See* 2005 COHEN, *supra* note 1, § 1.03[9] (citing Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2006))).

121. *See* Choate v. Trapp, 224 U.S. 665, 675–77 (1912); Winters v. United States, 207 U.S. 564, 576–77 (1908); 1941 COHEN, *supra* note 13, at 37 n.45 (citing Marlin v. Lewallen, 276 U.S. 58, 64 (1928); Carpenter v. Shaw, 280 U.S. 363, 366–67 (1980)). For recent agreements, tribal parties are versed in English and represented by lawyers, so a different set of rules may be appropriate. However, most contested agreements long predated these changes.

122. *See* United States v. Celestine, 215 U.S. 278 (1909).

> Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian, . . . it cannot be said to be clear that Congress intended by the mere grant of citizenship to renounce entirely its jurisdiction over the individual members of this dependent race.[123]

The first major decision clearly stating that ambiguous Indian statutes, other than those ratifying agreements, should be interpreted in Indians' favor upheld fishing rights of a small tribe in Alaska.[124] The next use was in an obscure and technical decision.[125] The second major decision was made soon after publication of Cohen's 1941 treatise, and Cohen participated in its briefing.[126] Thereafter, decisions invoking the statutory rule gradually increased until it became an established canon of interpretation.[127]

The theoretical justification for the treaty rule will not work for statutes that are not treaty equivalents. The treaty

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123. *Id.* at 290–91. The statement may have meant that the interpretation was favorable to Indians generally (and to the class represented by defendant's victim) if not to the defendant. No authority for "the rule" was cited, but the opinion's author was Justice Brewer, who had applied the treaty canon to a statute ratifying an agreement with a tribe in the landmark decision in *Winters v. United States*, 207 U.S. 564, 576–77 (1908). *See supra* text accompanying notes 51–52 (discussing the decision).

124. *See* Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89–90 (1918). The opinion cited *Choate v. Trapp*, 224 U.S. 665 (1912), "and cases cited." *Choate* interpreted a statute ratifying an agreement, that is, a treaty equivalent; its "cases cited" involved interpretation of treaties rather than statutes. For further discussion of *Alaska Pac. Fisheries*, see *infra* text accompanying notes 164–70.

125. *See* United States v. Reily, 290 U.S. 33, 39 (1933) (holding that under a special allotment statute, heir's title retained restriction on alienation). A few other opinions said or implied that Congress should not be found to have intended repeal of treaty rights absent clear intent. *See* United States v. Rickert, 188 U.S. 432, 442–43 (1903); Minnesota v. Hitchcock, 185 U.S. 373, 395–96 (1902); Choctaw Nation v. United States, 119 U.S. 1, 27–28 (1886); Leavenworth, Lawrence & Galveston R.R. Co. v. United States, 92 U.S. 733, 741–44 (1876). However, in all but the *Choctaw* case, the Court sustained a position advocated by the government. For a dissent similar to *Choctaw*, see *The Cherokee Tobacco*, 78 U.S. 616, 622–24 (1871) (Bradley, J., dissenting).

126. United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 353–55 (1941); *see also infra* text accompanying notes 183–87. On Cohen's participation, see *Santa Fe Pac. R.R. Co.*, 314 U.S. at 341; Felix S. Cohen, *Bibliography of Felix S. Cohen*, 9 RUTGERS L. REV. 351, 353 (1954). For details on the case, see generally CHRISTIAN W. MCMILLEN, MAKING INDIAN LAW: THE HUALAPAI LAND CASE AND THE BIRTH OF ETHNOHISTORY (2007). Briefs for Indians asserted a statutory rule in other pre-1941 cases. *See, e.g.*, Shoshone Tribe of Indians v. United States, 299 U.S. 476, 480 (1937).

127. *See* 2005 COHEN, *supra* note 1, § 2.02[1]–[2]; *infra* text accompanying notes 188–201 (discussing Bryan v. Itasca Cnty., 426 U.S. 373 (1976); Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); and other leading cases).

rule's search for expectations that were the basis for Indian consent to a treaty and for evidence of how Indian parties understood treaty terms cannot support a statute enacted without Indian consent. From the beginning, the government has had a loose policy of consultation with tribes, which waxed and waned with policy shifts.[128] But in the end, the statutes were what Congress favored, whether or not any or some or many tribes agreed.

1. Paternalism

Theories to justify the statutory rule are either suggested by the Court's opinions or asserted by scholars. The oldest is paternalism, based on the frequent statement in judicial opinions prior to the 1960s that the policy of the United States toward weak and defenseless Native Americans is one of benevolence. Among other problems, these statements often appeared in opinions justifying oppressive laws, most notoriously *Lone Wolf's* denial of tribal ownership and its green light for forced allotment.[129] One cannot match these encomiums to any consistent policy of judicial respect for Indian rights. The statements appear in decisions of every sort.

2. The Federal Trust Relationship

The most frequent theory in modern discourse is based on the trust relationship between Indian nations and the United States: Because of the federal trust obligation, ambiguous federal statutes should be interpreted in favor of Indian rights to property and sovereignty. The trust relationship is cited in judicial opinions and is the dominant theory in scholarly works including the 1982 and 2005 editions of the Cohen treatise.[130]

The trust concept regarding Indian land has been said to derive from the 1763 Royal Proclamation that placed land "under the dominion and protection" of the Crown "for the use of the . . . Indians."[131] However, the trust relationship is more commonly traced to Chief Justice Marshall's remark in

128. *See* Kevin K. Washburn, *Felix Cohen, Anti-Semitism and American Indian Law*, 33 AM. IND. L. REV. 583, 587–91 (2008).

129. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903).

130. *See, e.g.*, Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985); 2005 COHEN, *supra* note 1, § 2.02[2]; 1982 COHEN, *supra* note 16, at 221–25.

131. *See* 2005 COHEN, *supra* note 1, § 15.03.

Cherokee Nation v. Georgia that Indians' "relation to the United States resembles that of a ward to his guardian."[132] This dictum evolved from Marshall's analogy to a formal guardianship policy and into the allotment laws' land title terms, by which the United States owns allotments in trust for Indian beneficiaries.[133] For a century after *Cherokee Nation*, federal guardianship was repeatedly cited to justify policies adopted by the political branches, both those favoring and harming Indian interests.[134] When Indians opposed a federal policy, courts invoked the guardianship concept against them rather than in their favor.[135]

From the 1930s, the term trust relationship gradually replaced guardianship in legal discourse, and decisions invoking the statutory canon have cited the trust relationship as support for it.[136] Some discussions of the trust relationship assert special solicitude for Indian treaty rights.[137] This supports the trust concept indirectly. Political decisions extended the *Worcester* treaty interpretation in favor of |retained tribal sovereignty into federal policy for all Indian country, including reservations set aside by statute, executive order, or Spanish law.[138] As Cohen said in 1941, "The reciprocal obligations assumed by the [f]ederal [g]overnment and by the Indian tribes during a period of almost a hundred years constitute a chief source of present day Indian law."[139] This made *Worcester's* sovereignty doctrine the "backdrop" for sovereignty issues generally.[140]

However, the Court has at times defined the trust relationship as whatever Congress says it is.[141] A number of

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132. 30 U.S. 1, 17 (1831).

133. *See* 2005 COHEN, *supra* note 1, § 5.04[4][a]; *see generally* 2005 COHEN, *supra* note 1, § 16.03[2][b] (discussing the General Allotment Act, ch. 119, 24 Stat. 388 (1887) (formerly codified at 25 U.S.C. §§ 331–333) and subsequent amendments thereto).

134. *See, e.g.*, Choate v. Trapp, 224 U.S. 665, 677 (1912) (favoring); *Lone Wolf*, 187 U.S. at 566 (harming).

135. *See, e.g.*, United States v. Nice, 241 U.S. 591 (1916); *Lone Wolf*, 187 U.S. at 565.

136. *See* 2005 COHEN, *supra* note 1, § 5.04[4][a].

137. *See, e.g.*, Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601 (1975).

138. *See supra* notes 48–49 and accompanying text.

139. 1941 COHEN, *supra* note 13, at 33.

140. *See* McClanahan v. Ariz. Tax Comm'n, 411 U.S. 164, 172 (1973).

141. *See, e.g.*, Nevada v. United States, 463 U.S. 110, 127–28 (1983) (statutory duty to reclamation project overrode trust duty to tribe); United States v.

modern statutes expressly embrace the trust relationship and thus provide another background principle for the statutory canon.[142] But some Court decisions interpreting statutes passed during the allotment era pointed out that federal policy at that time was not favorable to tribal interests and read the statutes accordingly.[143] Notably, the Court has interpreted ambiguous allotment statutes that opened tribal reservations to white settlement to have implicitly eliminated reservation status of the opened area.[144]

3. The Democratic Deficit

Another theoretical concept should provide additional support for the statutory canon. When Congress imposes laws on Indian country, it lacks any semblance of political restraint. A member who votes against Indian interests will not risk losing the next election and may gain support from powerful interests opposing Indians.[145] Marshall's guardianship analogy and its successors alluded to this point: a guardian or trustee has such great control over a ward's or beneficiary's property that courts must impose strict standards of honesty and fair dealing.[146]

This democratic deficit is a strong reason for courts to

Mitchell, 445 U.S. 535, 541–46 (1980) (allotment trust imposed no management duties); *see also* 2005 COHEN, *supra* note 1, § 5.05[4][a]–[b] (detailing conflicts of interest within federal departments). Justice Thomas said the right analogy is guardianship rather than trust, which carries lesser duties. United States v. White Mountain Apache Tribe, 537 U.S. 465, 483 n.1 (2003) (Thomas, J., dissenting).

142. *See* 2005 COHEN, *supra* note 1, § 5.04[4][a] (gathering statutes).

143. *See, e.g.*, Cnty. of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 262–63 (1992).

144. *See infra* Part IV.A (discussing South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998); Hagen v. Utah, 510 U.S. 399 (1994); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. Dist. Cnty. Court, 420 U.S. 425 (1975)).

145. In the nation's earliest days, its Indian population was relatively numerous, but Indians were not citizens and could not vote. When Indians became citizens, they had become a small minority, and state voting laws kept many from voting until modern times. *See generally* 2005 COHEN, *supra* note 1, §§ 14.01[1]–[4]; 14.02[1], [2][b]. Some points in this section were raised in Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365, 378–81 (1989). A more recent analysis is found in Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45 (2012).

146. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 2, 77–79, 86–87 (2003); GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 1 (2d ed., rev. 1984). On Marshall's analogy, see *supra* text accompanying notes 132–33.

insist that Congress spell out legislative impairments of Indian rights. Ambiguous laws will not do. Whether this concern has directly influenced any court decision is uncertain. No judicial opinion has been found that recognizes it more exactly than the analogy identified above. The Court's adoption of the statutory canon may imply recognition; its demeaning references to Indians as weak and defenseless were at least an accurate description of their lack of direct political influence in Congress.

Recent events have softened the democratic deficit. Though tribes lack the votes to influence Congress directly, they have acquired greater public support and the ability to lobby Congress.[147] However, during most of our history, Congress acted with virtually no Indian influence and often in response to Indians' powerful enemies.[148] Thus, when courts interpret statutes adopted under those conditions, the democratic deficit ought to support a strong statutory canon.

This reasoning encounters more complex applications when we shift our attention from statutes governing Indian country to general federal laws applicable to everyone. These laws are tempered by normal political restraints. When Indians' interests are similar to those of other citizens, there should be no occasion for a statutory canon.[149] When general federal statutes impose on governments, tribal sovereignty is affected. At times tribes' interests may align with those of state and local governments, which have serious political clout.[150]

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147. *See, e.g.*, Report on National Congress of American Indians, INFLUENCE EXPLORER, http://influenceexplorer.com/organization/national-congress-of-american-Indians/b8e898903c5047db872e5f20acc5f5ca?cycle=-1 (last visited Mar. 5, 2012). Tribal interests even became tangled with the scandals involving Jack Abramoff and were accordingly the subject of a congressional inquiry and report. *See* STAFF OF S. COMM. ON INDIAN AFFAIRS, 109TH CONG., "GIMME FIVE"—INVESTIGATION OF TRIBAL LOBBYING MATTERS (Comm. Print June 22, 2006), *available at* http://www.indian.senate.gov/public/_files/Report.pdf. Improved public support is shown by President Nixon's 1970 Special Message on Indian Affairs, 1970 PUB. PAPERS 564 (1970), and by the positive recognition of the trust relationship in both major parties' presidential-year platforms since 1976, see *Political Party Platforms*, THE AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/platforms.php (last visited Mar. 7, 2012).

148. For discussion and analysis of manifold instances, see 2005 COHEN, *supra* note 1, § 1.03[4][a] (Indian Removal Act); United States v. Sioux Nation, 448 U.S. 371, 382–84 (1980) (Black Hills taking).

149. Reported decisions are in accord, though not on this explicit basis. *See* 2005 COHEN, *supra* note 1, § 2.03 ("Individual Indians and their property are presumed subject to the same general federal laws as all other persons.").

150. For example, federal law governs the status of noncitizens wherever

More often, however, tribal sovereignty raises distinct concerns. Tribal property has important cultural value.[151] Tribes and states are often in direct conflict over authority to govern Indian country.[152] These are important occasions to apply the statutory canon.[153] Other laws that apply to everyone can have uniquely negative impacts on Indian interests. A notable example is the Eagle Protection Act, which forbids killing eagles and possession of eagle parts.[154] Another is the statutory protection for religious freedom[155] applied to Indian claims to protect sacred sites on public lands. The statutory canon is justly applied to them, but results are mostly negative.[156]

The Supreme Court has so far addressed cases involving Indian challenges to general federal laws by saying that the issue in every case is whether Congress intended application of the contested statute to Indian country.[157] Because Congress often fails to consider the issue, we are left with the usual game of attributed intent. This yields some useful points, such as judging whether a statute would be rendered ineffective by an Indian country exception.[158] Some courts have thought it relevant whether a tribal activity is traditionally governmental

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found. *See* Arizona v. United States, 132 S. Ct. 2492 (2012).

151. *See* 2005 COHEN, *supra* note 1, § 15.01.

152. *See generally id.* §§ 6.01[5], 6.02[1]–[2][b], 6.03[1][a]–[2][c], 6.04[3][b][i]–[iv], 11.01[1]–[2], 11.02[1]–[3], 11.03, 11.04[1]–[5], 11.05[1]–[4], 11.06, 11.07, 11.08.

153. *See generally* 2005 COHEN, *supra* note 1, §§ 2.03, 21.02[5][c][i]–[6]; Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U. C. DAVIS L. REV. 85 (1991).

154. 16 U.S.C. §§ 668–668d (2006). On the importance of the Eagle Protection Act to Native Americans, see *United States v. Dion*, 476 U.S. 734 (1986); 2005 COHEN, *supra* note 1, § 14.03[2][c][ii][C]. The *Dion* Court applied the statutory canon but found clear congressional intent to override a treaty right. 476 U.S. at 738–45.

155. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb(4) (2006).

156. *See, e.g.*, Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm'n, 545 F.3d 1207 (9th Cir. 2008); Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008), *cert. denied*, 556 U.S. 1281 (2009); S. Fork Band v. U.S. Dep't of Interior, 643 F.Supp.2d 1192 (D. Nev. 2009), *aff'd per curiam*, 588 F.3d 718 (9th Cir. 2009); Comanche Nation v. United States, No. 08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008). Only the *Comanche Nation* claim was successful. None of the opinions recited the canon.

157. *See, e.g.*, Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 118 (1960). Most decisions on this issue are in the lower federal courts, but they observe a like rule. For more information, see cases cited in 2005 COHEN, *supra* note 1, §§ 2.03, 10.01[2][a]–[c], 21.02[5][c][i]–[ii], 21.02[6].

158. *See, e.g.*, Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 811–13 (1976).

or private, opining that private tribal activity should not merit an Indian exception.[159] This fits analysis based on political restraint because laws imposed on the private sector impact more voters.[160] However, when federal laws exempt enterprises owned by state and local government, tribes should have like treatment.[161]

Whether and when to rely on political restraint is a frequent subject of judicial review that sharply divides the Supreme Court on such basic issues as state sovereignty, voting rights, personal autonomy, interstate commerce, and rights of corporations.[162] In Indian law to date, the only explicit reliance on the concept of democracy has deployed the concept against tribal sovereignty, as explained below.[163] A more balanced approach is in order.

B. Application to Disputes with State or Private Parties

Like the treaty canon, the statutory rule has been more effective for tribes when the opposing interest is a state or private party. The rule's inaugural decision, *Alaska Pacific Fisheries v. United States*,[164] is illustrative and remarkable for several reasons. In 1887, the small Metlakatla band migrated from British Columbia to Alaska.[165] In 1891, Congress by statute set aside Annette Islands as a reserve for the tribe.[166]

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159. *See* 2005 COHEN, *supra* note 1, § 2.03 (describing the cases).

160. *Cf.* New York v. United States, 505 U.S. 144, 160 (1992) (in state sovereignty dispute, distinguishing laws imposed only on state governments from "generally applicable laws" imposed on states in common with private sector).

161. *See* Brian P. McClatchey, *Tribally-Owned Businesses Are Not "Employers": Economic Effects, Tribal Sovereignty, and* NLRB v. San Manuel Band of Mission Indians, 43 IDAHO L. REV. 127 (2006) (criticizing application of National Labor Relations Act to tribal business when it does not apply to state and local businesses). On labor and employment laws, see Wenona T. Singel, *The Institutional Economics of Tribal Labor Relations*, 2008 MICH. ST. L. REV. 487; Vicki J. Limas, *The Tuscarorganization of the Tribal Workforce*, 2008 MICH. ST. L. REV. 467; Ezekiel J.N. Fletcher, *De Facto Judicial Preemption of Tribal Labor and Employment Law*, 2008 MICH. ST. L. REV. 435; Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681 (1994).

162. *See* United States v. Lopez, 514 U.S. 549 (1995); Bush v. Gore, 531 U.S. 98 (2000); Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833 (1992); West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

163. *See infra* Part IV.C.

164. 248 U.S. 78 (1918).

165. *Id.* at 86.

166. *Id.* at 86–87 (citing Act of March 3, 1891, ch. 561, sec. 15, 26 Stat. 1094,

In 1916, the Alaska Pacific Fisheries Company installed a "formidable" fish-trap in waters off the islands.[167] The government successfully sued to enjoin maintenance of the trap.[168] The Court held that the 1891 statutory reservation included adjacent waters and submerged land despite the strong rule that land under navigable waters of federal territories is held by the United States in trust for future states and may be conveyed before statehood only on the clearest showing of intent.[169] Thus, the decision giving birth to the statutory canon was in favor of an immigrant tribe with no treaty rights, and the decision overcame a strong, contrary rule of interpretation.

Another notable feature of the *Alaska Pacific* opinion was its author, Justice Willis Van Devanter. Constitutional scholars know him as one of the conservative justices who voted to strike down New Deal legislation in the 1930s and federal child labor laws a generation earlier.[170] He was also the one justice in the Court's history with significant personal experience in American Indian law. His work in the field began when he represented his home state of Wyoming to win a notorious decision denying Indian hunting and fishing rights.[171] The same year, he moved to Washington and became an assistant attorney general in the Interior Department.[172] Over the next several years, he argued several Indian law cases to the courts, opposing suits by tribes against the government—including *Lone Wolf*—and supporting tribal rights when the government sued to enforce them.[173] Appointed to the Eighth Circuit in 1903, he did not sit for any major Indian law cases but heard

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1101).

167. *Id.* at 87.

168. *Id.* at 86.

169. *Id.* at 87–90; *see also supra* text accompanying notes 114–18. Despite the novelty of the Court's decision, it was unanimous.

170. *See Willis Van Devanter*, WIKIPEDIA, http://en.wikipedia.org/wiki/Willis_Van_Devanter (last visited June 6, 2012).

171. *See* Ward v. Race Horse, 163 U.S. 504, 507 (1896). This was one of the few hunting and fishing decisions that Indians have lost. *See supra* notes 53–57 and accompanying text.

172. *See Willis Van Devanter*, WIKIPEDIA, http://en.wikipedia.org/wiki/Willis_Van_Devanter (last visited June 6, 2012).

173. *See* United States v. Rickert, 188 U.S. 432, 434 (1903); Lone Wolf v. Hitchcock, 187 U.S. 553, 563 (1903); Cherokee Nation v. Hitchcock, 187 U.S. 294, 299 (1902); Minnesota v. Hitchcock, 185 U.S. 373, 382 (1902). He also represented the government in Indian law cases before the D.C. courts. *See, e.g.*, U.S. *ex rel.* West, v. Hitchcock, 19 App. D.C. 333, 337 (D.C. Cir. 1902).

many appeals from the Indian Territory.[174] On the Supreme Court from 1911, he became the Court's Indian law specialist, writing its notable opinions favorable to Indian interests in *Alaska Pacific Fisheries*, *United States v. Sandoval*,[175] *United States v. Quiver*,[176] *Lane v. Pueblo of Santa Rosa*,[177] *Seufert Bros. Co. v. United States*,[178] *United States v. Candelaria*,[179] *United States v. Chavez*,[180] and *Creek Nation v. United States*,[181] as well as in forty-four routine Indian law cases.[182] Justice Van Devanter's involvement in the *Lone Wolf* case was atoned by a strong judicial record respectful of Indian rights.

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174. *See, e.g.*, Stanclift v. Fox, 152 F. 697, 698 (8th Cir. 1907). Van Devanter did write the opinion in one Indian law case of note, *Rainbow v. Young*, 161 F. 835, 835 (8th Cir. 1908), which sustained the authority of Indian police on the Winnebago Reservation in Nebraska.

175. 231 U.S. 28 (1913) (holding Pueblo land is Indian country protected by federal laws defining crimes against Indians).

176. 241 U.S. 602 (1916) (denying federal authority to prosecute tribal Indians for adultery in Indian country).

177. 249 U.S. 110 (1919) (sustaining injunction against Interior Secretary to prevent wrongful disposal of tribal land).

178. 249 U.S. 194 (1919) (protecting Yakima treaty fishing rights).

179. 271 U.S. 432 (1926) (sustaining authority of U.S. to protect Pueblo land ownership).

180. 290 U.S. 357 (1933) (Pueblo land is Indian country protected by federal laws against theft of Indian livestock).

181. *See supra* note 109 and accompanying text.

182. Chippewa Indians of Minn. v. United States, 301 U.S. 358 (1937); British-American Oil Producing Co. v. Bd. of Equalization, 299 U.S. 159 (1936); Stewart v. Keyes, 295 U.S. 403 (1935); United States v. Reily, 290 U.S. 33, 39 (1933) (relying on statutory canon); Halbert v. United States, 283 U.S. 753 (1931); Mott v. United States, 283 U.S. 747 (1931); Wilbur v. United States *ex rel.* Kadrie, 281 U.S. 206 (1930); Larkin v. Paugh, 276 U.S. 431 (1928); Longest v. Langford, 276 U.S. 69 (1928); Marlin v. Lewallen, 276 U.S. 58, 64 (1928) (relying on treaty canon); Smith v. McCullough, 270 U.S. 456 (1926); United States v. Minnesota, 270 U.S. 181 (1926); United States v. Title Ins. & Trust Co., 265 U.S. 472 (1924); Bunch v. Cole, 263 U.S. 250 (1923); United States v. Bowling, 256 U.S. 484 (1921); Privett v. United States, 256 U.S. 201 (1921); La Motte v. United States, 254 U.S. 570 (1921); Harris v. Bell, 254 U.S. 103 (1920); Broadwell v. Bd., 253 U.S. 25 (1920); Ward v. Bd., 253 U.S. 17 (1920); Parker v. Richard, 250 U.S. 235 (1919); Parker v. Riley, 250 U.S. 66 (1919); Kenny v. Miles, 250 U.S. 58 (1919); Jefferson v. Fink, 247 U.S. 288 (1918); United States v. Ferguson, 247 U.S. 175 (1918); United States v. Chase, 245 U.S. 89 (1917); United States v. Rowell, 243 U.S. 464 (1917); Williams v. City of Chicago, 242 U.S. 434 (1917); Dickson v. Luck Land Co., 242 U.S. 371 (1917); Hill v. Reynolds, 242 U.S. 361 (1917); United States v. Nice, 241 U.S. 591 (1916); La Roque v. United States, 239 U.S. 62 (1915); Sizemore v. Brady, 235 U.S. 441 (1914); Washington v. Miller, 235 U.S. 422 (1914); Adkins v. Arnold, 235 U.S. 417 (1914); Skelton v. Dill, 235 U.S. 206 (1914); United States v. Bartlett, 235 U.S. 72 (1914); Pronovost v. United States, 232 U.S. 487 (1914); Perrin v. United States, 232 U.S. 478 (1914); Thurston v. United States, 232 U.S. 469 (1914); Monson v. Simonson, 231 U.S. 341 (1913); United States v. Mille Lac Band of Chippewa Indians, 229 U.S. 498 (1913); Kindred v. Union Pac. R.R. Co., 225 U.S. 582 (1912); Gritts v. Fisher, 224 U.S. 640 (1912).

The Court's second major decision to recite a statutory canon of interpretation was *United States v. Santa Fe Pacific Railroad Company* in 1941.[183] The rule again appeared to make a difference. The United States sued a railroad to enforce the Walapai Tribe's original Indian title.[184] The railroad claimed that several federal statutes had extinguished that title by implication.[185] The Court rejected each extinguishment claim for lack of clear intent, citing the treaty-equivalent rule of *Choate v. Trapp*:[186]

> We search the public records in vain for any clear and plain indication that Congress . . . intended to extinguish all of the rights which the Walapais had in their ancestral home . . . . Nor was there any plain intent or agreement on the part of the Walapais to abandon their ancestral lands . . . . No forfeiture can be predicated on an unauthorized attempt to effect a forcible settlement . . . unless we are to be insensitive to the high standards for fair dealing in light of which laws dealing with Indian rights have long been read.[187]

In the 1950s and 1960s, the government adopted and pursued a mindless policy to terminate the distinct legal status of Indian nations and end trust protection for tribal land. Indian opposition generated two of the most notable applications of the statutory canon.[188] In *Menominee Tribe of Indians v. United States*, the Court held that the statute terminating the Menominees' federal status had not abolished their freedom to hunt and fish on their former reservation without complying with state regulations.[189] The opinion relied on the treaty canon to infer that hunting and fishing rights were implicitly guaranteed by the treaty and on the statutory canon to hold that Congress had not abolished those rights.[190]

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183. 314 U.S. 339, 353–55 (1941).

184. *Id.* at 343.

185. *Id.* at 348–54.

186. *Id.* at 354. Walapai is now customarily spelled Hualapai. *See* THE HUALAPAI TRIBE WEBSITE, http://hualapai-nsn.gov/ (last visited Mar. 19, 2012). On original Indian title, see *infra* text accompanying notes 233–58.

187. *Santa Fe Pac. R.R. Co.*, 314 U.S. at 353–56.

188. On the termination policy generally, see 2005 COHEN, *supra* note 1, § 1.06.

189. 391 U.S. 404 (1968).

190. *Id.* at 405–06, 412–13. Dissenters agreed on the treaty right but thought that the statute had abolished it. *Id.* at 415 (Stewart, J., dissenting) ("The statute

The second occasion in which the Court applied the statutory canon to a termination policy was a 1976 decision interpreting the scope of a 1953 statute giving state courts civil and criminal jurisdiction over reservations in many states.[191] A Minnesota county relied on the statute to impose its personal property tax on an Indian resident of the Leech Lake Reservation.[192] The relevant text applied to reservation Indians "those civil laws of such State that are of general application to private persons or private property" except for laws relating to Indian trust property.[193] The plaintiff's mobile home was not trust property, so the statute appeared to apply state tax law, and the state courts so held.[194] The Supreme Court unanimously reversed, relying strongly on the statutory canon.[195]

The Court invoked the canon in a 1978 decision that protected tribal sovereignty from federal court review of individual rights claims: *Santa Clara Pueblo v. Martinez*.[196] A 1968 statute imposed most provisions of the Bill of Rights and the Equal Protection Clause on tribal governments.[197] The statute expressly authorized federal district courts to review tribal detentions by habeas corpus but was otherwise silent about enforcement.[198] The Santa Clara Pueblo passed and enforced a law on membership of children of mixed marriages under which offspring of Santa Clara men are members, while those of women are not.[199] In a suit to overturn the law as a denial of equal protection, the Supreme Court held that a civil cause of action to enforce the 1968 federal statute should not be

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is plain on its face . . . .").

191. Bryan v. Itasca Cnty., 426 U.S. 373 (1976).

192. *Id.* at 378.

193. 28 U.S.C. § 1360 (2006). The statute also expressly authorizes concurrent tribal authority where it is not inconsistent with state law. *Id.* § 1360(c).

194. *Itasca Cnty.*, 426 U.S. at 375.

195. *Id.* at 392.

196. 436 U.S. 49 (1978).

197. 25 U.S.C. §§ 1301–1303 (2006) (Indian Civil Rights Act). Congress passed the law in part because in 1896 the Court had held that tribes were not subject to the Bill of Rights directly. Talton v. Mayes, 163 U.S. 376 (1896). *Talton* is often hailed as an affirmation of tribal sovereignty, which in outcome it was. *See, e.g.*, 2005 COHEN, *supra* note 1, § 4.01[1][a]. However, the opinion was murky. It relied on the former view that the Bill of Rights did not apply to states, either. *Talton*, 163 U.S. at 382. The rights claim at issue was indictment by grand jury, and the Court cited its decisions, still good law today, refusing to impose that right on states under the Fourteenth Amendment. *Id.* at 384–85. And the Court stressed that Congress could impose laws on tribes. *Id.* at 384.

198. 25 U.S.C. §§ 1301–1303.

199. *Santa Clara Pueblo*, 436 U.S. at 51.

implied.[200] The opinion strongly relied on the statutory canon.[201]

C. Application to Disputes with the Federal Government

When tribes have sought judicial remedies against the federal government, sovereign immunity has been a dominant barrier to justice, and the statutory canon has seldom aided their claims. The first section of this part points out that sovereign immunity has defeated any claims for return of land in kind. While sovereign immunity is no barrier to injunctive relief against future wrongdoing by officials, such claims must be timely filed. Therefore, the only remedy for historical wrongs is damages claims, but these require either finding an unconstitutional taking or clear statutory consent to suit.

The second section of this part discusses the most important category of damages claims: those seeking redress for land wrongfully taken. Statutory consents to damages claims present challenging issues of interpretation, and decisions have often been hyper-technical and stingy. The section relates the long history of consent statutes including an account of the Indian Claims Commission.

The third section addresses the particular subject of the Court's failure to accord constitutional protection to original Indian title. The fourth briefly describes the status of executive order Indian reservations. The fifth section is a discussion of breach of trust claims for wrongs other than taking of land. Here again, interpretation of statutes consenting to damages remedies has been overly strict.

1. Remedy

Because of federal sovereign immunity, it is crucial to analyze remedies when reviewing Indians' disputes with the federal government. Tribes above all wanted to keep their land, but federal law had no judicial remedy to recover land

200. *Id.*

201. *Id.* at 60. As the dissent noted, the Court had readily implied a private civil cause of action to enforce previous civil rights laws. *Id.* at 73–74 (White, J., dissenting). In 2012 Santa Clara's membership voted to modify or repeal the restriction. *See* Tom Sharpe, *Santa Clara Vote on New Member Rules Leaves Loose Ends*, THE NEW MEXICAN, May 1, 2012, *available at* http://www.santafenewmexican.com/localnews/Pueblo-vote-on-member-rules-leaves-loose-ends.

wrongfully taken until recently.[202] Tribal land has often been restored by political action that set aside or expanded reservations by statute or executive order.[203] The 1934 Indian Reorganization Act provided for return of unsold land ceded under allotment statutes and authorized the Interior Department to take other land in trust "for the purpose of providing land for Indians."[204] Under secretarial regulations, unrestricted land within or adjacent to existing reservations is readily taken into trust, but the process is more difficult for land elsewhere.[205] Moreover, the Supreme Court restricted the statute to tribes recognized by Interior in 1934; the statutory canon was defeated by misapplication of the plain meaning rule, as the dissenters showed.[206]

In recent years, tribes have had occasional success in suits seeking an injunction or declaratory judgment against federal officials alleged to have breached federal trust obligations to tribes or otherwise to have acted illegally, and the statutory canon has played a role in some of these decisions.[207] However, equitable remedies are for future conduct,[208] while tribes often need remedies for past wrongs. When tribal property is

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202. *See* Quiet Title Act, 28 U.S.C. § 2409A (2006). The statute expressly does not apply to Indian trust lands. *Id.* § 2409A(a). It includes a limitations period of twelve years. *Id.* § 2409A(g).

203. *See* 2005 COHEN, *supra* note 1, § 15.04[3][b]–[4]; Act of Sept. 4, 1980, Pub. L. No. 96-340, 94 Stat. 1072 (expanding land base of Siletz Tribe); Act of Aug. 4, 1978, Pub. L. No. 95-337, 92 Stat. 455 (expanding Fallon Indian Reservation); Act of Sept. 21, 1972, Pub. L. No. 92-427, 86 Stat. 719 (expanding Warm Springs Reservation); Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437 (restoring Taos Pueblo ownership of sacred Blue Lake); *see also* Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 476–77 (1994) [hereinafter Newton 1994].

204. 25 U.S.C. §§ 463, 465 (2006). Laws specific to named tribes have similar provisions. *See* 2005 COHEN, *supra* note 1, § 15.07[1][a]. The 1983 Indian Land Consolidation Act promotes elimination of fractionated titles caused by the allotment laws. 25 U.S.C. §§ 2201–2209 (2006); *see also* 2005 COHEN, *supra* note 1, § 15.07[2].

205. *See* 25 C.F.R. pt. 151 (2011); 2005 COHEN, *supra* note 1, § 15.07[1][b]. Constitutional attacks on the statute by Indians' opponents have caused the criteria to be scrutinized and refined. *See id.* § 15.07[1][c].

206. Carcieri v. Salazar, 555 U.S. 379 (2009) (applying 25 U.S.C. § 479 (2006)). The Court majority pronounced the statute unambiguous, but the dissent and lower courts did not agree. For criticism of *Carcieri*, see Scott A. Taylor, *Indian Law: Taxation in Indian Country After* Carcieri v. Salazar, 36 WM. MITCHELL L. REV. 590 (2010). For criticism of "plain meaning," see Michael R. Merz, *Meaninglessness of the Plain Meaning Rule*, 4 U. DAYTON L. REV. 31 (1979).

207. *See* 2005 COHEN, *supra* note 1, § 5.05[1][a]. Of course, *Lone Wolf* was a failed attempt to enjoin loss of land. *See supra* text accompanying notes 75, 83.

208. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 664–68 (1974).

mismanaged by federal overseers, the wrong will often be unknown until after the fact because officials control the relevant records, often located far from Indian country.

For these reasons, most judicial contests between tribes and the federal government have involved damages claims, and all damages claims against the government depend on waivers of sovereign immunity.[209] In 1987, the Supreme Court held the Takings Clause to be a constitutional waiver;[210] but other claims depend on contracts or statutes that waive immunity.[211] The Supreme Court has often said that statutory waivers are strictly construed in favor of the government, though an irregular trend has generated some play in the rule's applications.[212] As relevant here, when the statutory Indian law canon clashed with the sovereign immunity rule, sovereign immunity usually, but not always, prevailed.

2. Damages for Land

An 1863 federal statute (known by its 1887 amended form as the Tucker Act) consented to damages claims against the government based on property or contract, but the statute unambiguously excluded claims based on treaties.[213] For this reason, Indian treaty claims required a special act of Congress for each tribe, consenting to suit, defining the cause of action, and waiving the statute of limitations.[214] The process was plagued by delay.[215] Many waivers were strictly construed against tribes: narrow causes of action, stingy damages rules,

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209. United States v. Testan, 424 U.S. 392 (1976).

210. First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 311–16 (1987). As it often does, the Court claimed that this had always been the law, or at least had been clear since its decision in *Jacobs v. United States*, 290 U.S. 13 (1933). However, Professor Sisk explained that *Jacobs* had simply acknowledged the Tucker Act's statutory consent to constitutional claims, which the Court had previously restricted to cases in which the government sought title to land. *See* Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 568–71 (2008). It is reasonable to suppose that *Jacobs*' recognition of Tucker Act jurisdiction based on inverse condemnation owed something to the Court's first recognition of the concept in the celebrated decision of *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

211. *Testan*, 424 U.S. at 400; *see generally* Sisk, *supra* note 210, at 525–33.

212. *See* Sisk, *supra* note 210, at 543–606.

213. *See* United States v. Sioux Nation, 448 U.S. 371, 384 n.15 (1980).

214. *See* 2005 COHEN, *supra* note 1, § 5.06[4]–[5].

215. *See* H. D. ROSENTHAL, THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION 19–20 (1990) (reporting an average of 15 years from enactment of consent to final judgment).

and substantial offsets for federal aid.[216] As a result, most claims were unsuccessful.[217] The Court of Claims could hear nontreaty claims, but many lawyers believed that all tribal claims were barred,[218] and most nontreaty claims would have needed waiver of the statute of limitations in any event.

That scheme was fundamentally changed by the 1946 Indian Claims Commission Act ("ICCA").[219] This act consented to all historical Indian claims being heard by a new Indian Claims Commission and reviewed by the Court of Claims.[220] The statute was generous in its definition of causes of action, encompassing a broad range of land claims and a provision to allow recovery for other wrongs.[221] However, the Commission and Court of Claims narrowed the latter substantially.[222] Furthermore, while ICCA waived immunity and limitations, it allowed other defenses and offsets.[223] ICCA also consented to future Indian treaty claims by removing the treaty exclusion from the Tucker Act, subject to the Act's six-year statute of limitations.[224]

The statute implied, but did not specify, that only damages could be awarded. In any case, the Commission and courts assumed as much from the outset.[225] Congress punted on other

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216. *See* 2005 COHEN, *supra* note 1, § 5.06[2]; ROSENTHAL, *supra* note 215, at 20–21, 27–33; Glen A. Wilkinson, *Indian Tribal Claims Before the Court of Claims*, 55 GEO. L.J. 511, 517–18 (1966).

217. *See* Wilkinson, *supra* note 216, at 513.

218. *See* Collins & Miller, *supra* note 104, at 102–12.

219. Act of Aug. 13, 1946, ch. 139, 60 Stat. 1049 (formerly codified as amended at 25 U.S.C. §§ 70–70n-2). The act's history is related at John T. Vance, *The Congressional Mandate and the Indian Claims Commission,* 45 N.D. L. REV. 325, 326–32 (1969).

220. Act of Aug. 13, 1946, ch. 139, 60 Stat. 1049 (formerly codified as amended at 25 U.S.C. §§ 70–70n-2).

221. *Id.* § 2, 60 Stat. 1050. Nonland claims came under § 2(5): "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."

222. *See* 2005 COHEN, *supra* note 1, § 5.06[3]; Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror,* 41 AM. U. L. REV. 753, 776–84 (1992) [hereinafter Newton 1992]. The most common nonland claim allowed was accounting for mismanagement of tribal funds. Many accounting claims were heard, but proofs were difficult. *See* ROSENTHAL, *supra* note 215, at 137, 139–40.

223. *See* 2005 COHEN, *supra* note 1, § 5.06[3].

224. ICCA § 24, 60 Stat. 1055 (codified as amended at 28 U.S.C. § 1505 (2006)); *see also* 2005 COHEN, *supra* note 1, § 5.06[5].

225. The implication arose from the Claims Commission name, review by the Court of Claims, and references in section 2 of the statute to deductions, offsets, and quantum of relief, and to the words "amount" and "sums" in §§ 15, 19, & 22(a), 60 Stat. 1050, 1053–55. When claimants sought awards of land in kind, their claims were rejected. *E.g.*, Osage Nation of Indians v. United States, 97 F.

issues of remedy, notably the major question of prejudgment interest.[226] In due course, decisions said that Fifth Amendment takings must include prejudgment interest.[227] However, the Commission and Court of Claims found numerous ways to avoid finding a taking.[228] The most egregious were refusing to recognize coerced or fraudulent treaties as takings and allowing the government to prevail on its claim that it acted as good faith manager of tribal assets when the facts belied the claim.[229] On the other hand, a few claims for interest based on agreements rather than takings succeeded, aided by the treaty canon.[230] And fair market value was the measure for land taken, rejecting the government's attempts to assert a lesser standard.[231]

An important and ironic defense was res judicata based on prior claims judgments. In two cases, the defense barred claims based on past judgments in special consent cases that were held—in effect, retroactively—to have found constitutional takings, though no takings claim had been made and no interest awarded.[232]

Supp. 381 (Ct. Cl. 1951), *cert. denied*, 342 U.S. 896 (1951). The statute's provisions on evidence, lawyers, and offsets implied some sort of adversarial procedure, but it has been criticized as overly adversarial by its last chair and by scholars. *See* Newton 1992, *supra* note 222, at 772; Vance, *supra* note 219, at 332–36

226. The statute's silence was not simply an oversight. Congress had considered but failed to pass statutes limiting prejudgment interest to six years. *See* ROSENTHAL, *supra* note 215, at 27–28; Howard M. Friedman, *Interest on Indian Claims: Judicial Protection of the Fisc,* 5 VAL. U. L. REV. 26, 28 (1970).

227. *See* Friedman, *supra* note 226, at 41.

228. *See id.* at 30–37. An experienced claims lawyer reported that as of 1966, only two ICCA takings claims for interest had succeeded. *See* Wilkinson, *supra* note 216, at 526.

229. Three Tribes of Fort Berthold Reservation v. United States, 390 F.2d 686 (Ct. Cl.1968); *see also* Friedman, *supra* note 226, at 34–37. The Supreme Court embraced the "good faith" theory of *Fort Berthold* in *United States v. Sioux Nation*, 448 U.S. 371, 416–21 (1980). For additional criticism, see Newton 1982, *supra* note 111.

230. *E.g.*, Peoria Tribe of Indians of Okla. v. United States, 390 U.S. 468, 472–73 (1968); Nez Perce Tribe v. United States, 176 Ct. Cl. 815, 829 (Ct. Cl. 1966), *cert. denied*, 386 U.S. 984 (1967) (partial recovery); Menominee Tribe of Indians v. United States, 67 F. Supp. 972, 975 (Ct. Cl. 1946).

231. *See, e.g.*, Tlingit & Haida Indians of Alaska v. United States, 389 F.2d 778, 781–84 (Ct. Cl. 1968).

232. Assiniboine Indian Tribe v. United States, 121 F. Supp. 906 (Ct. Cl. 1954), *cert. denied*, 348 U.S. 863 (1954); Blackfeet & Gros Ventre Tribes of Indians v. United States, 119 F. Supp. 161 (Ct. Cl. 1954), *cert. denied*, 348 U.S. 835 (1954). Failure to claim interest in the prior cases was, in hindsight, malpractice but understandable because of the widespread opinion that it was not recoverable until the Supreme Court decisions in 1935 and 1937. *See supra* text accompanying notes 109–11. On res judicata in the *Sioux Nation* case, see *infra* note 258 and ac-

3. Original Indian Title

Takings of land in original Indian title presents distinct issues of legal recognition and remedy. Original or aboriginal Indian title refers to tribal ownership antecedent to legal relations with a European or successor power.[233] The first American treaties with tribes involved cessions of part of a tribe's original territory and treaty recognition of land retained.[234] Parts of other tribes' original territory were recognized by statute or international treaty; lands of others were simply seized by settlers.[235] Under the theory of *Lone Wolf*, these distinctions would not have mattered in disputes about takings of tribal land because that decision denied constitutional protection to all tribal land.[236] The 1930s Court changed the law and held treaty title to be protected by the Takings Clause, but it did not say whether protection would include land in original title.[237]

Pre-1946, special acts of Congress consenting to damages claims were limited to causes of action specified in each statute. Until 1929, consents to land claims were based on ownership recognized in treaties, statutes, or executive orders, and the courts interpreted them strictly, thus excluding claims based on original title.[238] Starting in 1929, a few statutes allowed original title claims, and in 1945, the Court of Claims upheld the *Alcea* claim and was affirmed by the Supreme Court.[239] Soon after, ICCA was passed, and its broad causes of action were eventually interpreted to allow claims based on

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companying text.

233. *See* 2005 COHEN, *supra* note 1, § 15.04[2].

234. *See* PRUCHA, *supra* note 24, at 226–31.

235. *See id.* at 62–63, 978–82. Many reservations were set aside or expanded by executive order of the President. Their legal status is reviewed *infra* text accompanying notes 259–63.

236. *See supra* text accompanying notes 76–88.

237. *See supra* text accompanying notes 109–11.

238. *See* United States v. Alcea Band of Tillamooks, 329 U.S. 40, 49–54 (1946). The leading example is *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335 (1945) (stating that consent to claim based on treaty did not allow recovery based on original title). The Court divided 5-4; Justice Murphy's dissent relied strongly on the treaty canon to argue that plaintiffs should succeed under their treaty. *Id.* at 362. The dissent did not address original title.

239. Alcea Band of Tillamooks v. United States, 59 F. Supp. 934 (Ct. Cl. 1945), *aff'd*, 329 U.S. 40 (1946). The Court of Claims related that prior claims had failed for lack of proof or because jurisdictional acts were limited to treaty or other recognized title. *Id.* at 961–65. *Alcea* involved unratified treaties in Oregon, making proof easier.

original title.[240]

Constitutional protection was not at issue in *Alcea* until remand, when the plaintiffs sought interest on the judgment.[241] On its second review, the Supreme Court rejected the claim in a per curiam opinion that addressed the constitutional issue in a single sentence: "[l]ooking to the former opinions in this case, we find that none of them expressed the view that recovery was grounded on a taking under the Fifth Amendment."[242]

The Court squarely addressed the constitutional issue in *Tee-Hit-Ton Indians v. United States*, decided in 1955.[243] The Tee-Hit-Ton tribe in Alaska claimed that a federal timber sale condemned the timber interest in its original title land.[244] The tribe asserted that the Alaska Organic Act and other statutes recognized its ownership, entitling it to constitutional protection; in the alternative, it argued that its original title was protected by the Takings Clause.[245] The Court rejected both claims.[246]

The tribe's statutory claim was an opportunity to apply the statutory canon. However, three dissenting justices voted for the tribe on this claim without invoking the canon, and the majority also ignored it.[247] When Congress passed the Alaska Organic Act and other early statutes, it knew little about the extent of Native Alaskan interests, and these acts included

240. Otoe & Missouria Tribe v. United States, 131 F. Supp. 265 (Ct. Cl. 1955), *cert. denied*, 350 U.S. 848 (1955). As this decision shows, the government contested the issue vigorously. *See infra* note 244.

241. United States v. Alcea Band of Tillamooks, 341 U.S. 48, 48–49 (1951).

242. *Id.* at 49. Professor Friedman opined that the case did not settle the takings issue. Friedman, *supra* note 226, at 38.

243. 348 U.S. 272 (1955).

244. *Id.* Although the Court of Claims rejected the claim, the Supreme Court agreed to review the conflict because a few years earlier the Ninth Circuit had upheld another Alaskan tribe's takings claim. *Id.* at 275–76. The Court's opinions in prior cases, and a dissent, had language foreshadowing the constitutional ruling. Hynes v. Grimes Packing Co., 337 U.S. 86, 101–07 (1949); United States v. Alcea Band of Tillamooks, 329 U.S. 40, 56 (1946) (Reed, J., dissenting); Nw. Bands of Shoshone Indians v. United States, 324 U.S. 335, 338–40 (1945). Like the *Tee-Hit-Ton* majority, all were authored by Justice Stanley Reed, who seemed to have a personal vendetta on the issue. See also his gratuitous denigration of the treaty canon in *Northwestern Bands of Shoshone Indians*, 324 U.S. at 353.

245. *Tee-Hit-Ton Indians*, 348 U.S. at 273, 277.

246. *Id.* at 277–91.

247. *Id.* at 291 (Douglas, J., dissenting). In 1955 the statutory canon was not yet established. The Court had recognized it in all but three or four decisions. *See supra* notes 122–26 and accompanying text.

general provisions preserving Native rights.[248] The majority summarily read the statutes to preserve only whatever Native title would later be recognized, while the dissenters said that the Organic Act recognized Native ownership.[249]

For want of a treaty or statute, *Tee-Hit-Ton*'s constitutional holding presented an interpretive issue beyond the scope of the recognized canons. The Court's precedents on the Due Process and Takings Clauses say that constitutionally protected property interests are those recognized in state or federal law.[250] Therefore, the constitutional holding in *Tee-Hit-Ton* was either an interpretation of federal common law or of the Constitution itself. The Court's opinion largely begged the question by relying on the sort of circular reasoning used in *Lone Wolf*: that guardianship justifies anything the government does.[251] The policies underlying the treaty and statutory canons should have ready application to federal common law, but the courts have ignored the canons in that context.[252]

Tee-Hit-Ton prevented recovery of just compensation, including interest, in the few ICCA original-title cases that survived the minefield of government defenses.[253] For current and future claims, the decision's practical effect was mainly in Alaska because the statute of limitations bars most original-title claims elsewhere, unless Congress waives the statute. Many tribes would also face the barrier of res judicata based on

248. *Tee-Hit-Ton Indians*, 348 U.S. at 279–279.

249. *Id.* at 277–78, 291.

250. *See* RONALD D. ROTUNDA & JOHN E. NOWAK, 3 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.5(a) (4th ed. 2008).

251. *Tee-Hit-Ton Indians*, 348 U.S. at 279–82. Professor Friedman reviewed the history of the issue and made a strong case against the Court, suggesting that it simply adopted the distinction *ipse dixit* out of fear that liability would be too costly. Friedman, *supra* note 226, at 39–46. He did ignore the Court's statement in *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941) ("Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political not justiciable issues."). This tracked the brief for the United States with Cohen as counsel. *Id.* at 341. However, the matter was not at issue in that case. *See supra* text accompanying notes 183–87. Moreover, the statement can be read to refer only to the decision to extinguish, not to liability for taking.

252. Worse, it may have been avoided to undermine tribal sovereignty. *See infra* text accompanying note 347.

253. *See supra* notes 228–29 and accompanying text. However, Alaskan ICCA claims for fair market value of original title land, without prejudgment interest, succeeded. *E.g.*, Tlingit & Haida Indians of Alaska v. United States, 389 F.2d 778 (Ct. Cl. 1968).

a prior claims case judgment.[254] For this reason, loss of the Tee-Hit-Ton tribe's statutory claim had practical effect similar to loss of the constitutional issue, and failure to interpret the statute in favor of the tribe had almost the same practical impact as the constitutional holding. Congress resolved Alaskan claims in the 1971 Alaska Native Claims Settlement Act.[255] There was significant consultation with Natives during the drafting and hearings on the statute, and it conveyed substantial land holdings in kind to new Native corporations with shares owned by Natives individually.[256] However, critics have pointed out a number of shortcomings.[257]

For most tribes, recognition of constitutional protection to original Indian title in 1955 would have been too late to avoid statute of limitations or res judicata defenses. On the other hand, such recognition would have made a stronger political case for tribes to seek new waivers from Congress. The Sioux claim based on its treaty title illustrates both issues: new waiver and compensation in kind rather than cash.[258]

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254. *See supra* note 232 and accompanying text. For a notorious example, see United States v. Dann, 873 F.2d 1189 (9th Cir. 1989), *cert. denied,* 493 U.S. 890 (1989); *see also* Newton 1992, *supra* note 222, at 761–63; Caroline L. Orlando, *Aboriginal Title Claims in the Indian Claims Commission:* United States v. Dann *and Its Due Process Implications*, 13 B.C. ENVTL. AFF. L. REV. 241, 265–80 (1986).

255. Act of Dec. 18, 1971, Pub. L. 92-203, 85 Stat. 688–716 (codified as amended at 43 U.S.C. §§ 1601–1629a (2006)).

256. *See* James E. Torgerson, *Indians Against Immigrants—Old Rivals, New Rules: A Brief Review and Comparison of Indian Law in the Contiguous United States, Alaska, and Canada*, 14 AM. INDIAN L. REV. 57, 72 (1989) ("Alaskan Natives were deeply involved in the development and passage of ANCSA"); Arthur Lazarus, Jr. & W. Richard West, Jr., *The Alaska Native Claims Settlement Act: A Flawed Victory*, 40 LAW & CONTEMP. PROB. 132, 132–38 (1976).

257. *See* THOMAS R. BERGER, VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION (1985); Marilyn J. Ward Ford & Robert Rude, *ANCSA: Sovereignty and a Just Settlement of Land Claims or an Act of Deception*, 15 TOURO L. REV. 479, 489 (1999) ("ANCSA did not provide wealth, land, or improvement in the lifestyles of Alaska Natives. Instead it divided Alaska Natives [and] placed their lands and culture in jeopardy . . . ."); Newton 1994, *supra* note 203, at 461, 471–74. An attempt to recover damages for original title extinguished by the statute failed based on *Tee-Hit-Ton*. Inupiat Community of Arctic Slope v. United States, 680 F.2d 122 (Ct. Cl. 1982), *cert. denied*, 459 U.S. 969 (1982).

258. *See* United States v. Sioux Nation, 448 U.S. 371 (1980) (affirming $100 million-plus judgment for taking the Black Hills). The Sioux had lost their initial claim based on a 1920 special consent statute but then obtained a second statute that waived res judicata as well as immunity and limitations. *Id.* at 384–89. However, by the time of the 1980 judgment, the Sioux had decided that the only just resolution was restoration of land in kind, so they refused to accept the cash. Their judgment sits in the Treasury continuing to draw interest. *See* Oglala Sioux Tribe of the Pine Ridge Indian Res. v. United States, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) (dismissing suit for land); Different Horse v. Sal-

4. Executive Order Reservations

Many Indian reservations were established or expanded by executive orders of presidents between 1855 and 1919.[259] Of course, the land set aside was originally Indian land, usually in possession of the tribe for which the order reserved it and for which original title had never been formally extinguished. However, legal status was much improved by executive order. An order's boundaries obviate any need to prove the extent of original title. These reservations have full legal status for all purposes except constitutional protection against the federal government.[260] ICCA expressly allowed claims based on executive orders, but the Commission and Claims Court rejected constitutional protection.[261] That protection requires legislative recognition, but this can be implied.[262] Under the standard of implied recognition, aided by the statutory canon, it is likely that all current reservations have recognized title.[263]

5. Damages for Breach of Trust

Issues about interpretation of federal waivers of sovereign immunity also arise in cases claiming wrongs other than taking land. These are commonly called breach of trust cases, and again, the statutory canon of interpretation has often failed to overcome federal sovereign immunity. The basis for these claims derives from the smothering control over Indian resources exercised by the federal Indian affairs bureaucracy and by the U.S. Treasury.[264] When land is not taken outright, it is often mismanaged. Proceeds for land purchases are stolen or lost in the Treasury.[265]

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azar, No. 09-4049, 2011 WL 3422842 (D.S.D. Aug. 4, 2011) (denying suit to reopen the case). *See generally* JEFFREY OSTLER, THE LAKOTAS AND THE BLACK HILLS: THE STRUGGLE FOR SACRED GROUND (2010).

259. *See* 2005 COHEN, *supra* note 1, § 15.04[4].

260. *See id.*

261. *See id.*

262. *See id.*

263. *See id.* For some doubt on this point, see Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215, 1257–59 (1980). *But see* Idaho v. United States, 533 U.S. 262 (2001) (sustaining authority of executive order to reserve navigable waterway to tribe).

264. *See, e.g.*, United States v. Mitchell, 463 U.S. 206 (1983). *See generally* 2005 COHEN, *supra* note 1, §§ 17.01–17.03[2].

265. *See* 2005 COHEN, *supra* note 1, § 5.03[3][b]; Cobell v. Salazar, 573 F.3d 808, 809–11 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3497 (2010).

Some pre-1946 special-consent cases included mismanagement claims, with mixed success.[266] The ICCA's broad provisions defining causes of action opened the possibility of many kinds of claims beyond land takings, but the Commission and courts narrowed their application.[267] Occasional Indian claims continue to be heard under special jurisdictional acts.[268] But most current breach-of-trust claims are made under the Tucker Act.

Two barriers have defeated most Tucker Act Indian claims. First, the statute of limitations barred many claims.[269] Second, other claims failed for want of a cause of action; unlike the ICCA and earlier special consent laws, the Tucker Act does not specify causes of action.[270] Rather, to state a claim, a litigant must invoke a federal law or contract that "could fairly be interpreted as mandating compensation by the [f]ederal [g]overnment."[271] In every case tribes argue that the federal trust duty should satisfy that requirement, but the Supreme Court disagrees and requires a more specific waiver of immunity.[272] Thus, under the Tucker Act, mismanagement of Indian allotments could not be redressed based on the allotments' federal trust title because that title imposed no management duties; instead, it resembles a common-law use.[273] In another case, the trust relationship did not protect the Navajo Nation from corrupt action by the Secretary of the Interior regarding Navajo coal leases because the leasing statute did not impose compensable duties.[274] In these and

266. *See, e.g.*, Crow Nation v. United States, 81 Ct. Cl. 238, 271, 281 (Ct. Cl. 1935) (claims for mismanagement and loss of funds offset by federal expenditures). These claims suffered the same difficulties as land claims during that period. *See supra* text accompanying notes 214–18.

267. *See supra* text accompanying note 222.

268. *See* 2005 COHEN, *supra* note 1, § 5.06[4][a].

269. *See* Steven Paul McSloy, *Revisiting the "Courts of the Conqueror": American Indian Claims Against the United States*, 44 AM. U. L. REV. 537, 543–82 (1994); Newton 1992, *supra* note 222, at 790. Professor Newton discussed Indian claims that trust theory or other rules have tolled the statute and found very limited success. *See id.* at 792–800. *See also* Sisk, *supra* note 210, at 580–605 (discussing whether statutes of limitation for waivers of sovereign immunity are jurisdictional or function as in private litigation).

270. United States v. Navajo Nation, 537 U.S. 488, 490 (2003).

271. *Id.*

272. *See, e.g.*, *id.*

273. United States v. Mitchell, 445 U.S. 535, 542–44 (1980). *See* RESTATEMENT (THIRD) OF TRUSTS § 6 (2003). For detailed review of this decision and its antecedents, see Richard W. Hughes, *Can the Trustee Be Sued for Its Breach? The Sad Saga of* United States v. Mitchell, 26 S.D. L. REV. 447 (1981).

274. *Navajo Nation*, 537 U.S. at 493–514.

other cases, invocation of the statutory canon did not yield interpretations favorable to the Indians. However, mismanagement of allottees' timber resource was held compensable based on statutes committing control of their timber to federal officials.[275] Recently, a massive suit for mismanagement of allottees' trust funds succeeded.[276] Generally, claims' success or failure turns on views of the justices who hold the balance of power on a consistently divided Supreme Court.[277]

One must conclude that redress for the government's wrongful dispossession or mismanagement of Indian resources has been far short of fair compensation. A few tribes achieved just results, but most were buried in a blizzard of technicalities. The statutory canon was of little importance to a process in which courts and commissioners were a greater barrier than politicians; although, like politicians, the judges often seemed motivated more by saving the Treasury than by justice.[278]

IV. TRIBAL SOVEREIGNTY'S SETBACKS SINCE 1975

Tribal sovereignty has lost ground since 1975, and changes in the Supreme Court's membership are a likely cause. In his 1968 campaign for president, Richard Nixon made the Supreme Court's membership a prominent political issue, and

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275. United States v. Mitchell, 463 U.S. 206 (1983).

276. Cobell v. Salazar, 573 F.3d 808 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3497 (2010). After this decision, the parties settled the claim for $3.4 billion. *See* Elouise Cobell, *Cobell Case Wins Final Approval in Major Victory For Native Americans*, NDN NEWS, June 21, 2011, *available at* http://ndnnews.com/2011/06/cobell-case-wins-final-approval-in-major-victory-for-native-americans (last visited Aug. 17, 2012). For details, see Armen H. Merjian, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and* Cobell v. Salazar, 46 GONZ. L. REV. 609 (2010–11).

277. From 1980, all Indian claims decided on the merits by the Supreme Court have had dissents. *Navajo Nation*, 537 U.S. at 514 (Souter, J., dissenting); White Mtn. Apache Tribe v. United States, 537 U.S. 465, 481 (2003) (Thomas, J., dissenting); *Mitchell*, 463 U.S. at 228 (Powell, J., dissenting); *Mitchell*, 445 U.S. at 546 (White, J., dissenting). Chief Justice Rehnquist voted against the Indian side in each of these cases, as well as in *United States v. Sioux Nation*, 448 U.S. 371, 424 (1980).

278. This was the thrust of Professor Friedman's *Judicial Protection of the Fisc* article. Friedman, *supra* note 226, at 30–37, 39. His main examples were ICC's barriers to finding a taking in *Fort Berthold* and other cases and the footnote in *Tee-Hit-Ton v. United States*, 348 U.S. 272, 283 n.17 (1955), in which Justice Reed recited the government's estimate that recognizing original title would cost nine billion dollars, an immense sum in 1955.

it has been one ever since.[279] Most observers agree that the Court has changed and that Indian sovereignty has been affected as a result.[280] Tribes successfully defended sovereignty over their members in major decisions between 1959 and 1987, and this aspect of tribal sovereignty remains secure.[281] But in other battlegrounds, reviewed here, tribes have had either mixed or very little success. The canons were invoked and discussed in every case. The burning question for Indian nations is whether the modern Court has dishonored the canons.

The first part below explains the Supreme Court's mixed record in lawsuits contesting the boundaries of Indian reservations within which tribes can exercise sovereign powers. The boundary issue is largely settled, as all or nearly all possible contests have been decided, with some decisions favoring tribes but important ones going against them. Though regularly invoked, the statutory canon had little effect in these cases.

This section's second part addresses the Supreme Court's controversial decisions divesting tribes of most sovereign authority over nonmembers in tribal territory. The decisions that denied tribal authority over civil claims, and over Indians who did not belong to the governing tribe, recited false history and ignored precedents.

One reason the Court recited for the divesting decisions is its concern for the civil rights of nonmembers who cannot vote

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279. When running for election, Nixon promised to appoint "strict constructionists" to the Supreme Court. Except for Ford, every Republican nominee since has done the same. Beginning with the 1980 campaign, abortion became a major focus, with Republicans and Democrats dueling over whether *Roe v. Wade* should be overturned. As a result, the confirmation process became much longer. *See Strict Constructionism*, WIKIPEDIA, http://en.wikipedia.org/wiki/Strict_constructionism (last visited Aug. 16, 2012); Neal Devins, *Through the Looking Glass: What Abortion Teaches Us About American Politics*, 94 U. COLO. L. REV. 293, 304–09, 315–18 (1994) (book review essay).

280. *See, e.g.*, Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 580 (2008) ("federal Indian law as practiced before the Supreme Court is in serious normative decline . . . ."); Bethany R. Berger, *Liberalism and Republicanism in Federal Indian Law*, 38 CONN. L. REV. 813, 814, 817 (2006) (conservative justices favor states' rights over Indians'; liberals favor individual over tribal rights based on "ignorance of history and short-sighted, even illiberal, failure of perception"); Skibine, *supra* note 10, at 2–3 (summarizing views of several writers); 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, 316–52 (2001) (discussing views of justices in detail in relation to liberal and conservative labels).

281. *See* 2005 COHEN, *supra* note 1, § 4.01[1][b]–[f].

in tribal elections. This section's third part argues that this is a mistaken analysis of the subject.

A. Reservation Diminishment

In modern contests over boundaries of Indian reservations, results have been mixed, and the statutory canon has had little effect. The territorial extent of tribal sovereignty depends mostly on reservation boundaries. These originally coincided with land reserved for exclusive Indian occupancy or ownership, making the determination easy.[282] But the allotment laws opened part or all of many reservations to non-Indian entry and settlement.[283] The first problem caused by these openings was determining their effects on criminal laws applicable to Indian country. Lacking legislative guidance, courts reached conflicting decisions[284] until a 1948 statute resolved many issues.[285] The statute provides that all land within reservation boundaries is Indian country regardless of ownership.[286] When active tribal sovereignty revived after 1959, litigants began to dispute whether allotment and opening had abolished reservation status of opened areas.[287] In its first two decisions on the issue, the Supreme Court noted that the opening statutes said nothing about reservation boundaries and held the reservations at issue to be intact.[288] One opinion found the relevant law clear, the other insisted on clear congressional intent to diminish.[289]

In 1975, the Court's third decision on reservation boundaries retreated from requiring clear intent of Congress to diminish.[290] In *DeCoteau v. District County Court*, the Court held that an ambiguous statute had abolished the Lake

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282. *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 561 (1832).

283. *See* 2005 COHEN, *supra* note 1, § 1.04.

284. *See* 1982 COHEN, *supra* note 16, at 29–34.

285. 18 U.S.C. § 1151 (2006). On issues the statute resolved, see 1982 COHEN, *supra* note 16, at 29–34.

286. 18 U.S.C. § 1151(a).

287. *See* Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Supt. Of Wash. State Pen., 368 U.S. 351 (1962); DeCoteau v. Dist. Cnty. Court, 420 U.S. 425 (1975); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); Solem v. Bartlett, 465 U.S. 463 (1984); Hagen v. Utah, 510 U.S. 399 (1994); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998), discussed *infra* notes 288–310 and accompanying text.

288. *Mattz*, 412 U.S. at 481; *Seymour*, 368 U.S. at 351.

289. *Seymour* found the statute clear. 368 U.S. at 355–59. *Mattz* insisted on clear intent. 412 U.S. at 504–05.

290. *DeCoteau*, 420 U.S. at 425.

Traverse Reservation in South Dakota.[291] The 1891 statute ratified an agreement with the Sisseton and Wahpeton Sioux without material change.[292] It was therefore a treaty substitute, and review should have been based on the Indians' reasonable expectations about its effects. The Court did rely on the agreement to distinguish the two earlier decisions, which had been imposed on unconsenting tribes.[293] It also distinguished them based on payment: Lake Traverse tribes were paid immediately from the Treasury, while tribes in the prior cases were paid only by proceeds of sales to settlers.[294] This seemed to be a makeweight. When a tribe cedes an entire territory, it is reasonable to imply that the ceded land ceases to be a reservation regardless of the form of payment. When instead it cedes only noncontiguous parts of the land in a reservation, as at Lake Traverse, it is equally difficult to understand how the form of payment should imply abolition of reservation status.

The Court's holding was grounded on the operative part of the agreement that appeared verbatim in the statute: The "Indians hereby cede, sell, relinquish, and convey to the United States all their right, title, and interest in and to all the unallotted lands within the limits of the reservation . . . ."[295] But these words said nothing about abolishing the reservation, and the Court made no effort to ascertain the Indians' understanding of their import.[296] Instead, the opinion purported to rely on the statute's words, legislative history, and surrounding circumstances.[297] It claimed to honor the statutory canon but decided that the quoted words were "precisely suited" to abolish the reservation.[298]

Two years later, the Court held that three similar laws

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291. *Id.*

292. Act of Mar. 3, 1891, ch. 543, §§ 26–29, 26 Stat. 989, 1035–39. This was the annual Indian appropriations act that included ratification of seven allotment agreements.

293. *DeCoteau,* 420 U.S. at 448.

294. *Id.*

295. *Id.* at 445.

296. The Court quoted statements by Indian parties to the agreement from which one might have determined their understanding that the reservation would be abolished, but the question is uncertain in the absence of a systematic effort to examine it. *See id.* at 433–35. The dissenting justices were content to point out that the language relied on by the majority was ambiguous and thus insufficient. *Id.* at 463.

297. *Id.* at 445.

298. *Id.*

diminished the Rosebud Sioux Reservation.[299] The tribe made allotment and opening agreements with the government, but the Court again failed to require that the Indians' understanding be determined.[300] However, the tribe claimed that Congress had not relied on proper agreements, so that the statutes were imposed.[301] The Court accepted the tribes' claim, gave brief obeisance to the statutory canon, and then relied on statutory language that matched the 1975 case.[302] The ambiguous language had hardened into magic words, as the dissenters protested.[303]

However, the Court's next decision on the issue unanimously held that a 1908 allotment and opening statute imposed on two tribes had not effected reservation diminishment.[304] The statute lacked the magic language relied on in the prior cases, but it expressly referred to the reservations as "diminished" and their opened areas as part of the public domain.[305] Ten years later, the Court held that a statute imposed on a tribe that had resoundingly refused to agree to its terms had diminished its reservation because it referred to the opened area as part of the public domain.[306] A 1998 decision was nearly a reprise of the 1975 case: a statute ratified an agreement with the Yankton Sioux Tribe that included the magic, ambiguous language the Court had held to

299. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

300. *See id.* at 587–88. Language quoted by the Court again indicated that such an examination might have found that the tribe had understood that its reservation would be diminished. *See id.* at 592–93.

301. This claim had a complex history that the Court did not bother to sort out. Art. XII of the 1868 Sioux Treaty required consent of three-fourths of adult male members for further land cessions. 15 Stat. 635, 639. The 1889 agreement with the Sioux that divided the 1868 reservation into six smaller parts including Rosebud and ceded the rest, was allegedly agreed to by three-fourths of adult male members (though with much evidence of duress). It provided for allotment but said it should be agreed to by majority vote. Another section preserved consistent parts of the 1868 treaty. Congress ratified the agreement without material change. Act of Mar. 2, 1889, ch. 405, 25 Stat. 888, §§ 8, 9, 12, 19. Allotment at Rosebud began with a 1901 pact that was agreed to by three-fourths if adult males but required immediate cash purchase. Congress balked and refused to ratify. A 1903 agreement providing for payment out of proceeds from settlers' purchases was agreed to by majority vote short of three-fourths. Similar events led to the other two statutes at issue. The tribe argued that all three laws were imposed without consent, and the Court accepted that claim as a premise for its decision. *See Rosebud Sioux Tribe*, 430 U.S. at 590–98.

302. *Rosebud Sioux Tribe*, 430 U.S. at 586–98.

303. *Id.* at 618–19.

304. Solem v. Bartlett, 465 U.S. 463 (1984).

305. *Id.* at 474–76.

306. Hagen v. Utah, 510 U.S. 399, 412–13 (1994).

be "precisely suited" to diminishment.[307] The Court unanimously held the reservation abolished.[308] The Tribe argued that provisions of the Yankton agreement not found in the Lake Traverse agreement implied that the Indians had not understood that their reservation would be abolished.[309] The Court rejected that argument, but the claim at least led to a discussion in some detail of how the Indians had understood the agreement.[310]

Normal rules of statutory interpretation cannot reconcile these decisions. From 1973, every opinion purported to rely on the statutory canon. When the statutes were treaty substitutes, the statutory canon was the wrong focus, but in any case, very similar laws were interpreted inconsistently. As others have observed, the record of subsequent treatment of the opened area is the only factor that makes sense of all the cases.[311] Reservation areas held undiminished had continuing Indian and federal agency presence similar to other reservations. Those held to be diminished or abolished had much less Indian and federal presence and had been assumed not to be reservations for decades. The cases seem to rest on a rule of collective laches: when no one challenged the effect of an allotment and opening statute for many decades, latter-day contests were barred by the passage of time.[312] The Court did interpret ambiguities in the records of subsequent treatment in the Indians' favor. But the canons had little direct role in interpreting the agreements and statutes.

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307. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 344–45 (1998).

308. *Id.*

309. *Id.* at 345–49.

310. *Id.*

311. *See, e.g.*, Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 24–27 (1999).

312. In *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), the Oneidas purchased land within the area of their 1788 treaty reservation. The land had been wrongfully sold in 1807, and the reservation had been treated as abolished since 1805. The Court held that laches prevented restoration of reservation status to the purchased land. *Id.* at 217–20. The Court cited and relied on the diminishment cases, but the issue was different because none had involved land owned by a tribe or held in trust for Indians. *See id.* at 215. For criticism, see Sarah Krakoff, City of Sherrill v. Oneida Indian Nation*: A Regretful Postscript to the Taxation Chapter in Cohen's Handbook of Federal Indian Law*, 41 TULSA L. REV. 5 (2005).

B. Tribal Jurisdiction Over Nonmembers

The canons of interpretation have had severe tests in recent contests about tribal authority over nonmembers in tribal territory. In a series of decisions since 1978, the Supreme Court has decided that tribes have very little sovereignty over non-Indians and over Indians who do not belong to the governing tribe. These decisions have generated a flood of critical scholarship.[313] My focus is on application of the canons in this context.

The first, and most difficult, issue decided by the Court involved criminal jurisdiction over non-Indians. And it arose under quite unfavorable facts. The Suquamish Tribe in Washington claimed criminal jurisdiction to punish non-Indian offenders.[314] Defendants argued that tribal authority was preempted by a federal statute providing for federal criminal jurisdiction over interracial crimes in Indian country, commonly called the Indian Country Crimes Act.[315] The statute's terms preserve concurrent tribal jurisdiction over Indian defendants but do not say anything about tribal jurisdiction over non-Indians.[316] The terms also say nothing about state jurisdiction, but the courts have consistently interpreted the statute to preempt state authority over interracial crimes by non-Indians, and traditional norms

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313. *See, e.g.*, Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623 (2011); Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 391 (2007/2008) ("There is no question that in the last thirty years, the Supreme Court has presided over an unprecedented assault on the sovereignty of Indian tribes."); Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 659–60 (2006); Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of* Lone Wolf, 38 TULSA L. REV. 5, 33 (2002) ("As the years have gone by, the jurisprudential spread between the Court and the scholarly community has become a gulf that now may be impassible."); Getches, *supra* note 280, at 267 ("The Supreme Court has made radical departures from the established principles of Indian law.").

314. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 193 (1978). The Court recited that the reservation had been opened, and its population was 2,928 non-Indians and 50 Suquamish members. *Id.* at 193 n.1.

315. 18 U.S.C. § 1152 (2006). The statute evolved from laws passed between 1790 and 1854 and from some treaty provisions. *See* 1982 COHEN, *supra* note 16, at 287–88.

316. 18 U.S.C. § 1152 ("This section shall not extend to . . . any Indian committing any offense in the Indian country who has been punished by the local law of the tribe . . . ."). This appears to give exclusive authority to the tribe or feds, whichever acts first.

avoided concurrent jurisdiction over serious crimes.[317] Limited judicial precedents barred tribal authority as well.[318] Thus, the statute could have been read to preempt tribal power—an interesting test of the canons.[319] Instead, the Supreme Court held that the tribe had no jurisdiction based on an expansive and radical theory.[320] Largely ignoring the statute, it claimed

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317. *See, e.g.*, Donnelly v. United States, 228 U.S. 243, 253–54, 271 (1913). Donnelly was a non-Indian convicted of murdering an Indian on a reservation. Jurisdiction was based on predecessors of section 1152, and the Court sustained the conviction after extensive review of the statute's application. *See id.* at 268–72. The Court had no occasion to consider whether jurisdiction was concurrent, but counsel for both sides made arguments that assumed either the United States or the state had exclusive jurisdiction. *See id.* at 253–54. As the Court noted, crimes by non-Indians against non-Indian victims had been held subject to state jurisdiction exclusive of federal. *Id.* at 271. In *Williams v. United States*, 327 U.S. 711, 714 (1946), the Court stated in dicta that federal jurisdiction under the statute is exclusive of state jurisdiction. No judicial opinion has even hinted that jurisdiction might be concurrent.

318. The only reported decision on tribal jurisdiction was *Ex parte Kenyon*, 14 F. Cas. 353 (C.C.W.D. Ark. 1878). The court granted habeas corpus to a non-Indian in Cherokee custody, stating: "[T]o give [the Cherokee] court jurisdiction of the person of an offender, such offender must be an Indian, and the one against whom the offence is committed must also be an Indian. Rev. St. 1873, § 2146 [codified as amended in 18 U.S.C. § 1152]." *Ex parte Kenyon*, 14 F. Cas. at 355. Because there was an alternative holding, this may have been dicta. The court's statement that the victim must be Indian was wrong; the statute clearly preserves concurrent tribal authority when the accused is Indian and the victim is not. When both accused and victim are Indian, the statute preserves exclusive tribal jurisdiction, so the court's error may reflect the general assumption that jurisdiction ought to be exclusive. A Supreme Court dictum referred to the statute's effect on tribal authority. Interpreting a Cherokee treaty to reserve exclusive tribal jurisdiction over an alleged crime by a Cherokee, the Court stated,

> The general object of these statutes [predecessors of 18 U.S.C. § 1152] is to vest in the courts of the [Cherokee] nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side.

Ex parte Mayfield, 141 U.S. 107, 116 (1891). This statement repeated the *Kenyon* error about crimes by Indians against non-Indian victims; it appears again to reflect the background assumption that jurisdiction ought to be exclusive. *Oliphant*, 435 U.S. at 209, also quoted Justice Johnson's dissenting opinion in *Fletcher v. Peck*, 10 U.S. 87, 147 (1810) (". . . the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves."). This remark had no relevance to the case and was not joined by any other justice.

319. The Court of Appeals briefly discussed and rejected the claim. Oliphant v. Schlie, 544 F.2d 1007, 1010–11 (9th Cir. 1976), *rev'd*, 435 U.S. 131 (1978). The original Cohen treatise stated that, aside from specific rights in early treaties, tribes lacked authority to prosecute non-Indians, but Cohen did not analyze the issue. 1941 COHEN, *supra* note 13, at 148. One scholar reviewed the issue extensively and concluded that the statute was not intended to preempt tribal authority over non-Indians. *See* Peter C. Maxfield, Oliphant v. Suquamish Tribe: *The Whole Is Greater Than the Sum of Its Parts*, 19 J. CONTEMP. L. 391, 418–23 (1993).

320. *Oliphant*, 435 U.S. at 209–11.

that criminal jurisdiction over non-Indians had been implicitly taken from tribes upon their incorporation into the United States.[321] The opinion's main theme was to argue that federal authorities had always assumed tribes had no criminal jurisdiction over non-Indians.[322] Of course, such an assumption could have been based on the statute. The Court also said that tribal authority to punish would have raised procedural concerns that were reflected in traditional assumptions.[323] Scholars have shown that the Court's collection of assumptions was selective and ignored contrary evidence,[324] but no member of the Court has questioned the decision.

Three years later, *Montana v. United States*[325] extended the new theory of implicit divestiture to civil jurisdiction. At issue there was the Crow Tribe's authority to regulate hunting and fishing on its treaty reservation, which had been allotted and opened.[326] The Court's analysis divided the issue based on land ownership.[327] For Indian trust land, the Crow Tribe could regulate civilly based on its power of exclusion.[328] For land owned by non-Indians or by the State of Montana, general tribal jurisdiction was implicitly divested by incorporation.[329] This time there was no attempt to claim that divesting had been assumed all along; almost all reported precedents had sustained tribal authority in civil matters. The Court recognized these decisions but crafted a special category of retained tribal power to distinguish them: "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing,

321. *Id.*

322. *Id.* at 197–206. This claim was previewed in the dissenting opinion of then-Judge Anthony Kennedy's dissent in the Court of Appeals. *Oliphant*, 544 F.2d at 1014–19. Terms of the early treaties that defined Indian sovereignty yielded tribes' foreign affairs powers. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 17–18 (1831). Until *Oliphant*, powers internal to Indian country had been retained unless preempted by Congress. *See* 2005 COHEN, *supra* note 1, § 4.02[3][a].

323. *Oliphant*, 435 U.S. at 211–12.

324. *See* Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems,* 37 ARIZ. ST. L.J. 1047, 1056 (2005); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1161–63 (1990); Maxfield, *supra* note 319, at 418–23.

325. 450 U.S. 544 (1981).

326. *Id.* at 547–48.

327. *Id.* at 551–55.

328. *Id.* at 554–56.

329. *Id.* at 563–64.

contracts, leases, or other arrangements."[330] The opinion also stated that tribes *may* retain additional power to protect essential tribal interests.[331]

As was the case for criminal jurisdiction, federal statutes provided a means to address the case in less radical fashion. The Court of Appeals had followed that course, holding that the allotment and opening laws deprived the tribe of authority to regulate hunting and fishing on fee land owned by non-Indians, but not generally.[332]

Implicit divestiture's third casualty was tribal jurisdiction over Indians belonging to other tribes. After several years of dicta and indirect holdings, the Court applied the theory of implicit divestiture to deprive tribes of criminal jurisdiction in the 1990 decision in *Duro v. Reyna*.[333] The opinion claimed the same historical pattern as in *Oliphant*,[334] but this factual claim was close to fraudulent. The Indian Country Crimes Act that was the backdrop for *Oliphant* had always applied to all Indians, not just to those locally enrolled. Thus, the *Duro* Court rewrote the tribal jurisdiction clauses of the statute.[335] The Court revealed its actual reasons later in the opinion. It said that whatever was done in the past, Indians are now American

330. *Id.* at 565–66.

331. *Id.* at 566 (emphasis added). This dictum turned out to be meaningless. *See infra* text accompanying note 341.

332. *See id.* at 550. The Court of Appeals had held that the tribe owned the beds and banks of the Big Horn River, but the Supreme Court reversed, so the lower court did not explore the jurisdictional implications of that factor either. *See id.* at 556–57.

333. 495 U.S. 676 (1990). Prior to 1978, judicial precedents of all kinds distinguished between Indians and non-Indians. For the first time a Court opinion shifted the distinction to tribal members and nonmembers in *United States v. Wheeler*, 435 U.S. 313, 326 (1978). No issue in the case depended on the distinction, so it was a gratuitous dictum on an issue that was not briefed. Next, a 1980 civil case held that nonmember Indians were subject to state jurisdiction when members were not. Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 161 (1980). Briefing and analysis were minimal. The distinction arose randomly in the 1981 *Montana* opinion discussed above; again it was not at issue and not briefed. *See supra* text accompanying notes 325–32.

334. *Duro*, 495 U.S. at 688–92.

335. *See supra* text accompanying note 316. In *United States v. Rogers*, 45 U.S. 567, 573 (1846), the Court said that the provision preserving tribal jurisdiction over Indians "does not speak of members of a tribe, but of the race generally, of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs." The *Duro* opinion quoted this language, but (perhaps deliberately?) misapplied it to the statute's imposition of federal jurisdiction rather than to its preservation of tribal jurisdiction over crimes by Indians. 495 U.S. at 689.

citizens and entitled to the civil rights of citizens.[336] (Was the Court saying noncitizen Indians had none?) The opinion invoked the democratic deficit by pointing out that nonmembers cannot vote in tribal elections.[337] The Court said that tribal membership is voluntary, so members consent to tribal authority.[338] True, but membership is equally voluntary for members of other tribes. An individual can surrender tribal membership and its federal law status.[339] In any event, Congress disagreed with the Court's revision and restored the traditional interpretation.[340]

Having established implicit divestiture, the focus shifted to defining the scope of civil jurisdiction left to tribes by the *Montana* theory—consensual relations, essential tribal interests, and exclusion from trust land. As scholars have detailed, the Court has read all three categories narrowly, and its expressed concern with the inability of nonmembers to vote in tribal elections has spread to become a major factor in civil as well as in criminal matters.[341]

At least on vital economic issues, the decisions are mixed. The Court sustained tribal power to tax lessees of tribal property and to control hunting and fishing on trust land free

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336. *Duro*, 495 U.S. at 692–93.

337. *Id.* at 693–94.

338. *Id.* at 693.

339. *See* 2005 COHEN, *supra* note 1, § 3.03[3]; *cf.* Morton v. Mancari, 417 U.S. 535, 554 n.24 (1974) ("The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.'").

340. 25 U.S.C. § 1301(2) (2006). A constitutional attack on the validity of the override failed but did not fully resolve all issues raised. United States v. Lara, 541 U.S. 193, 209 (2004) ("[W]e need not, and we shall not, consider the merits of Lara's due process claim. . . . Like the due process argument, however, [his] equal protection argument is simply beside the point[;] therefore we do not address it."). The statute applies only to criminal law. 25 U.S.C. § 1301(2). Its possible application to issues of civil jurisdiction has not been judicially resolved. For discussion of later cases on the due process and equal protection issues, see Matthew L. M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L. J. 579, 630–34 (2008).

341. *See, e.g.*, Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005); Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 651–53 (2003); 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); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States Rights, Color-Blind Justice, and Mainstream Value*s, 86 MINN. L. REV. 267 (2001).

of state interference.[342] The Court also crafted an awkward but effective rule to bar state taxation of non-Indians participating in other forms of economic development on reservations.[343] But changing Court membership betrayed that rule to allow state taxation of oil and gas production from tribal trust land.[344] And a non-Indian business on its own land can cater to tourists attracted to Navajo Indian country free of any tribal tax.[345] However, the Court interpreted ambiguous federal laws to allow tribal gambling enterprises to operate free of state interference, a decision which led to today's tribal casinos.[346]

C. Divestiture, Democracy, and the Canons

As the previous section relates, since 1978 the Supreme Court has crafted a new doctrine of implied divestiture to deprive tribes of most jurisdiction over nonmembers in tribal territory, and it has relied on democracy as an important policy reason for its decisions. The canons have been shunted aside. However, the Court did not spell out the formal basis for implied divestiture. Because recognition of tribal sovereignty derives from treaties, the new doctrine could be based on a theory of implied cession by the Indians in the treaties. One scholarly view is that divestiture was based on federal common law—with no text to interpret, common law would provide a possible way to avoid the canons.[347] Or perhaps divestiture was simply a matter of conquest. If the former, it is impossible to square the treaty implication with any fair rule of treaty interpretation, and none of the divestiture decisions made an

342. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (sustaining tribal taxation of mineral lessees); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (sustaining exclusive tribal control of hunting and fishing on tribal land).

343. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144–52 (1980) (barring state taxation of transactions between tribes and others involving development of "reservation value").

344. *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989). Only one justice was common to the majorities in *Cotton* and in *White Mountain Apache*.

345. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

346. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). The Court's complex opinion alluded to the statutory canon, mainly by reference to *Bryan v. Itasca County*, 426 U.S. 373 (1976). *Cabazon*, 480 U.S. at 207–14. Congress reacted to the decision by passing the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701–2721 (2006)). *See generally* 2005 COHEN, *supra* note 1, §§ 12.01–.07.

347. *See* Singer, *supra* note 341, at 650 n.32. *But see supra* text accompanying note 252 (arguing that there should be a canon for federal common law).

attempt to do so. To that extent, those who accuse the Court of abandoning the canons, including dissenting justices, have a powerful case. And of course, conquest is supposed to be a legislative power, not judicial. If the theory supporting implied divestiture is an interpretation of the Constitution, we ought to be told the reasoning for that interpretation.

Whatever the theory, the Court's invocation of democracy to create and extend divestiture is misplaced. As explained above, when Congress imposes laws on Indians in Indian country, it acts without normal voter restraint, a strong reason to require that ambiguities in these statutes be interpreted in favor of Indians and tribes.[348] When federal Indian country laws regulate nonmembers of tribes, there is a similar lack of direct voter restraint. Until the Court's modern takeover, relations between tribes and nonmembers were regulated by Congress. One might argue that nonmembers lack the political authority to obtain a fair hearing in Congress, but examination of the question should show this claim to be incorrect. Tribal jurisdiction is regularly and vigorously opposed by state governments, which have significant influence in Congress.[349] Thus, there is no evidence that nonmembers in Indian country have been neglected by Congress.

The Court has deployed the divestiture theory to create a novel set of rules governing relations between tribes and nonmembers that it considers appropriate. It has effectively shifted primary lawmaking on this subject from Congress to itself, an institution with far less political accountability than Congress. The Court has often said that the Constitution commits Indian policy to Congress.[350] It should restore that rule.

CONCLUSION

The Indian treaty canon is firmly grounded in the basic rules for interpretation of treaties and contracts. The Supreme Court has dishonored it in two major instances: delayed recognition of tribal land ownership and implicit divestiture of tribal sovereignty over nonmembers. In many other matters, the canon has served well to preserve tribal resources and

348. *See supra* text accompanying notes 145–48.

349. Many decisions cited *supra* in Parts II.B, and III.B, and *supra* notes 343–46 involved state governments opposing Indian sovereignty as parties or amici, or both.

350. *See* 2005 COHEN, *supra* note 1, § 5.02[1]–[2].

sovereignty. Notably, it helped to establish the trust relationship between Indian nations and the United States.

The Indian statutory canon derives from the treaties and the trust relationship and should have additional support from the lack of political restraint on Congress's broad power over Indian country. Its application to general federal statutes could be improved by considering whether a statute peculiarly impacts Indian country and the related question of political restraint. The statutory canon's major failure has been in the Court's crabbed and picky interpretations of statutes intended to redress federal wrongs.

Both canons have been notably more successful for Indian rights when opponents were states or private interests and less so when tribes challenged the feds. Historically, whatever policy federal authorities chose to support, for or against Indian interests, has usually prevailed. Since 1975, the pattern has changed dramatically. The government has sided with tribes on most major controversies, in particular in contests about reservation diminishment and about tribal authority over nonmembers.[351] The Court's response was to seize for itself the dominant policy-setting role. Tribes are addressing the role reversal by seeking aid of Congress against a hostile Court.[352]

351. *See, e.g.*, Carcieri v. Salazar, 555 U.S. 379 (2009); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 646 (2001); Montana v. United States, 450 U.S. 544 (1981); DeCoteau v. Dist. Cnty. Court, 420 U.S. 425 (1975).

352. *See, e.g.*, *supra* text accompanying note 340.

INDIAN COURTS AND FUNDAMENTAL FAIRNESS: *INDIAN COURTS AND THE FUTURE* REVISITED

MATTHEW L.M. FLETCHER*

For Ann Getches

This article comes out of the University of Colorado Law Review's symposium issue honoring the late Dean David H. Getches. It begins with Dean Getches's framework for analyzing Indian courts. I revisit Indian Courts and the Future*, the 1978 report drafted by Dean Getches, and the historic context of the report. I compare the 1978 findings to the current state of Indian courts in America. This article focuses on the reality that the ability of Indian courts to successfully guarantee fundamental fairness in the form of due process and equal protection of the law for individuals under tribal government authority is uniquely tied to the legal infrastructure available to the courts. Congress tried to provide the basic framework in the Indian Civil Rights Act ("ICRA"), and many of the most successful tribal justice systems have borrowed from ICRA or developed their own indigenous structure to guarantee due process and equal protection. I argue that ICRA is declining in importance as Indian tribes domesticate federal constitutional guarantees by adopting their own structures to guarantee fundamental fairness.*

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INTRODUCTION

There are about three hundred American Indian courts, or tribal courts,[1] in the United States. These courts constitute a powerful exercise of tribal government authority in the modern era, statutorily cabined only by the Indian Civil Rights Act ("ICRA").[2] They are usually considered the foundation for

1. I will use "Indian courts" and "tribal courts" synonymously. Dean Getches used "Indian courts," which is a term that many might think archaic in the twenty-first century. The more recent accepted phrase is "tribal courts."

2. Pub. L. No. 90-284, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301–41 (2006)). *See generally* Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557 (1972); Arthur Lazarus, Jr., *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 N.D. L. REV. 337 (1969). ICRA purported to extend many, but not all, federal constitutional rights to persons under tribal jurisdiction. *Cf.* Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1676–77 (2012) (noting that the Second Amendment does not apply to Indian tribes).

individual rights protections in tribal justice systems[3] despite being criticized as not good fits for tribal government.[4] As tribal justice systems develop, they rely less on ICRA and more on indigenous jurisprudence. This article traces that movement.

This article was prepared in honor of the late Dean of the University of Colorado Law School David Getches and traces the modern history of Dean Getches's contribution to the ongoing public discussion about the legitimacy of Indian courts. His work began in the late 1970s with the publication of *Indian Courts and the Future*, a report of an extensive survey of tribal courts commissioned by the National American Indian Court Judges Association.[5] Getches's work, in many ways the first of its kind, provided the groundwork for establishing a theoretical basis for making tribal law more independent of federal influence and control.

Tribal justice systems, embodied by Indian courts, made enormous strides in the last several decades. Congress is supportive of Indian courts,[6] and more recently, the

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3. *See* U.S. COMM'N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT, at II-3 (June 1991) (describing the origins of ICRA and asserting that "[i]t was through the . . . ICRA . . . that Congress statutorily imposed on the tribal governments restrictions similar to those found in the Bill of Rights").

4. *See* Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC'Y REV. 1123, 1123 (1994) (arguing that individual rights protections are sometimes incompatible with collective tribal rights).

5. NAT'L AM. INDIAN CT. JUDGES ASS'N., INDIAN COURTS AND THE FUTURE: REPORT OF THE NAICJA LONG RANGE PLANNING PROJECT (David H. Getches & Orville N. Olney eds., 1978) [hereinafter "REPORT"]. Thanks to the outstanding law librarians at the University of Colorado Law School library, the REPORT and its two appendices are available online. *See* William A. Wise Law Library, *David H. Getches Collection*, http://www.colorado.edu/law/lawlib/research_resources/digital_collections/getches_collection/ (last visited Oct. 28, 2012).

6. *E.g.*, 25 U.S.C. §§ 3601(4)–(9) ("(4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems; (5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments; (6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights; (7) traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes and to the goals of this Act; (8) tribal justice systems are inadequately funded, and the lack of adequate funding impairs their operation; and (9) tribal government involvement in and commitment to improving tribal justice systems is essential to the accomplishment of the goals of this Act."); 25 U.S.C. §§ 3651(5)–(11) ("(5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring the health and safety and the political integrity of tribal governments; (6) Congress and the Federal

Department of Justice has begun to support tribal justice systems by proposing the Stand Against Violence and Empower ("SAVE") Native Women Act, which would reestablish tribal criminal jurisdiction over non-Indians for some crimes.[7] The Senate eventually incorporated this provision into the 2012 Senate version of the Violence Against Women Act ("VAWA") reauthorization.[8]

But the news is not all good. Opponents of tribal sovereignty continually attack tribal justice systems as a means to undercut tribal government authority. In the recent debates over the limited expansion of tribal criminal justice authority in the VAWA reauthorization bill, opponents claimed tribal courts were illegitimate and illiberal, citing to examples opponents claim are representative of tribal justice systems everywhere.[9] Many tribal governments have illiberal tendencies, and some Indian courts are incapable of combating the worst abuses of tribal governments.[10] Yet, in most instances, modern tribal justice systems are successful at resolving these issues.

This article begins with Dean Getches's framework for

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courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands; (7) enhancing tribal court systems and improving access to those systems serves the dual Federal goals of tribal political self-determination and economic self-sufficiency; (8) there is both inadequate funding and an inadequate coordinating mechanism to meet the technical and legal assistance needs of tribal justice systems and this lack of adequate technical and legal assistance funding impairs their operation; (9) tribal court membership organizations have served a critical role in providing training and technical assistance for development and enhancement of tribal justice systems; (10) Indian legal services programs, as funded partially through the Legal Services Corporation, have an established record of providing cost effective legal assistance to Indian people in tribal court forums, and also contribute significantly to the development of tribal courts and tribal jurisprudence; and (11) the provision of adequate technical assistance to tribal courts and legal assistance to both individuals and tribal courts is an essential element in the development of strong tribal court systems.").

7. S. 1763, 112th Cong. (2011).

8. *See Senate Passes VAWA, Including Protections for Native Women,* NAT'L CONGRESS OF AM. INDIANS (Apr. 26, 2012), http://www.ncai.org/news/articles/2012/04/26/senate-passes-vawa-including-protections-for-native-women.

9. S. REP. NO. 112-153, at 40–41, 51–55 (2012) (reporting minority views of Senators arguing against expansion of tribal court jurisdiction); H.R. REP. NO. 112-480, at 58–59 (2012) (reporting House majority views that tribal courts will not provide adequate due process to nonmembers).

10. *See generally* Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799 (2007) (theorizing illiberalism in tribal governance); Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 50 SAN DIEGO L. REV. (forthcoming 2013) (theorizing lack of tribal accountability for human rights violations).

analyzing Indian courts. Part I first revisits *Indian Courts and the Future*,[11] the 1978 report drafted by Dean Getches, and discusses the historic context of the report. It then analyzes the substance of that report and the framing given to the description of Indian courts by Dean Getches. Part I concludes by comparing the 1978 findings to the current state of Indian courts in America.

Next, this article focuses on the ability of Indian courts to successfully guarantee fundamental fairness in the form of due process and the equal protection of the law for individuals under tribal government authority. Part II first details several tribal court opinions that exemplify the uses of ICRA in the last few decades. These modern court opinions demonstrate the ability of Indian courts to guarantee fundamental fairness to tribal court litigants beyond the minimum standards of the Indian Civil Rights Act by incorporating tribal statutory and common law principles. Finally, this article addresses the question of the future relevance of ICRA. Congress tried to provide the basic framework of individual rights protection in ICRA,[12] and many of the most successful tribal justice systems have borrowed from ICRA or developed their own indigenous structure to guarantee due process and equal protection.[13] ICRA is declining in importance as Indian tribes domesticate federal constitutional guarantees by adopting their own structures to guarantee fundamental fairness.

In short, this article argues that some tribal courts are developing a jurisprudence following principles of "fundamental fairness" that account for tribal customary and traditional law in comporting with American notions of "due process" and "equal protection." This jurisprudence of fundamental fairness may effectively replace, over time, tribal court borrowing of American law in rights cases.

I. THE GETCHES REPORT AND THE PRESENT

This Part covers several decades of recent history involving American Indian justice systems. I begin by describing and

11. *See* REPORT, *supra* note 5.

12. *See* Indian Civil Rights Act, 25 U.S.C. §§ 1301–03 (2006).

13. GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS CONST. art. X, § 1 (1988) (codifying Section 2 of the Indian Civil Rights Act as it existed in 1988 into the tribal constitution).

summarizing what I call the "Getches Report" and follow that with a subsection on the state of Indian courts as of 1978. I conclude this Part with a subsection doing the same for Indian courts in 2012.

A. The Historical Context of the Getches Report

In 1979, the National American Indian Court Judges Association ("NAICJA") published a report entitled *Indian Courts and the Future: Report of the NAICJA Long Range Planning Project*.[14] The project involved surveys of twenty-three tribal courts from around the country about their structure, jurisdiction, day-to-day operations, procedures, and relations with state and federal courts.[15] The results of the surveys are published as Appendix 1 to the report.[16] Appendix 2 collects articles by more than a dozen American Indian law scholars and practitioners who drafted some of the first serious scholarship on tribal courts.[17] In the report, Dean Getches summarized the results of the project and offered dozens of recommendations for developing tribal courts. The report helped tribal advocates begin responding to the series of Congressional hearings that purported to detail (mostly anecdotally) the abuses and incompetence of tribal governance and adjudication in the 1960s.[18] These hearings served as the factual predicate for the enactment of ICRA.[19]

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14. *See* REPORT, *supra* note 5.

15. *See id.* at 5.

16. *See* NAT'L AM. INDIAN CT. JUDGES ASS'N, INDIAN COURTS AND THE FUTURE: APPENDIX 1, COMPLICATION OF FINDINGS FROM RESERVATION SURVEYS (David H. Getches & Orville N. Olney eds., 1978) [hereinafter "APPENDIX 1"].

17. *See* NAT'L AM. INDIAN CT. JUDGES ASS'N, INDIAN COURTS AND THE FUTURE: APPENDIX 2, DISCUSSION MATERIALS PREPARED FOR PROJECT ADVISORY COMMITTEE (David H. Getches & Orville N. Olney eds., 1978) [hereinafter "APPENDIX 2"].

18. For an overview of the 1960s hearings, see Elizabeth Ann Kronk, *Tightening the Perceived "Loophole": Reexamining ICRA's Limitation on Tribal Court Punishment Authority*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY 211, 219–25 (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley, eds. 2012).

19. Meanwhile, the American Indian Policy Review Commission recommended the expansion of federal support of tribal justice systems. *See* AM. INDIAN POL'Y REVIEW COMM'N, 95th Cong., 1st Sess., Final Report 167 (1977). The Commission found that the limitations of tribal justice systems could be tied most directly to resources. *See id.* One commentator in the study argued that Indian tribes that did not have the capacity to "administer criminal and civil jurisdiction in the early 1950s" should not be restricted years later, further noting that "it should have been foreseen that such capabilities would someday be

The study arrived at a critical juncture in the history of American Indian law. The report came immediately after the Supreme Court's holding in *Oliphant v. Suquamish Indian Tribe*[20] that tribal courts have no criminal jurisdiction over non-Indians; and in the same year as the American Bar Foundation's report, *American Indian Tribal Courts: The Costs of Separate Justice*[21] that recommended the abandonment of efforts to develop tribal justice systems.[22] It would have been interesting to see whether the Court would have addressed the factual findings of the study in the *Oliphant* decision. Perhaps the Court would have pointed to the report and focused on the areas where tribal justices systems needed to improve as justification for limiting tribal jurisdiction. Or, perhaps the Court would have been more likely to be persuaded that tribal jurisdiction over non-Indians was not terribly disturbing as a civil rights matter. Who knows?

Indian Courts and the Future was the first serious study of tribal justice systems. NAICJA staffers and consultants prepared a detailed survey of tribal courts.[23] The survey results offer data that twenty-first century tribal judges and tribal court practitioners would find familiar in some ways and foreign in other ways.[24] The meat of the report is Dean Getches's history of tribal courts and tribal justice systems[25]

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developed . . . ." *Id.* (quoting letter from Douglas Nash, Counsel to the Umatilla Reservation to Donald R. Wharton, Task Force No. 4).

20. 435 U.S. 191 (1978), *superseded by statute*, Pub. L. No. 101-511, 104 Stat. 1892 (1990).

21. SAMUEL J. BRAKEL, AMERICAN INDIAN TRIBAL COURTS: THE COST OF SEPARATE JUSTICE (1978); *see also* Samuel J. Brakel, *American Indian Tribal Courts: Separate? "Yes," Equal? "Probably Not,"* 62 A.B.A. J. 1002 (1976); Richard B. Collins, Ralph W. Johnson & Kathy Imig Perkins, *American Indian Courts and Tribal Self-Government*, 63 A.B.A. J. 808 (1977) (criticizing and responding to Brakel, *American Indian Tribal Courts: Separate? "Yes," Equal? "Probably Not," supra*).

22. *See* BRAKEL, *supra* note 21, at 103 ("[I]t would be more realistic to abandon the [tribal court] system altogether and to deal with Indian civil and criminal problems in the regular county and state court systems.").

23. APPENDIX 1, *supra* note 16, at 1–20.

24. *E.g.*, Juli Anna Grant, *Abby Abinanti, Chief Judge, Yurok Tribal Court, Klamath, California, and California Superior Court Commissioner*, 2 J. CT. INNOVATION 347, 348 (2009) (noting expanded jurisdiction of the tribal court coupled with funding shortages). In contrast to the REPORT, the contemporaneous American Bar Foundation study apparently involved little more than visits by the author to five reservations, conducting informal interviews with various tribal court personnel and parties to tribal court cases, some form of "person on the street" interviews of people in reservation communities, and attendance at a tribal court personnel training. *See* BRAKEL, *supra* note 21, at 3.

25. *See* REPORT, *supra* note 5, at 7–13.

and the recommendations of NAICJA after reviewing the survey and the scholarship.[26] The study concluded that Indian courts suffer from a terrific lack of resources that undercut the ability of the courts to guarantee fundamental fairness.[27] Perhaps most importantly, the study concluded that Indian courts had few law-trained judges and Indian country[28] had limited numbers of law-trained counsel available to litigants.[29]

Indian Courts and the Future, published in 1978, set the stage for discussions about tribal justice systems for the next several decades and more and this report continues to have relevance to the advancement of tribal courts.

B. The State of Indian Courts Circa 1978

At this time, Indian courts suffered from a lack of legal infrastructure—constitutional texts, statutory texts, tribal customary law, and traditional law—upon which to draw and interpret.[30] Tribal judges usually applied state and federal precedents in their 1970s and early 1980s opinions.[31] They did so despite the fact that those opinions were derived from federal and state statutes that did not apply in the tribal context and involved common law from the Anglo-American tradition that also did not apply to tribal communities.[32]

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26. *See id.* at 103–95.

27. *See id.* at 53–55 (reporting findings that the large majority of tribal court judges were not lawyers and the large majority of tribal court advocates were lay people).

28. "Indian country" is a term of art in federal Indian law, denoting the relevant legal boundaries where federal, state, and tribal boundaries meet. *See* 18 U.S.C. § 1151 (2006) (defining "Indian country" for federal criminal jurisdiction purposes). I also use "Indian country" less specifically, as here, to generally describe the place where Indians and tribes reside.

29. *See* REPORT, *supra* note 5, at 53–55, 65 (discussing reliance on non-Indian judges, low salaries for judges and court staff, lack of on-reservation attorneys and law-trained court clerks, and reliance on lay advocates).

30. *See id.* at 37–40, 43–44 (discussing the unavailability of tribal law, the scarcity of model codes, the lack of separation of powers and judicial independence, and the problems with borrowing state law).

31. *See id.* at 43–44 (discussing reliance upon state laws).

32. The prototypical example of a federal common law rule that, at one time, would have been a poor fit for tribal communities is the *Miranda* rule, where criminal suspects have a right to silence and other rights derived, at least in part, from an American tradition of using physical violence to elicit confessions in criminal cases. *See* Miranda v. Arizona, 384 U.S. 436, 446–48 (1966); Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It—and What Happened to It*, 5 OHIO ST. J. CRIM. L. 163, 163–64 (2007). In *Navajo Nation v. Rodriguez*, 8 Navajo Rptr. 604, 615–16 (Navajo 2004), the court noted the disconnect between Anglo-American traditional police

Statutorily, with the exception of a few tribal constitutions,[33] courts had little to draw upon except ICRA.[34] Until 1978, when the Supreme Court decided *Santa Clara Pueblo v. Martinez*,[35] holding that ICRA did not provide a federal cause of action to adjudicate those claims, litigants could access federal courts to litigate ICRA complaints.[36]

The Report noted the widely differing responses from the twenty-three tribal courts on their understanding and implementation of ICRA.[37] Consultants to the study wrote their responses after visiting the tribal courts.[38] The consultants reported that many of the tribal courts had changed into more formal and less traditional entities ten years after ICRA's enactment.[39] The consultants noted that many, but not all, of the courts stated that ICRA was helpful as a guide to compel the court to provide proper procedure to litigants and in helping guide substantive civil rights cases.[40]

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practices and those of the Navajos.

33. For an extensive survey of tribal constitutions available in the 1960s and 1970s, see generally CHARTERS, CONSTITUTIONS AND BY-LAWS OF THE INDIAN TRIBES OF NORTH AMERICA, PTS 1–12 (George E. Fay, ed. 1967–1971).

34. *See* Indian Civil Rights Act, 25 U.S.C. § 1302 (2006).

35. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

36. *Cf.* REPORT, *supra* note 5, at 76 (predicting more and more federal court ICRA cases). At the time, there was robust scholarly literature debating whether federal courts should have ICRA jurisdiction. *Compare* Alvin J. Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D. L. REV. 1 (1975) (arguing against), *with* Joseph de Raimses, *The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government*, 20 S.D. L. REV. 59 (1975) (arguing in favor).

37. *See* APPENDIX 1, *supra* note 16, at 261–67.

38. *See id.* at 2.

39. *See id.* at 263–64 ("The court is much more formal and Anglicized. . . . Procedure is becoming more Anglo oriented. . . . The court has become much less traditional and much more formal. . . . Court procedure has become more formal and sophisticated since passage of the ICRA.").

40. *See id.* at 263 ("Indirectly, a great effect—NAICJA [Native American Indian Court Judges Association] training in response to passage of the ICRA has changed judges' techniques; prosecutor to be hired will be a result of ICRA."); *id.* ("Judges feel the ICRA is a good thing, as it gives them a guideline for defining individual rights."); *id.* ("New code, currently being done, includes ICRA protections in law and procedure for the first time."). *But see id.* at 264 ("[C]ourt procedures are inadequate and need to be updated."); *id.* ("Superintendent of the agency BIA ignores the ICRA. He rejects any of the protections and concepts underlying the act."); *id.* ("The court does not follow ICRA procedures, and there are repeated violations. The steps are finally being taken to remedy some of this, but the BIA is still afraid of any challenge being mounted to the court's procedures. The judge either doesn't understand the ICRA, or he takes it too casually."). An additional positive development arising out of the enactment of ICRA was increased availability of training. *See id.* at 263; *cf.* Letter from Ralph W. Johnson to David H. Getches (June 10, 1977), *reprinted in* APPENDIX 2, *supra*

As a general matter, it appears the tribal courts welcomed ICRA, especially when it came to procedural improvements. However, one court—according to the consultants—failed to comply with ICRA, saying that "[t]he tribe would lose at any time if someone challenged the tribal court on their ICRA procedures."[41]

It appears that the twenty-three tribal courts surveyed took ICRA more seriously as a procedural guide to provide fundamental fairness to litigants, rather than as an invitation to adopt federal civil rights protections wholeheartedly.[42] The relative willingness of tribal courts to comply with ICRA was tempered by some courts' view that ICRA had been imposed on tribes.[43]

Dean Getches highlighted the similarities between rural justice systems and tribal justice systems, noting several common factors such as "close acquaintance between the judge and parties," lower caseload, and limited resources.[44] Because judges often know the parties, the tribal courts surveyed in the study reported that "[p]ersonalized attention to the needs of defendants was . . . common . . . ."[45] That attention resulted in more guilty pleas.[46] However, the increase in guilty pleas did not necessarily lead to more jail time; in fact, jail sentences were rare.[47]

It appears that ICRA had relatively little impact on reservation justice. Dean Getches reported that "[t]he major change in some courts is that proceedings have become more formal and sophisticated or, in the words of some respondents, Anglicized."[48] A corollary to this conclusion is that "tradition has played a smaller role in court proceedings since the Act."[49] Dean Getches did not offer a working definition of what

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note 17, at 127–35 (recommending greater availability of tribal law-specific training for tribal judges and court staff).

41. APPENDIX 2, *supra* note 17, at 267 (court number 17).

42. *See* APPENDIX 1, *supra* note 16, at 263.

43. *E.g.*, *id.* at 267 (noting response to question about general concerns about ICRA: "The fact that they have to apply the ICRA at all."); *see also* Kirke Kickingbird, *"In Our Image..., After Our Likeness:" The Drive for the Assimilation of Indian Court Systems*, 13 AM. CRIM. L. REV. 675, 694–95 (1976) (expressing concern about ICRA's imposition of non-Indian values on tribal justice systems).

44. REPORT, *supra* note 5, at 61.

45. *Id.*

46. *See id.*

47. *See id.*

48. *Id.* at 79.

49. *Id.* at 42–43, 74, 79 (discussing how tradition has been shunted aside and how traditional punishments are rare).

"tradition" or "traditional" meant at the time of the survey. However, it is likely that for most reservations surveyed at this time, a "traditional" criminal prosecution involved semiformal court proceedings without a written record, lawyer participation, or a jury.[50] In addition, most tribal judges believed their courts already complied with the federal requirements in ICRA before its passage.[51] Finally, none of the twenty-three tribes surveyed had waived immunity from suit in tribal court to effectuate ICRA.[52] Of course, these results pre-dated *Martinez*,[53] which held that federal courts have no jurisdiction to entertain civil rights claims against tribes.[54] It therefore makes sense that the tribes would have no pressing reason to consider a waiver.

Dean Getches's framing of the report contrasted with most observers' views of tribal justice systems in one important way—the report was an inside-out view of tribal justice systems rather than an outside-in view.[55] Typically, commentators assume that a federal solution, perhaps an act of Congress, is necessary to reform tribal justice systems.[56] While Dean Getches recommended that Congress provide much (if not all) of the funding to improve tribal justice systems, he also proposed tribal legislation to develop the necessary

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50. *See* JOHN R. WUNDER, "RETAINED BY THE PEOPLE": A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 132–33 (1994); *Rights of Members of Indian Tribes: Hearing Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs*, 90th Cong. 127 (1968) (statement of John S. Boyden, general counsel, Hopi Indian Tribe) (describing objections to American criminal procedure practice from New Mexico Pueblo communities). These kinds of proceedings were even less "traditional" than tribal justice systems in centuries past. *See* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 112–13 (1983).

51. REPORT, *supra* note 5, at 79 ("Some tribal codes and rules of court procedure have been modified to reflect the requirements of the Act, but most judges said they were already complying when it was passed.").

52. *See id.* at 44.

53. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

54. *See* Lawrence R. Baca, *Reflections on the Role of the United States Department of Justice in Enforcing the Indian Civil Rights Act*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY, *supra* note 18, at 1, 5.

55. By "outside-in," I mean a study of tribal courts by outsiders usually (if not exclusively) judging tribal justice systems by resort to nontribal factors, such as American constitutional law. An example of an "outside-in" study is the American Bar Foundation study by Brakel referenced in note 21. The 1991 United States Commission on Civil Rights report, THE INDIAN CIVIL RIGHTS ACT, is another.

56. *See* Robert L. Bennett, *The Tribal Judiciary*, *in* APPENDIX 2, *supra* note 17, at 13, 25–26 (reporting recommendations by others that Congress should develop a national tribal appellate court and enact tribal laws governing descent and distribution of estates).

infrastructure in Indian country in order to make tribal justice systems viable. Specifically, Dean Getches recommended that tribal legislatures develop their code structures to include the ordinances necessary to govern and to codify a process to apply tribal customary law as a means of preserving the "Indianness" of tribal justice systems.[57] Dean Getches also offered suggestions on how to separate governmental powers in order to prevent abuses, by and against tribal courts, by adopting necessary tribal statutes to ensure proper separation of powers.[58] Importantly, Dean Getches argued that weak tribal judiciaries would inadvertently open the door to state and federal interference with internal tribal affairs.[59]

Dean Getches's recommendations on tribal judicial compliance with ICRA were limited to procedural protections.[60] Like the Supreme Court implied in *Martinez*,[61] Dean Getches argued that the meaning of "due process" and "equal protection" should be left to tribal courts to interpret: "[t]he goal of protection of individual rights in the court should be achieved by maintaining unique Indian traditions and heritage in harmony with the establishment of such individual rights."[62] While American courts recognize claims based on the phrases "due process" and "equal protection," Dean Getches implicitly acknowledged that tribal courts should be free to diverge from American law in order to preserve the "Indianness" of tribal justice systems and tribal law. Of course, there was no way for anyone at the time to predict how that would come about or whether it would happen.

C. The State of Indian Courts Circa 2012

Each year, tribal justice systems grow in numbers, quality,

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57. *See* REPORT, *supra* note 5, at 110–13.

58. *See id.* at 113–15, 124–32 (recommending changes to tribal judicial selection, tenure, and removal rules, and proposing direct separation of the powers statutes).

59. *See id.* at 2.

60. *See id.* at 116–17.

61. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 (1978) ("By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under § 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts.").

62. REPORT, *supra* note 5, at 117.

and sophistication,[63] and they grow in a manner many would never have contemplated or expected in 1978. While no one knows with certainty how many tribal courts there are in the United States, my estimate places that number at approximately three hundred.[64] Despite having their civil and criminal jurisdiction over nonmembers handcuffed by United States Supreme Court decisions before most even began accepting cases,[65] tribal courts have developed in some of the most creative and progressive ways. Examples include developing cooperative arrangements with state courts,[66] civil remedies against non-Indian criminal offenders,[67] peacemakers courts (traditional dispute resolution practices),[68] and drug courts.[69]

But, just as in 1978, many tribal courts remain undeveloped and often inefficient because of a lack of resources

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63. *See generally* MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW (2011) (surveying tribal court opinions); DAVID E. WILKINS & HEIDI KIIWETINEPINESIIK STARK, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 73–78 (3d ed. 2011) (describing the development of tribal justice systems); HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, THE STATE OF NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 44–50 (2008) [hereinafter HARVARD PROJECT] (same).

64. A 2005 report on Indian courts noted that the Bureau of Justice Assistance had awarded grants to 294 Indian tribes for planning and enhancing their court systems. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, PATHWAYS TO JUSTICE: BUILDING AND SUSTAINING TRIBAL JUSTICE SYSTEMS IN CONTEMPORARY AMERICA 6 (2005) [hereinafter PATHWAYS TO JUSTICE], *available at* http://law.und.edu/_files/docs/tji/docs/pathways-report.pdf.

65. *See* Montana v. United States, 450 U.S. 544, 565–66 (1981) (limiting tribal civil jurisdiction over nonmembers); Oliphant v. Suquamish Indian Tribes, 435 U.S. 191, 211 (1978) (eliminating tribal criminal jurisdiction over non-Indians); *see also* Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 815–30 (2006) (describing how Congress undermined tribal criminal jurisdiction in 1885 by enacting the Major Crimes Act, now codified at 18 U.S.C. § 1153).

66. *See* Korey Wahwassuck, John P. Smith, & John R. Hawkinson, *Building a Legacy of Hope: Perspectives on Joint Tribal-State Jurisdiction*, 36 WM. MITCHELL L. REV. 859, 861–67 (2010).

67. *See* Hallie Bongar White, Kelly Gaines Stoner, & James G. White, *Creative Civil Remedies against Non-Indian Offenders in Indian Country*, 44 TULSA L. REV. 427 (2008).

68. Raymond D. Austin, *Freedom, Responsibility, & Duty: ADR and the Navajo Peacemaker Court*, 32 JUDGES' J. 8 (1993) (describing the development of Navajo peacemaker courts); Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875 (1999) (profiling Grand Traverse Band peacemaker court).

69. *See* Ronald Eagleye Johnny, *The Duckwater Shoshone Drug Court, 1997–2000: Melding Traditional Dispute Resolution with Due Process*, 26 AM. INDIAN L. REV. 261 (2001–2002) (describing the Duckwater Shoshone drug court).

and a lack of functional judicial independence.[70] Concerning resources, tribal judges face the reality of limited governmental social services for families and children in need[71] and limited tribal court operations resources.[72] Furthermore, many tribal judges and their staff members have little or no access to electronic legal research and law clerks,[73] although some law schools with Indian law programs are now serving as sources for tribal courts seeking low-cost court clerks.[74] On the structural side, many tribal judges face overt and covert attacks on their independence (although the extent of interference with the judicial function by tribal policymakers is debated).[75] For example, many tribal constitutions provide express or implied tribal council control over appointments and retention of tribal judges.[76] Additionally, some tribal judges

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70. *See* Joseph Thomas Flies-Away, Carrie Garrow, & Miriam Jorgensen, *Native Nation Courts: Key Players in Nation Building*, *in* REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 115, 123 (Miriam Jorgensen, ed. 2007).

71. *E.g.*, Patrice H. Kunesh, *A Call for an Assessment of the Welfare of Indian Children in South Dakota*, 52 S.D. L. REV. 247, 260 (2007) ("For generations, however, tribes have not been able to meet the most basic needs of their tribal families, and Indian people continue to suffer serious consequences of such persistent privation.").

72. For example, currently, tribal courts cannot implement the Tribal Law and Order Act's public defender requirements due to lack of funding. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-658R, TRIBAL LAW AND ORDER ACT: NONE OF THE SURVEYED TRIBES REPORTED EXERCISING THE NEW SENTENCING AUTHORITY, AND THE DEPARTMENT OF JUSTICE COULD CLARIFY TRIBAL ELIGIBILITY FOR CERTAIN GRANT FUNDS (2012), *available at* http://www.gao.gov/products/GAO-12-658R.

73. *See* Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439, 455–56 (1999).

74. *See* MASSEY MAYO CASE & JILL E. TOMPKINS, U. OF COLO. L. SCH., A GUIDE FOR TRIBAL COURT LAW CLERKS AND JUDGES (2007), http://www.colorado.edu/iece/docs/Thompson/Final_version_Guide.pdf.

75. *Compare* AM. INDIAN L. CENTER, SURVEY OF TRIBAL JUSTICE SYSTEMS AND COURTS OF INDIAN OFFENSES (2000) (*cited in* Benjamin J. Cordiano, *Unspoken Assumptions: Examining Tribal Jurisdiction over Nonmembers Nearly Two Decades after* Duro v. Reina, 41 CONN. L. REV. 265, 283–295 (2008)) (finding little interference), *and* B.J. JONES, THE INDEPENDENCE OF TRIBAL JUSTICE SYSTEMS AND THE SEPARATION OF POWERS 12 (2006), *available at* http://law.und.edu/tji/_files/docs/bjones-jud-indep-memo.pdf (examining the tribal court case law and finding a trend toward increased judicial independence), *with* Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137, 180 n.226 (2004) (questioning the validity of the American Indian Law Center survey).

76. *E.g.*, COLORADO RIVER INDIAN TRIBES CONST. AND BY-LAWS art. VI, § 1(k), *available at* http://www.crit-nsn.gov/crit_contents/ordinances/constitution.pdf (empowering tribal council to establish tribal court).

face threats from tribal legislatures on budgets.[77] Many tribal courts have virtually no authority to review tribal government actions—even where tribal independence is assured by constitution or statute—because of tribal sovereign immunity.[78]

Despite these concerns and limitations on tribal judicial growth, improvements remain notable. The number of tribal courts has doubled since 1978.[79] Many tribal courts do enjoy significant independence and adequate budgetary and governmental support resources. More Indian tribes have the resources to offer adequate social services and to develop alternatives to adversarial proceedings, such as Peacemaker courts or circle sentencing.[80] The respect for tribal courts by tribal governments, tribal members, nonmembers, and foreign governments, while difficult to quantify, improves every year.[81] An increasing number of state courts have adopted rules codifying some form of comity, often reciprocated by tribal courts, in regards to tribal court judgments and orders.[82]

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77. *Cf., e.g.*, Grand Traverse Band of Ottawa & Chippewa Indians v. Grand Traverse Band of Ottawa & Chippewa Indians Tribal Ct Adm'r, Stipulation of Dismissal, No. 02-04-967-CV (Grand Traverse Band Tribal Ct., May 22, 2003) (citing 3 Grand Traverse Band Code § 201, the budgetary process for the tribal court).

78. *Cf.* FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 73 (1995) (noting that tribal leaders must balance respect for individual rights with the possibility of civil rights suits "grind[ing] tribal activity to a halt").

79. The Bureau of Indian Affairs counted 134 tribal courts in 1977. *See* REPORT, *supra* note 5, at 148 n.5. No one knows exactly how many tribal courts are in operation now, but my guess is between 250 and 300, based on the Bureau of Justice Assistance report. *See* PATHWAYS TO JUSTICE, *supra* note 64, at 6 (noting 294 tribes had requested federal assistance to develop or enhance tribal justice systems by 2005); *see also* Maylinn Smith, *Tribal Courts: Making the Unfamiliar Familiar*, MINORITY TRIAL LAW., Spring 2008, at 2, *available at* http://www.jrsla.org/pdfs/publications/2008_spring_minoritytrial.pdf (suggesting there are 275 tribal courts).

80. *See generally* Flies-Away, Garrow & Jorgensen, *supra* note 70, at 123–26 (surveying tribal restorative and reparative justice systems, such as Peacemaker courts and circle sentencing); Jessica Metoui, *Returning to the Circle: The Reemergence of Traditional Dispute Resolution in Native American Communities*, 2007 J. DISP. RESOL. 517, 521–38 (2007).

81. *Cf.* HARVARD PROJECT, *supra* note 63, at 122–23 (discussing institutional requirements needed to improve respect for tribal justice systems).

82. *E.g.*, MICH. CT. RULE 2.615 (reciprocal comity rule on tribal court judgments); *cf.* Craig Smith, *Full Faith and Credit in Cross-Jurisdictional Recognition of Tribal Court Decisions Revisited*, 98 CALIF. L. REV. 1393, 1395 (2010) (arguing that the United States Constitution's Full Faith and Credit Clause and Congressional enactments implementing the Clause mandate that state courts give full faith and credit to tribal court judgments); Stacy L. Leeds,

Slowly, state courts began recognizing routine tribal court judgments and orders as a matter of state common law.[83] Tribal court cooperation with local probation offices, social workers and child protection units, and law enforcement have, in some cases, paved the way for improved tribal-state relations and multitudes of intergovernmental agreements.[84] In recent years, more and more tribal courts have made their codes, ordinances, and court rules—as well as written opinions—available online.[85] Joining the hard-copy *Indian Law Reporter*, which publishes selected tribal court opinions, are Westlaw, Lexis, and Versus Law.[86] With tribes making their constitutions and statutes available online and elsewhere, tribal law has never been easier to find.

Meanwhile, tribal courts are developing their own common law. The Navajo Nation's judiciary is the clear leader in this regard.[87] Other tribal courts have done the same, with mixed results, as we will see in the next section. However, many tribal courts, following the lead of the tribal legislatures, still resort to the borrowing of state and federal law in deciding substantive matters of law.[88]

The next section further develops the sketch of modern tribal courts by providing a small survey of some tribal court opinions that address the question of providing fundamental fairness to litigants in the context of ICRA and tribal

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Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective, 76 N.D. L. Rev. 311, 346–60 (2000) (empirical study of tribal judges' experience with state court recognition of their judgments).

83. *E.g.*, John v. Baker, 982 P.2d 738, 761–64 (Alaska 1999) (recognizing tribal court judgment as a matter of comity); Fredericks v. Eide-Kirshmann Ford, Mercury, Lincoln, Inc., 462 N.W.2d 164, 167–71 (N.D. 1990) (recognizing tribal court judgment as a matter of comity); Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians, 612 N.W.2d 709, 718–19 (Wis. 2000) (recognizing principles of comity to require state and tribal courts to allocate jurisdiction amongst themselves).

84. *E.g.*, Kathryn E. Fort, *Waves of Education: Tribal-State Court Cooperation and the Indian Child Welfare Act*, 47 TULSA L. REV. 529 (2012) (describing Michigan's experience in developing cooperation between tribal and state agencies in the context of Indian child welfare).

85. *See generally David Selden*, *Basic Indian Law Research Tips: Tribal Law* (Jan. 2012), *available at* http://narf.org/nill/resources/tribal_law_research_ article.pdf.

86. *See id.*

87. *See generally* RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW 39 (2009) (study of Navajo common law and jurisprudence).

88. *See* Hon. Steven Aycock, *Thoughts on Creating a Truly Tribal Jurisprudence* (2006), *excerpted in* FLETCHER, AMERICAN INDIAN TRIBAL LAW, *supra* note 63, at 117–18.

customary and traditional law.

II. FUNDAMENTAL FAIRNESS AND INDIAN COURTS

What guarantees fundamental fairness in Indian courts? Is it ICRA? Is it unwritten tribal customary and traditional law? Is it tribal statutory and constitutional protections? For each tribe, the answer may be different. As we saw in the last section, Dean Getches focused the discussion about these questions by placing the onus on tribal justice systems and away from how state or federal courts and legislatures could guarantee fairness in Indian country. Rather than recommending another federal solution, Dean Getches, on behalf of the National American Indian Court Judges Association, recommended positive tribal law, a return to tribal traditions, and guarantees of procedural due process. In other words, Dean Getches argued that eventually tribal jurisprudence on due process and equal protection should not be based on American jurisprudence but instead on tribal law.

And yet, tribal judges and litigants rely almost exclusively on American jurisprudence concerning due process and equal protection as introduced into tribal law by ICRA.[89] In our 2008 study of tribal court decisions applying ICRA to civil rights claims, we found that ninety-five percent of tribal courts applied American law.

Of the 120 cases involving an ICRA issue, tribal court judges cited federal and state case law as persuasive (and often controlling law) in 114 cases (95 percent). And, of the six cases in which the tribal court explicitly refused to apply federal or state case law, either the parties included tribal members in a domestic dispute or the tribal court held that its interpretations of the substantive provisions of ICRA were stronger or more protective of individual rights than would otherwise be available in analogous federal or state cases.[90]

Of course, the selection of these cases likely dictated the

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89. *See generally* MATTHEW L.M. FLETCHER, TRIBAL COURTS, THE INDIAN CIVIL RIGHTS ACT, AND CUSTOMARY LAW: PRELIMINARY DATA (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103474; *see also* Catharine A. MacKinnon, Martinez *Revisited*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY, *supra* note 18, at 27, 31 ("[T]ribal courts are dispensing justice on sex equality in a very similar way to the US federal courts, with all its disappointing and unnecessary limitations.").

90. *See* FLETCHER, TRIBAL COURTS, THE INDIAN CIVIL RIGHTS ACT, AND CUSTOMARY LAW: PRELIMINARY DATA, *supra* note 89, at 6.

result in that every case involved an allegation relating to, or reasoning based upon, application of ICRA.

In my view, and this is terribly preliminary, tribal courts will soon rely less on ICRA and the related American jurisprudence on due process and equal protection and more on their own customs and traditions for insight.[91] American law was (and still is) a necessary crutch to establishing a tribal common law that effectively guarantees fundamental fairness to litigants in Indian courts as tribes continue to reestablish and adapt their customs and traditions to meet modern needs. Tribal courts have long recognized a need for a legal foundation that would help them guarantee fundamental fairness for all litigants, and American law, as imposed by Congress in ICRA, provides that foundation. Tribal justice systems can proceed in a manner that builds upon that foundation, as many have.[92] Or tribal courts can dispense with ICRA and federal and state law altogether and choose to rely exclusively on their own common law. As Vine Deloria and Clifford Lytle once wrote, "The greatest challenge faced by the modern tribal court system is in harmonizing of past Indian customs and traditions with the dictates of contemporary jurisprudence."[93]

The subsections that follow provide examples of: (1) tribal courts that have embraced American law in order to provide the necessary foundation required to guarantee fundamental fairness; (2) tribal courts that are relying less on American law and, occasionally, rejecting American law altogether; and (3) the potential pitfalls of moving away from American law.

A. *American Law as a Crutch*

Since the Supreme Court's decision in *Martinez*,[94] tribal

91. Modern scholarship on tribal custom is rapidly developing, and so tribal courts will be able to draw upon that scholarship. *E.g.*, AUSTIN, *supra* note 87 (survey of Navajo common law); Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9 KAN. J.L. & PUB. POL'Y 761 (1999–2000) (study of Hopi common law); s*ee generally* Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 AM. INDIAN L. REV. 319 (2007–2008) (study of tribal common law generally).

92. *See, e.g.*, Mark D. Rosen, *Evaluating Tribal Courts' Interpretations of the Indian Civil Rights Act*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY, *supra* note 18, at 275 (surveying tribal courts' application of largely federal and state law to ICRA claims); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1997–1998) (same).

93. *See* DELORIA & LYTLE, *supra* note 50, at 120.

94. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

courts applied American law, as in ICRA, to guarantee due process and equal protection. As Dean Getches noted in 1978, tribal law was generally unavailable to judges, litigants, and the public,[95] all but forcing tribal judges and litigants to argue American law. What is more interesting, as this subsection shows, is that many tribal courts seemed to apply American law, mostly federal law, as precedential law, rather than as persuasive law. Regardless, in possibly hundreds of cases, tribal courts announced, often as a matter of first impression, the tribal interpretation of "due process" by reference to American cases. Here are but a few examples.

Each of the following excerpts involves a question of fundamental fairness, such as a right to notice and a hearing (*Turtle Mountain* and *St. Regis Mohawk*), or property rights (*Puyallup* and *Chitimacha*) that relies on American constitutional law for formulation and legal support. These statements of hornbook American law appear in many tribal court opinions and look no different than the statements one would see in state and federal court opinions.

Please note that I have disregarded the convention of writing that discourages the use of block quotes in favor of quoting extensively from several tribal court opinions. As a reader, you may be tempted to simply skip the block quotes. Please do not. I am trying to preserve the authorial style and the context of the discussions in these opinions.

1. Turtle Mountain Band of Chippewa Indians Court of Appeals:

> A fundamental requirement of [d]ue process is that the parties be given adequate or reasonable notice. "An elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . . . The notice must be of such nature as reasonably to convey the required information . . . ." Reasonable notice must be given at each new step in the proceedings.[96]

95. *See* REPORT, *supra* note 5, at 37–39 (noting the borrowing of state and federal law).

96. Monette v. Schlenvogt, et al., No. TMAC 04-2021, 2005.NATM.0000003, ¶ 25 (Turtle Mtn. Tribal Ct. App., Mar. 31, 2005) (VersusLaw) (citing Mullane v. Central Hanover Bank & Trust Co., 399 U.S. 306, 314 (1952)).

2. Puyallup Tribal Court:

> The United States Constitution states in pertinent part that no person shall be deprived of property without due process of law. U.S. Constitution, Fifth Amendment. Similarly, the Indian Civil Rights Act prohibits an Indian Tribe exercising powers of self-government from depriving any person of property without due process of law . . . . The essence of due process requires notice and an opportunity to be heard . . . . The notice should be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . ."[97]

3. St. Regis Mohawk Tribal Court:

> The Indian Civil Rights Act safeguards those rights restated in entirety in the Constitution of the Saint Regis Mohawk Tribe. Under the Indian Civil Rights Act tribes are prohibited from depriving persons of rights without due process. While Federal, state, and tribal law is not binding authority upon the Saint Regis Mohawk Tribal Court such can act as persuasive authority. The fundamental requirements of due process is the "opportunity to be heard" . . . . The hearing must be at a "meaningful time and in a meaningful manner" . . . . Due process also requires notice, the right to be heard in a full and fair hearing, to call witnesses and to be heard before an impartial decision maker. The Constitution of the Saint Regis Mohawk Tribe safeguards the same rights as those stated in the Indian Civil Rights Act, that is the political, social, and civil rights of duly enrolled members of the Tribe.[98]

4. Chitimacha Indian Tribal Court of Appeals:

> While the Fifth Amendment due process clause does not apply so as to limit the power of tribal self-government, we

97. Delgado v. Puyallup Tribal Council, No. 95-3604, 1996.NAPU.0000007, ¶¶ 48–50 (Puyallup Tribal Ct. April 3, 1996) (VersusLaw) (citing Mullane, 399 U.S. at 314–315).

98. *In re* Constitutional Question re: Voting, 1998.NASR.0000001, ¶ 40 (St. Regis Mohawk Tribal Ct. Sept. 10, 1998) (VersusLaw) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914); Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

> believe that the due process analysis developed over the years in federal jurisprudence is instructive and a logical place to begin an analysis of the due process protections found in the Indian Civil Rights Act.
>
> The procedural due process provision of the Fifth Amendment to the United States Constitution that is made applicable to the States through the 14th Amendment can be traced back to ideas that first originated in the Magna Charta of England. The Fifth Amendment to the Constitution of the United States states that no person shall "be deprived of life, liberty or property, without due process of law. . . ." In applying this simple language to real life situations the United States Supreme Court has cautioned against the setting out specific rules [sic] which apply in each and every situation. In case after case the United States Supreme Court has adapted the general concept of procedural due process to deal with the competing interests presented by the case at hand. The Court has specifically held: . . . the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.
>
> Moreover, courts have held that procedural due process is . . . "flexible and calls for such procedural protections as the particular situation demands." Simply put: What is procedural due process under the Fifth Amendment in one case is not in another. Each case is different.
>
> In the recent case of [*Mathews v. Eldridge*], the Court set out a "balancing of interests" test to determine the . . . "specific dictates of due process . . ." which included the following three factors: (1) The private interests at stake; (2) The government's interests involved; and (3) The risk that the procedure will result in error.[99]

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99. Chitimacha Housing Authority v. Martin, No. 93-0006, 1994.NACH.0000002, ¶¶ 108–111 (Chitimacha Indian Tribal Ct. App. Sept. 1, 1994) (VersusLaw) (citing and quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Little v. Streate, 452 U.S. 1, 5–6 (1981); Wolf v. McDonnell, 418 U.S. 539, 560 (1974); Goldberg v. Kelly, 397 U.S. 254, 267 (1970); Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)) (other footnotes omitted).

Discussing these tribal courts here is not intended as criticism of these courts. In each of these cases, it is clear that the tribal judiciary is attempting to apply a law that is fair and reasonable to the litigants and in accordance with ICRA. These cases exemplify a rational response to the need to find and apply law that meets the courts' requirement to guarantee fundamental fairness to litigants.

A second category of tribal courts are more hesitant to adopt and apply American law but have little choice given the dearth of available tribal customary law. Consider this statement from the Mashantucket Pequot Tribal Court, which chose to presumptively apply American precedents in the absence of customary law that would trump the American precedents:

> "The due process clause of the ICRA applies to all tribal proceedings: criminal, civil and administrative" . . . . The ICRA is to be interpreted in a manner "consistent with Tribal practice or custom" . . . . Here, there is no distinctively Mashantucket Pequot tribal custom or tradition or cultural norm which is offered in support of the amendment to the Board of Review policy. In the absence of a clearly demonstrated tribal custom or tradition, and because many provisions of the ICRA, including the due process clause, are in language nearly identical to the Bill of Rights and state and federal constitutions, the court will apply general federal and state principles of due process . . . .[100]

Likely, there simply is no relevant Pequot tribal customary law to apply to civil rights claims. Moreover, it is unlikely that the litigants would be able to research, adapt, and apply tribal customary law in the briefing or during oral argument. These cases demonstrate the standard practice of tribal courts in applying and interpreting ICRA, which is the borrowing of American law as a gap-filler, or crutch. In the last decade or more, several tribal courts are moving away from applying American law and making an effort to adapt and adopt tribal

100. Miller v. Mashantucket Pequot Gaming Enter., 2 Mash. Rep. 418, 421 (1998) (quoting Johnson v. Mashantucket Pequot Gaming Enter., 2 Mash. Rep. 249, 255 (1998); Dugan v. Mashantucket Pequot Gaming Enter, 1 Mash. Rep. 142, 145 (1995)) (other citations omitted).

customs and traditions.[101] This is an important development that Dean Getches both presaged and recommended in the report.[102]

B. The Rise of American Indian Tribal Law

ICRA, along with the accompanying American law that tribal courts so often used to interpret and apply it, is slowly falling by the wayside as tribal courts, litigants, and tribal legislatures rediscover, adapt, and apply tribal customary and traditional law in tribal court cases.[103] It is a very slow process and, frankly, should not be done without careful consideration and understanding of a tribe's customs and traditions. As addressed below, several tribal courts are moving in this direction, often without even expressing it. Tribal courts that are moving away from applying ICRA can be grouped into three categories. First, there are courts that apply ICRA's provisions (such as "due process") but partially reject American jurisprudence in favor of tribal custom and tradition unless a gap exists. A second group applied ICRA but eventually rejected it and now relies exclusively on tribal customary and traditional law. A final group (which is largely hypothetical at this time) rejects ICRA altogether, finding the basis for fundamental fairness guarantees exclusively in tribal law (either custom or statute).

One might ask why it is important that Indian courts begin to develop their own jurisprudence and discard American law where possible. American constitutional law derives from a text to which Indian tribes are not, and cannot, be a party.[104] Moreover, tribal constitutions are not copies of the federal or state constitutions, and some tribes have no written constitution.[105] Those are merely structural differences. There

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101. *See generally* FLETCHER, TRIBAL COURTS, THE INDIAN CIVIL RIGHTS ACT, AND CUSTOMARY LAW: PRELIMINARY DATA, *supra* note 89.

102. *See* REPORT, *supra* note 5, at 86 (reporting that tribal judges hoped for the development of an "Indian common law"); *see also id.* at 110–12 (recommending development of tribal law).

103. *E.g.*, Sekaquaptewa, *Evolving the Hopi Common Law*, *supra* note 91 (reviewing the development of Hopi common law).

104. *See* Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751, 756 (1998) (Indian tribes were "not parties to the 'mutuality of . . . concession' that 'makes the States' surrender of immunity from suit by sister States plausible.'") (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 782 (1991)).

105. *See* Robert J. Miller, Tribal Constitutions and Native Sovereignty 14 (April 4, 2011) (unpublished manuscript), (available at http://ssrn.com/

are cultural differences, too. Even where tribes have incorporated the phrase "due process" into their organic text, the meaning of due process is dependent on the culture of governance in that tribal community.[106] "Equal protection" may mean more (or, unfortunately, less) civil rights protections for women, people with disabilities, and GLBT persons, than under federal or state constitutional law.[107] Finally, differences of scale matter. The United States Constitution governs more than three hundred million people, and state constitutions govern any number from hundreds of thousands to dozens of millions. Most tribal constitutions, and their accompanying governments, govern far fewer people.

1. Partial Rejection of American Jurisprudence in Applying ICRA

More and more, tribal courts are beginning to move away from reliance upon American law as the primary source for interpreting the provisions of ICRA, including due process and equal protection. It is natural to borrow federal and state case law as a gap-filler in interpreting these legal doctrines, especially where the corpus of tribal common law is sparse. However, these tribal courts are aware of the limitations and side effects of American law in tribal justice systems and apply the law sparingly.

a. Cheyenne River Sioux Tribal Court of Appeals

Consider the Cheyenne River Sioux Tribal Court of Appeals. In *High Elk v. Veit*,[108] the court explained how Lakota notions of due process interacted with ICRA in a case involving a garnishment order. The tribal court opinion draws immediately from the due process requirements of ICRA but quickly moves toward discussion of tribal precedents. The tribal judges were wise to resist blind reliance upon state and federal cases involving garnishments. Those cases take into

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106. *See* Newton, *supra* note 92, at 344 n.238 (noting that tribal courts "need not follow the U.S. Supreme Court precedents 'jot-for-jot'").

107. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 432–40 (6th ed. 2011).

108. 6 Am. Tribal Law 73 (Cheyenne River Sioux Tribal Ct. App. 2006).

consideration that trial courts and their administrators deal with hundreds of thousands of garnishment orders a year and that the practical considerations of that administration affect the due process rights of garnishees in a manner that may or may not be similar in tribal court:

> Appellants raise a series of objections to the attachment/garnishment order [under] the federal Indian Civil Rights Act of 1968, 25 U.S.C § 1302(8). While some are phrased as procedural irregularities, most of these . . . implicate the due process requirements of notice and hearing. In *Cheyenne River Sioux Tribe Housing Authority v. Howard*, No. 04-008A (Ch. Riv. Sioux Ct. App., Sept. 23, 2005) this Court recently reaffirmed the traditional Lakota values embodied in the term due process of law. Just as Lakota tradition requires the respectful listening to the position of all interested persons on any important issue, the legal requirement of due process of law requires that all persons interested in a matter receive adequate written notice of any proceeding that would implicate their personal interests, including their property or, as here, rent payments contractually owed to them, that they be made parties to any case or judgment that would affect those interests, and that they have a full and fair opportunity to participate as a party in any hearing on such issues. In the *Howard* case, this Court recently summarized the requirements of due process in a civil context as follows:
>
>> This Court has long recognized that basic Lakota concepts of fairness and respect as well as the federal Indian Civil Rights Act, 25 U.S.C § 1302(8), clearly guarantee all parties who appear before the courts of the Cheyenne River Sioux Tribe due process of law . . . . Basic to any concept of due process of law in a civil proceeding, such as this eviction case, is receipt of timely notice and the opportunity to be heard and present evidence at a hearing in support of one's case . . . . The basic requirements of notice and hearing, which lie at the core of civil due process of law, do not constitute mere formal requirements or hoops that must be surmounted before judgment. Rather, due process involves functional procedural prerequisites designed to assure that every party has a *realistic*

> opportunity to be heard in any case affecting their legal rights. Here, Mr. Howard was fighting to remain in the only home he lawfully occupied, a precious and important right, indeed, particularly for a person in Mr. Howard's fragile medical condition, even if he did own the home in question.

> Every court of the Cheyenne River Sioux Tribe is bound both by customary Lakota concepts of respect and by the requirements of due process of law protected by the federal Indian Civil Rights Act, 25 U.S.C. § 1302(8), to assure that the parties before them are all afforded due process of law.[109]

Here, Lakota traditions do not necessarily supplant ICRA. Instead, they serve as the replacement for what other tribal courts might have used to define and interpret "due process," that is, American law.

The next logical step, although the court and the attorneys practicing before the court may not realize or even desire it, is for tribal courts to recognize that ICRA is unnecessary altogether and that Lakota law should stand alone to protect fundamental fairness.

b. Colville Confederated Tribes Court of Appeals

Similarly, the Colville Confederated Tribes judiciary has recognized the importance of ICRA while limiting its application by taking care to protect and preserve tribal customs and traditions. Colville will not apply American law in interpreting ICRA unless the American precedents are consistent with tribal custom and tradition:

> To place ICRA in perspective for this analysis, we note that the Act was enacted to provide those appearing before tribal courts with certain protections from the Bill of Rights while fostering tribal self-government, and not to impose the full Bill of Rights on tribes. Therefore, when applying common law principles based upon the Bill of Rights to civil rights issues arising from ICRA and tribal law, we do so with

109. *Id.* at 77–80 (citing Dupree v. Cheyenne River Housing Auth., 16 Indian L. Rep. 6106 (Cheyenne River Sioux Ct. App. 1988) and Mullane v. Central Hanover Bank, 339 U.S. 306 (1950)) (other citations omitted).

> considerable care. Federal common law doctrine which interprets duties and protections flowing from the United States Constitution and the Bill of Rights did not include in its development, and is not rooted in tribal law, custom and tradition. Therefore, we will examine how the federal courts have handled similar constitutionally-based issues, but because the origins of tribal law differ, any parallels between federal common law and tribal law must be drawn with caution. Accordingly, we will narrowly adopt such common law interpretations when we are fully satisfied they are consistent with tribal law.[110]

This matter involved tribal criminal sentencing, an area of law uniquely tied to the legal and political culture of the polity. Tribal custom and tradition would seem to be of paramount importance in such cases. Conversely, reliance upon American law would be particularly suspect.

2. Developing Rejection of ICRA

The Navajo Nation and the Hopi Tribe are two tribes that appear to have adopted and applied ICRA for many years, only to later affirmatively reject most aspects of the Act in its common law tradition. Both Navajo and Hopi have a long tradition of developing a tribal common law independent of much reliance upon American law, especially ICRA.[111] Both of these courts have applied ICRA and occasionally borrowed American precedents in applying ICRA but have lately moved onto an exclusively tribal common law. Navajo's tribal common law is older[112] and, thus, will be discussed first.

a. Navajo Nation Supreme Court

The Navajo Nation Judiciary has already successfully

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110. Sam v. Colville Confederated Tribes, No. 93-15379, 1994.NACC.0000002, at ¶¶ 24–25 (Colville Confederated Tribes Ct. App. 1994) (VersusLaw).

111. *See generally* AUSTIN, *supra* note 87 (study of Navajo common law and jurisprudence); Sekaquaptewa, *Evolving the Hopi Common Law*, *supra* note 91 (study of Hopi common law and jurisprudence).

112. *See* Daniel L. Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969–1992*, 18 AM. INDIAN L. REV. 379, 381–87 (1993); *see also* JUSTIN B. RICHLAND, ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT 39–41 (2008) (noting that the Hopi tribal court ordinance dates to 1972).

adopted and applied tribal customary and traditional law in a large and growing body of tribal common law.[113] The Judiciary separated the rights provided by ICRA from tribal rights at an early stage in modern American tribal court jurisprudence.[114] In a recent opinion, the Navajo Nation Supreme Court identified the sources of law that it applies when reviewing civil rights cases involving tribal government action, and barely mentioned ICRA:

> The Navajo Nation, while lacking a Constitution, has written organic laws which "set the boundaries for permissible governmental action by the legislative, executive, and judicial branches of the Navajo Nation." Doctrines of checks and balances, separation of powers, accountability to the People, and service of the anti-corruption principle formed the premise for "The Title II Amendments of 1989" (Title II Amendments) enacted by Navajo Nation Council Resolution CD-68-89 on December 15, 1989, which established our three-branch government. Principles of due process, equal protection, the right to counsel in criminal cases, rights of assembly and petition, the right to bear arms, freedom of religion and other rights closely tracking the United States Bill of Rights are guaranteed by the Navajo Nation Bill of Rights (1986). Judicial fairness and independence and access to the courts are guaranteed by the Judicial Reform Act of 1985. The above laws, in addition to substantive rights found in the Navajo Treaty and broad principles of fundamental fairness in our tribal Fundamental Laws, "set the boundaries for permissible governmental action by the legislative, executive, and judicial branches of the Navajo Nation," and are collectively our "fundamental, organic laws."[115]

The Navajo legislature adopted its own Bill of Rights in 1967[116] and has developed a rich common law of its own decisions interpreting and applying tribal customary and traditional law. In many ways, ICRA is all but irrelevant. But

113. *See generally* AUSTIN, *supra* note 87 (study of Navajo common law and jurisprudence).

114. *See, e.g.*, Nez v. Bradley, 3 Navajo Rptr. 126, 129–30 (Navajo 1982).

115. EXC v. Jensen, No. SC-CV-07-10, 2010 WL 3701050, at *12 (Navajo 2010).

116. *See* Navajo Nation Code Ann. tit. 1, § 1 (2005) (citing Navajo Nation Council Res. CO-63-67, October 9, 1967); AUSTIN, *supra* note 87, at 72.

the Navajo Nation has not adopted a written constitution,[117] so ICRA remains a significant foundation of the legal guarantees of fundamental fairness to litigants, if for no other reason than to demonstrate that Navajo rights protections are more generous than those provided in ICRA.[118] Navajo jurisprudence goes beyond ICRA in providing fairness to litigants, but ICRA served as an important steppingstone in the process of developing Navajo common law necessary to guarantee fundamental fairness.[119]

b. Hopi Tribe Appellate Court

Like the Navajo judiciary, the Hopi Appellate Court struggled with how and whether to apply ICRA at all. In cases like *Harvey v. Hopi Tribe*[120] and *Maho v. Hopi Tribe*,[121] the court appears to have presumed the Act applied. The court now appears to have affirmatively rejected ICRA. In the language of *In re Batala*, the court wrote in a footnote:

> In spite of the language of the Indian Civil Rights Act, 25 U.S.C. § 1302(10), the Court said, "[w]e do not decide today, whether contempt of court is the type of criminal offense contemplated by the ICRA to afford the defendant the right to a trial by jury. However, arguments could be made that a right to a jury trial is guaranteed to defendants in criminal contempt cases." Appellant cites three cases from Hopi case law to argue why the failure of the trial court to apprise him of his right to a jury trial constituted reversible error. . . . The third case, *In the Matter of Sekayumptewa*, et al., No Appellate Number (Hopi Ct.App.1997), outlined rights guaranteed under the Indian Civil Rights Act as potentially applicable to Hopi contempt cases. These rights included the right to a jury trial, subsection 10 of the Act . . . . The court in that case did outline due process rights for

117. *See* Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 231 (1989).

118. *See* AUSTIN, *supra* note 87, at 73.

119. *See, e.g.*, Nelson v. Initiative Comm. to Reduce Navajo Nation Council, No. SC-CV-03-10, 2010 WL 4174625, at *4 (Navajo 2010) (citing Halona v. MacDonald, 1 Navajo Rptr. 189 (Navajo 1978)) ("Judicial review by tribal courts of Council resolutions is mandated by the Indian Civil Rights Act, 25 U.S.C. § 1302.").

120. 1 Am. Tribal Law 270, 272 (Hopi App. Ct. 1997).

121. 1 Am. Tribal Law 278, 280 n. 3 (Hopi App. Ct. 1997).

> defendants under the Indian Civil Rights Act, 25 U.S.C. § 1302, in contempt cases, but the Hopi Appellate Court has not bound itself to the black letter meaning of that statute. That Act is more instructive than binding for Hopi purposes and used only at the discretion of the Hopi Appellate Court. Language in *Sekayumptewa* supports this interpretation of Hopi authority, saying only that "the section of the Indian Civil Rights Act that *may* apply to contempt proceeding[s] include . . . ." Furthermore, there was no question of fact to be decided by a jury in this case even if Appellant was convicted of criminal contempt.[122]

The court added: "the Hopi Tribe is not bound by the provisions of the Indian Civil Rights Act."[123] However, the Hopi courts still treat ICRA as persuasive authority, as the same opinion notes.[124]

Again like the Navajo, the Hopi judiciary has seemingly rejected ICRA but has apparently done so in dicta. Regardless, it is my opinion that many more tribal courts will be engaging in the same kind of legal analysis about the general applicability of ICRA to tribal governments. Navajo and Hopi courts are leaders in developing tribal common law. It is natural that their experience and success in announcing tribal common law will inspire other courts to do the same. Eventually, it would not be surprising to see more tribal court opinions rejecting the authority of Congress to enact ICRA, especially considering that the Supreme Court rejected federal enforcement of the statute in *Martinez*.[125]

3. Complete Rejection of ICRA

The tribal court grouping in this section remains largely hypothetical. It remains an open question whether the Nottawseppi Huron Band of Potawatomi Indians Supreme Court and other courts will affirmatively reject ICRA, but I suspect more and more courts may address this possibility in the near future. Following the lead of tribal courts like Navajo

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122. *In re* Batala, 4 Am. Tribal Law 462, 468 n.13 (Hopi App. Ct. 2003) (citations omitted).

123. *Id.* at 468.

124. *Id.* ("As the *Sekayumptewa* opinion noted, the provisions of the Indian Civil Rights Act *may* apply to contempt cases in the Hopi Appellate Court.") (emphasis in original).

125. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

and Hopi, newly constituted tribal courts may skip ICRA altogether and find tribal sources of authority to guarantee fundamental fairness to litigants.

a. Nottawseppi Huron Band of Potawatomi Indians Supreme Court

Here, I discuss one tribal court opinion, the first appellate opinion from a new tribal court in Michigan. It never discussed ICRA as a source of relevant authority, even though (at the time) no parallel tribal rights provisions existed.[126] In this opinion, I and my two colleagues on the bench (Chief Justice John Waubunsee and Associate Justice Holly Thompson) on the Nottawseppi Huron Band of Potawatomi Indians Supreme Court adopted Anishinaabe customs and traditions as a means of forming the basis for guaranteeing fundamental fairness in reviewing government action. We began our analysis with the most basic formulation of tribal custom and tradition, what some might term natural law. Where other tribal courts might have started with ICRA or American constitutional law as the foundation of tribal law, we looked to the Anishinaabe language and the philosophy of the Anishinaabe people:

> Eva Petoskey, a member of the Grand Traverse Band of Ottawa and Chippewa Indians, and a former Vice-Chair of the Grand Traverse Band Tribal Council, recently stated:
>
> > There is a concept that expresses the egalitarian views of our culture. In our language we have a concept, *mino-bimaadziwin*, which essentially means to live a good life and to live in balance. But what you're really saying is much different, much larger than that; it's an articulation of a worldview. Simply said, if you were to be standing in your own center, then out from that, of course, are the circles of your immediate family. And then out from that your extended family, and out from that your clan. And then out from that other people within your tribe. And out from that people, other human beings

126. The Nottawseppi Constitution now provides for limitations on the exercise of governmental powers. *See* NOTTAWSEPPI HURON BAND OF POTAWATOMI INDIANS CONST. art. VII (2012), *available at* http://www.nhbpi.com/pdfs/legal/NHBP_Constitution.pdf.

> within the world, other races of people, all of us here in the room. And out from that, the other living beings . . . the animals, the plants, the water, the stars, the moon and the sun, and out from that, the spirits, or the *manitous*, the various spiritual forces within the world. So when you say that, *mino-bimaadziwin*, you're saying that a person lives a life that has really dependently arisen within the web of life. If you're saying that a person is a good person, that means that they are holding that connection, that connectedness within their family, and within their extended family, within their community. . . .
>
> The historical record of the Nottawaseppi Huron Band offers examples: [E]very time somebody was sick [in the 1930's], the women would all gather together and they'd send the word around and they'd go there [to the home of the ill member] and they'd clean that place out. They'd wash blankets, wash dishes, cook and just do everything. Take care of the baby and everything. . . .
>
> [*Mino-bimaadziwin*] informs individual Anishinaabe life choices, but also informs the direction of tribal governance. Fred Kelly, an Anishinaabe and member of the Onigaming First Nation in Canada, draws the connection between [*Mino-bimaadziwin*] and Anishinaabe legal principles: The four concentric circles in the sky—*Pagonekiishig*—show the four directions, the four stages of life, the four seasons, the four sacred lodges (sweat, shaking tent, roundhouse, and the Midewe'in lodge), the four sacred drums (the rattle, hand, water, and big ceremonial drum), and the four orders of Sacred Law. Indeed, the four concentric circles of stars is the origin of the sacred four in *Pimaatiziwin* that is the heart of the supreme law of the Anishinaabe. And simply put, that is the meaning of a constitution. . . .
>
> [*Mino-bimaadziwin*] is not a legal doctrine, but forms the implicit basis for much of tribal custom and tradition, and serves as a form of fundamental

> law. We are careful, however, not to equate customary and traditional law as a common law basis for the decision in all cases before this Court. We again emphasize our holding that the Constitution and tribal code offers little or no guidance on how Article IX elections should be governed, nor is there an enumerated statement of fundamental constitutional rights principles. Today, [*Mino-bimaadziwin*] guides our common law analysis of clarifying the outer boundaries of acceptable governmental conduct in administering Article IX elections.[127]

In the *Spurr* opinion, the Nottawaseppi Huron Band Supreme Court could have reached out and applied ICRA, but instead chose to recognize Anishinaabe custom as a basis for the guarantee of fundamental fairness in holding tribal elections.[128]

These cases show increasing and occasionally dramatic departures from ICRA. However, it should be remembered that in each case it appears that the tribal court sought to provide stronger guarantees of fundamental fairness under tribal law than would have been available in applying American jurisprudence in the areas of due process and equal protection.

C. Hypothetical Pitfalls of Rejecting ICRA

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127. Spurr v. Tribal Council, No. 12-005APP, at 4–6 (Nottawseppi Huron Band of Potawatomi Indians Sup. Ct. 2012) (quoting Eva Petoskey, *40 Years of the Indian Civil Rights Act: Indigenous Women's Reflections*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY, *supra* note 18, at 39, 47–48); U.S. DEP'T OF INTERIOR, BUREAU OF INDIAN AFFAIRS, ANTHROPOLOGICAL TECHNICAL REPORT—HURON POTAWATOMI, INC., *reprinted in* U.S. DEP'T OF INTERIOR, BUREAU OF INDIAN AFFAIRS, PROPOSED FINDING—HURON POTAWATOMI, INC. 218, 226 (1995); Vanessa A. Watts, Towards Anishinaabe Governance and Accountability: Reawakening our Relationships and Sacred Bimaadziwin 77 (2006) (unpublished master's thesis, University of Victoria) (quoting interview by Vanessa A. Watts with Fred Kelly, member of the Onigaming First Nation (December 14, 2005)), *available at* http://dspace.library.uvic.ca:8080/ handle/1828/2222.

128. *See* Spurr, No. 12-005APP, at 7 (citing Crampton v. Election Bd., 8 Am. Tribal Law 295, 296 (Little River Band of Ottawa Indians Tribal Ct. May 8, 2009); Bailey v. Grand Traverse Band Election Bd., No. 2008-1031-CV-CV, 2008 WL 6196206, at *9, 11 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Judiciary, Aug. 8, 2008) (en banc); Deckrow v. Little Traverse Bay Bands of Odawa Indians, No. C-006-0398, 1999 WL 35000425, at *2 (Little Traverse Bay Bands of Odawa Indians Tribal Ct. Sept. 30, 1999)).

In the report, Dean Getches listed several ways in which federal courts are significantly deferring to tribal courts, including: requiring litigants to exhaust tribal remedies before challenging tribal jurisdiction;[129] recognizing continuing tribal court authority in Public Law 280 states;[130] enforcing off-reservation treaty regulations;[131] and enforcing laws against nonmembers after delegation from Congress.[132] Dean Getches also suggested that quick access to a fair forum was an important strength of tribal justice systems and that ICRA played an important role in guaranteeing fundamental fairness.[133]

Critics of tribal courts worry that the courts do not offer acceptable protections to litigants—especially to persons—not members of the tribe. Such criticism has sparked a mini-backlash against tribal jurisdiction in Congress.[134] Rejection of ICRA may fan the flames of those criticisms.

At least some of the justices on the United States Supreme Court in more recent years appear to share that view.[135] In 2001, Justice Souter authored an opinion deeply injurious to tribal interests in establishing regular civil jurisdiction over nonmembers. His concurrence in *Nevada v. Hicks*,[136] which quoted Getches's *Indian Courts and the Future*, raised serious concerns about fundamental fairness in tribal justice systems as they adjudicate the rights of nonmembers:

> Although some modern tribal courts "mirror American

129. *See* REPORT, *supra* note 5, at 88 (citing O'Neal v. Cheyenne River Sioux Tribe, 582 F.2d 1140 (8th Cir. 1975)). The Supreme Court later approved of the tribal court exhaustion doctrine in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987).

130. *See* REPORT, *supra* note 5, at 88–89 (citing Bryan v. Itasca County, 426 U.S. 373 (1976)).

131. *See id.* at 89 (citing Settler v. Lameer, 507 F.2d 231 (9th Cir. 1975); United States v. Washington, 520 F.2d 676 (9th Cir. 1974), *cert. denied*, 419 U.S. 1032 (1974)).

132. *See* REPORT, *supra* note 5, at 89 (citing United States v. Mazurie, 419 U.S. 544 (1975)).

133. *See id.* at 89–90.

134. *See* S. REP. NO. 112-513, at 40–41, 51–55 (2012) (reporting minority views of senators arguing against expansion of tribal court jurisdiction).

135. *See* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 115–17 (2002) (arguing that the Court sees a "democratic deficit" in tribal governance); Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1221 (2010) (surveying tribal civil jurisdiction cases).

136. 533 U.S. 353 (2001).

> courts" and "are guided by written codes, rules, procedures, and guidelines," tribal law is still frequently unwritten, being based instead "on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices," and is often "handed down orally or by example from one generation to another." . . . The resulting law applicable in tribal courts is a complex "mix of tribal codes and federal, state, and traditional law," NATIONAL AMERICAN INDIAN COURT JUDGES ASSN., INDIAN COURTS AND THE FUTURE 43 (1978), which would be unusually difficult for an outsider to sort out.[137]

Justice Souter's remarks generated an enormous amount of scholarly debate, almost all of it attacking a perceived bias in the Supreme Court against tribal interests or responding to Justice Souter's concerns.[138] Interestingly, and relevant to this Symposium, Dean Getches issued a powerful response to Justice Souter in the *Minnesota Law Review*, arguing that the Court was concerned with what he termed "difference"—that is, any court adopting a tradition that differed from the Anglo-American tradition was suspect—and that it was wrong to do so:

> In the tribal court jurisdiction cases, the issue was not the specific denial of any fundamental right, but a general concern with difference—the kind of difference that might be expressed with the laws of any other country or, indeed, among states which, in our federal system, may apply their own mix of laws ranging from the common law of England to unique local ordinances. In these cases, however, the Court has treated the matter as if the most powerful factors were the unfamiliarity of the tribal court to the defendant. The Court acknowledged the impact on the tribe's interests in maintaining reservation health and safety through the exercise of sovereignty over reservation activities but, unlike a traditional conflict of law analysis, gave no weight to the preference for the local law of the place of injury. If the Court's role in these cases had been to make a conflict of

137. Hicks, 533 U.S. at 384–85 (Souter, J., concurring) (quoting Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 130–31 (1995)) (other citations omitted); REPORT, *supra* note 5, at 43.

138. *See, e.g.*, Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 407–08 (2007–2008).

> law balancing decision, even without applying Indian law principles, it arguably did not do so with a full appreciation of the tribal interests that were at stake.[139]

According to Dean Getches, the Court is concerned with "difference"—and when it comes to nonmembers haled into tribal courts against their will, "difference" makes all the difference.

One could argue that tribal courts walk a fine line when discarding or limiting the utility of ICRA. One could also argue that it does not matter, especially since the Supreme Court seemed to state in a later case that ICRA, merely a federal statute, does not carry the same weight as the United States Constitution and, therefore, provides insufficient protection for nonmembers in tribal court.[140] I have argued that the Supreme Court's concerns about tribal jurisdiction over nonmembers are largely irrelevant now and will become even more so with time and experience.[141] Because increasing numbers of nonmembers are consenting to tribal jurisdiction,[142] the Supreme Court's jurisprudence lives on borrowed time.

Moreover, the legitimacy of tribal common law to outsiders is of limited importance. In other words, only nonmembers subject to tribal civil jurisdiction and Indians subject to tribal criminal jurisdiction have the right to seek outside review of tribal court jurisdiction (in civil cases)[143] or review of a criminal conviction.[144] Tribal justice systems must fight an even greater battle first—demonstrating their legitimacy to the tribal membership.

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139. 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, 346–47 (2001).

140. *See* Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 337 (2008) ("Tribal sovereignty, it should be remembered, is 'a sovereignty outside the basic structure of the Constitution.' The Bill of Rights does not apply to Indian tribes. Indian courts 'differ from traditional American courts in a number of significant respects.'" (citations omitted)).

141. *See* Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 1014–16 (2010).

142. *See* Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45, 116, 120 (2012).

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

144. *See* 25 U.S.C. § 1303. As the law currently stands, only tribal members and other Indians are subject to tribal criminal jurisdiction. *See* United States v. Lara, 541 U.S. 193, 200 (2004); United States v. Wheeler, 435 U.S. 313, 324 (1978).

CONCLUSION

ICRA is a creature of Congress. While Congress may have intended that tribal justice systems be the primary interpreter of "due process" and "equal protection" in accordance with tribal customs and traditions, those concepts remain American concepts, not tribal concepts. ICRA has served, and will continue to serve, an important purpose in assisting tribal courts, litigants, and legislatures in providing the legal infrastructure necessary to guarantee fundamental fairness in Indian country. ICRA is a kind of crutch, a placeholder for tribes and tribal courts to lean upon until proper and legitimate tribal law arises to take its place.

That brings us full circle to the great Dean Getches and the remarkable *Indian Courts and the Future*. Dean Getches's introduction to the report noted that ICRA was a "challenge" to tribal justice systems—one he hoped tribal governments could meet. He wrote about his concerns that federal courts would be skeptical of tribal jurisdiction if tribal courts did not guarantee fundamental fairness to all litigants:

> In measuring Indian courts, federal courts are certain to examine acts of Congress, which deal with the operation of tribal judicial systems. The most sweeping and recent of such acts is the Indian Civil Rights Act. Unquestionably, the Act limits the sovereignty of Indian tribes because it insists upon a form of government not necessarily of their own choosing. They must adhere to concepts of due process and equal protection and assure their members a list of substantive rights borrowed from the United States Constitution, which may be alien to their own traditions of government. The familiarity of non-Indian courts with the federal Bill of Rights provides a ready index for evaluating Indian courts—a gauge for their degree of effectiveness as vehicles of preemption of state governmental activity, and of their exercise of tribal self-government. Yet the response of tribes and, significantly, of the federal establishment as their mentor and trustee has not been adequate to fulfill Congress' mandate and to meet the challenge of ICRA

fully.[145]

Dean Getches also worried about the tribal and federal response to ICRA, and he was right to do so, given the alien character of American law to many Indian communities. But he recognized that the federal Bill of Rights was familiar to most Indian people and certainly to Indian court judges. Federal rights could serve as an important guidepost, even if Indian courts eventually adapted their customs and traditions to meet modern needs. Dean Getches recognized that the goal was to develop tribal jurisprudence and common law with an eye toward tribal customs and traditions, and his work put that goal front and center.

145. REPORT, *supra* note 5, at 2–3 (citation omitted).

REVIVING THE PUBLIC OWNERSHIP, ANTISPECULATION, AND BENEFICIAL USE MOORINGS OF PRIOR APPROPRIATION WATER LAW

GREGORY J. HOBBS, JR.*

This article addresses originating principles of Colorado prior appropriation water law and demonstrates how the Colorado Supreme Court has applied them in significant cases decided during the first decade of the twenty-first century, a sustained period of drought. These principles include public ownership of the water resource wherever it may be found within the state, allocation of available unappropriated surface water and tributary groundwater for appropriation by private and public entities in order of their adjudicated priorities, and the antispeculation and beneficial use limitations that circumscribe the amount and manner of use each water right is subject to. Demonstrating that Colorado water law is based on conservation of the public's water resource and its use by private persons, public entities, federal agencies, and Indian Tribes, the article focuses on the following points. Colorado's prior appropriation doctrine started off recognizing adjudication only of agricultural uses of water. Now it embraces environmental and recreational use, in addition to serving over five million persons, most of who live in urban and suburban areas. The viability of the water law is dependent upon faithful enforcement of water rights in order of their adjudicated priorities when there is not enough water available to serve all needs. At the same time, innovative methods have emerged to ameliorate strict prior

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appropriation enforcement. Conditional water rights are placeholders in the priority system and should not be decreed in the absence of proof that the water can and will be placed to actual beneficial use in the amount and for the purpose claimed. Unadjudicated water use practices and undecreed enlargements of water rights will not be recognized because they have not been subjected to the water court notice and decree procedure enacted by the General Assembly for the protection of other water rights. The Colorado General Assembly may fashion new conjunctive use management tools for operation of the surface water and tributary groundwater regime consistent with the Colorado Constitution's prior appropriation provisions. Through legislative enactment, sustainability now joins optimum use and protection against injury as goals of the water law.

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Scarce and Dear

A river can be killed by treating it only as a commodity rather than the habitat of life itself. When we nurture our singing and working rivers, we celebrate the greater community in which we live.

What we consider a river in the southwest is different from other parts of our country. It looks nothing like the Mississippi or the Potomac in their breadth or depth. It may not run at all for a portion of the year. It may gush abundantly at other times.

Our southwestern rivers are scarce, dear, and worthy of respect at all times. Because we live in community, we understand that water rights are valuable use rights and states sharing an interstate stream system are entitled to an equitable division of the natural flow.

We also understand that water rights do not carry with them a right to pollute a stream or choke its course to extinction. There is much we can do to help a river keep or revive its natural course.

Pools, riffles, runs, meanders, cover, insects, fish, water clean enough to serve agriculture, domestic drinking water, recreation, and fisheries—this picture of a restored western river is becoming for us a basic lesson in western civics.[1]

INTRODUCTION

This article arises out of an invitation to speak at a symposium in honor of David Getches at the University of

1. JUSTICE GREG HOBBS, *Scarce and Dear*, *in* INTO THE GRAND 21, 21 (2012).

Colorado Law School in April of 2012. Water law was one of David's primary interests. Charles Wilkinson and Sarah Krakoff, who organized the symposium, asked me to address what I consider to be significant developments in water law. Because I know them best, I have chosen to focus on a set of recent Colorado Supreme Court cases that demonstrate how prior appropriation law can change and adapt while applying its most fundamental principles. Consistent with the expert peer format of this symposium, this article assumes familiarity with water law and law review literature, but I hope its content also speaks to others interested in an overview of Colorado's water system. The short prose poem I set forth above encapsulates a viewpoint David advocated wholeheartedly: streams, for all their worth, are scarce and dear.[2]

The cases I examine are *Empire Lodge,*[3] *Park County Sportsmen's Ranch*,[4] *High Plains,*[5] *ISG*,[6] *Pagosa I* and *II*,[7] *Burlington Ditch*,[8] and *Rio Grande Subdistrict No. 1*.[9] The major themes these decisions illustrate include: public ownership of the water resource; allocation and voluntary market-driven reallocation of a scarce water supply to public and private uses; integration of tributary groundwater and surface water into the prior appropriation adjudication[10] and

2. I believe David persistently pressed the center to hold together. He did this by consistently cultivating an understanding of the peoples and the magnificence of this great land. Advocate and scholar of Native American Tribes, water, natural resources, the environment, and the way our country has grown while also despoiling the environment mindlessly and needlessly in the course of growing, he committed himself—lawyer, teacher of many, law school Dean, father, husband, and colleague—to the justice of restoration, a conservative conviction, that we must preserve what we most hold dear so we can learn to prosper together. *See* JUSTICE GREG HOBBS, *David Getches, Passionate Intensity Holding the Center from Flying Apart*, *in* INTO THE GRAND 105, 105–07 (2012).

3. Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139 (Colo. 2001).

4. Bd. of Cnty. Comm'rs of the Cnty. of Park v. Park Cnty. Sportsmen's Ranch, 45 P.3d 693 (Colo. 2002).

5. High Plains A & M, LLC v. Se. Colo. Water Conservancy Dist., 120 P.3d 710 (Colo. 2005).

6. ISG, LLC v. Ark. Valley Ditch Ass'n, 120 P.3d 724 (Colo. 2005).

7. Pagosa Area Water & Sanitation Dist. v. Trout Unlimited (*Pagosa I*), 170 P.3d 307 (Colo. 2007); Pagosa Water & Sanitation Dist. v. Trout Unlimited (*Pagosa II*), 219 P.3d 774 (Colo. 2009).

8. Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist., 256 P.3d 645 (Colo. 2011).

9. San Antonio, Los Pinos & Conejos River Acequia Pres. Ass'n v. Special Improvement Dist. No. 1 of the Rio Grande Water Conservation Dist. (*Subdistrict No. 1*), 270 P.3d 927 (Colo. 2011).

10. Adjudication is the process through which a Colorado Water Court decrees the point of diversion, the amount of diversion, the type of use, and the place of

administration system; application of the beneficial use and antispeculation doctrines to water transfers as well as to water right claims; and incorporation of nonconsumptive uses such as instream flow and recreational water rights into the water rights system.

These are emerging themes across the prior appropriation states of the West. Many streams are over-appropriated due to natural and legal constraints. These constraints include the erratic amount of water available under weather and climatic conditions affected by climate change,[11] interstate water apportionments allocated by interstate compacts[12] and United States Supreme Court equitable apportionment decrees,[13] and integration of federal agency and tribal reserved water right priorities into the state's adjudication and administration systems.[14] A stream is considered to be over-appropriated when there is not enough water available to fill the needs of all adjudicated appropriations that have been made absolute by actual usage.[15]

Where there is unappropriated water still available for appropriation, traditional agricultural, municipal, and commercial uses must compete, as I explain below, for a share of water with the new instream flow and recreational kayak course water uses. As competition for appropriation of the relatively little remaining unappropriated water intensifies, the Colorado General Assembly, the seven water courts, the

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use of a water right. *See High Plains A & M, LLC*, 120 P.3d at 718–19.

11. *See generally* COLO. FOUND. FOR WATER EDUC., CITIZEN'S GUIDE TO COLORADO CLIMATE CHANGE (2008) [hereinafter CLIMATE CHANGE].

12. *See* COLO. REV. STAT. § 37-61-101 (1921) (Colorado River Compact); *id.* § 37-62-101 (1948) (Upper Colorado River Compact); *id.* § 37-63-101 (1921) (La Plata River Compact); *id.* § 37-64-101 (1968) (Animas-La Plata Project Compact); *id.* § 37-65-101 (1923) (South Platte River Compact); *id.* § 37-66-101 (1938) (Rio Grande River Compact); *id.* § 37-67-101 (1942) (Republican River Compact); *id.* 37-68-101 (1963) (Amended Costilla Creek Compact); *id.* § 37-69-101 (1948) (Arkansas River Compact).

13. *See generally* COLO. FOUND. FOR WATER EDUC., CITIZEN'S GUIDE TO COLORADO'S INTERSTATE COMPACTS (2010), http://www.courts.state.co.us/userfiles/file/Court_Probation/19th_Judicial_District/Court_House_History/cfwe%20Compacts%20Guide%20text%20as%20published.pdf [hereinafter INTERSTATE COMPACTS].

14. *See, e.g.*, City & Cnty. of Denver v. United States, 656 P.2d 36, 38–39 (Colo. 1982); S. Ute Indian Tribe v. King Consol. Ditch Co., 250 P.3d 1226, 1236–67 (Colo. 2011) (holding that Colorado's resume notice and newspaper publication procedure is equally applicable to federal reserved and tribal water rights as it is to Colorado prior appropriation water rights).

15. *See* Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1150 (Colo. 2011).

Colorado Supreme Court, and the State Engineer are employing the originating principles of public ownership, antispeculation, beneficial use, and prior appropriation administration in fulfilling their responsibility to maintain a stable, reliable, and adaptable water law system.

Part I of this article addresses the originating principles of prior appropriation water law as seen through Colorado constitutional, statutory, and case law precedent. These fundamental principles include public ownership of the water resource wherever it may be found within the state, allocation of available unappropriated surface water and tributary groundwater for appropriation by private and public entities in order of their adjudicated priorities, and the antispeculation and beneficial use limitations that circumscribe the amount and manner of use to which each water right is subject. This Part describes the forces that helped shape prior appropriation water law and the creation of prior appropriation water rights within an adjudication and administration system that integrates federal and tribal reserved water rights into a stable, reliable, and adaptable water law. This Part also discusses the government's responsibility to manage water and protect vested water use rights as an operative paradigm of prior appropriation water law.

Part II of this article examines six early twenty-first century cases of the Colorado Supreme Court that confirm and apply originating principles of prior appropriation law in an era of ever-increasing demand for an erratically available water supply.

Empire Lodge teaches that the right to share in a portion of Colorado's public water resource allocated to Colorado under the nine applicable interstate compacts and two equitable apportionment decrees[16] is dependent upon faithful enforcement of water rights in order of their adjudicated priorities when there is not enough water available to serve all needs. At the same time, innovative methods have emerged to ameliorate strict prior appropriation enforcement. For example, holders of junior water rights that would otherwise be curtailed in times of short water supply can divert out of priority by replacing sufficient water to the stream for the protection of senior water rights under court approved augmentation plans or, under certain circumstances, State

16. *See generally* INTERSTATE COMPACTS, *supra* note 13.

Engineer approved substitute supply plans.

Park County Sportsmen's Ranch holds that the water-bearing capacity of Colorado aquifers throughout the state belongs to the public's water resource and is not owned by the overlying landowner. This decision illustrates how the water law of Colorado differs remarkably from that of states like Texas[17] that adhere to a common law doctrine of groundwater under which groundwater use is controlled or owned by the overlying or adjoining landowner as an incident of land property rights. In Colorado, the public owns all forms of surface water and groundwater; in turn, the Colorado Constitution, statutes, and case decisions allocate and define the nature, extent, and interrelationship of public agency and private water use rights.

High Plains and *ISG* demonstrate the interplay between the judicial and legislative branches of Colorado government in applying the antispeculation and beneficial use principles of prior appropriation water law to water transfer cases. Water courts can decree changes of water rights, retaining their senior appropriation dates for use elsewhere, subject to conditions preventing injury to other water rights and identification of the place and type of use where the water right being changed will be utilized.

Pagosa I and *Pagosa II* stand for the proposition that there is so little unappropriated water remaining to Colorado under its interstate apportionments that water rights should remain in the stream unadjudicated until such time as a viable consumptive or nonconsumptive water right proves the need for an appropriation. Conditional water rights are placeholders in the priority system and should not be decreed in the absence of proof that the water can and will be placed to actual, beneficial use in the amount and for the purpose claimed. Cities seeking to appropriate an additional long-term supply of water must prove that the planning period, the population projections, and the additional amount of water they propose to be conditionally decreed are reasonable, taking into account conservation measures and future land use mixes that affect per capita water consumption.

Burlington demonstrates that municipalities and businesses seeking to have the benefit of transferred senior agricultural water rights priorities will be limited in a change-

17. *See* Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 832 (Tex. 2012).

of-water-right proceeding to the amount of water historically consumed beneficially over a representative historical period of time under the decreed water right being changed. Unadjudicated water use practices and undecreed enlargements of water rights will not be recognized because they have not been subjected to the water court notice and decree procedure enacted by the General Assembly for the protection of other water rights.

Subdistrict No. 1 teaches that the Colorado General Assembly may fashion new conjunctive use management tools for operation of the surface water and tributary groundwater regime that are consistent with the Colorado Constitution's prior appropriation provisions. Through legislative enactment, sustainability now joins optimum use and protection against injury as goals of water law.

Based on an examination of these cases and connected statutory innovations, I conclude that Colorado water law is changing and adapting to the needs of a growing state whose economy and environment must be served conjointly. The resiliency of the state's prior appropriation law harkens back to its founding principles: public ownership of the water resource, establishment of nonspeculative actual and beneficial use water rights by public agencies and private persons, and administration of water rights in order of their adjudicated priorities, with provisions for innovative management tools that ameliorate strict priority enforcement in order to optimize use of the available water resources. The integration of federal and tribal reserved and appropriative rights into Colorado's adjudication and administration system through the 1969 Act of the Colorado General Assembly[18] is a hallmark accomplishment. Living within the state's interstate water allocation limits is an ongoing obligation owed by Colorado to downstream states. The continued viability of Colorado water law depends upon the faithful performance by public officials of their constitutional and statutory responsibilities, as well as water user respect for the rights of others.

18. The Water Right Determination and Administration Act of 1969, 1969 Colo. Sess. Laws Ch. 373, 200.

I. PRINCIPLES OF COLORADO PRIOR APPROPRIATION LAW

A. Constitutional Fundamentals of Public Ownership, Antispeculation, Beneficial Use, and Priority Administration

Any system of water law adopted by a state or nation will necessarily reflect the needs and values of its populace and, most significantly, the supply of water available for use in addressing those needs and values. The premise that birthed prior appropriation[19] water law is that water users in a water-scarce region undergoing a population increase must need the water for an actual and continuing beneficial use[20] in order to obtain and retain a share of the public's water resource.[21] In

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19. "Appropriation" is defined as:

> the application of a specified portion of the waters of the state to a beneficial use pursuant to the procedures prescribed by law; but no appropriation of water, either absolute or conditional, shall be held to occur when the proposed appropriation is based upon the speculative sale or transfer of the appropriative rights to persons not parties to the proposed appropriation, as evidenced by either of the following: (I) The purported appropriator of record does not have either a legally vested interest or a reasonable expectation of procuring such interest in the lands or facilities to be served by such appropriation, unless such appropriator is a governmental agency or an agent in fact for the persons proposed to be benefitted by such appropriation. (II) The purported appropriator of record does not have a specific plan and intent to divert, store, or otherwise capture, possess, and control a specific quantity of water for specific beneficial uses.

COLO. REV. STAT. § 37-92-103(3)(a) (2011). "Conditional water right" is defined as "a right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such water right is to be based." *Id.* § 37-92-103(6).

20. "Beneficial use" is defined as

> the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made, and, without limiting the generality of the foregoing, includes the impoundment of water for recreational purposes, including fishery or wildlife, and also includes the diversion of water by a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district for recreational in-channel diversion purposes. For the benefit and enjoyment of present and future generations, 'beneficial use' shall also include the appropriation by the state of Colorado in the manner prescribed by law of such minimum flows between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree.

Id. § 37-92-103(4).

21. *See* High Plains A & M, LLC v. Se. Colo. Water Conservancy Dist., 120

his brilliant work analyzing the Colorado Constitution's water provisions and nineteenth century Colorado Supreme Court water opinions implementing them, Professor David Schorr demonstrates that prior appropriation water law broke radically from riparian water law in order to prevent moneyed land interests from monopolizing the scarce waters of the arid West through land ownership of stream banks, a characteristic of riparian law.[22] *Use only what you need subject to the prior established use rights of others* became institutionalized as a means for distributing water fairly to those who could put it to use. As Professor Schorr explains:

> Colorado was admitted as the thirty-eighth state of the Union in the centennial year of 1876. Article XVI of its new constitution contained four sections dealing with water rights, under the heading of "Irrigation." These constitutional provisions reveal a "radical Lockean" scheme of acquisition based on use and limitations on the aggregation of private property. Present were the by-now familiar rules allowing ditch easements and providing for restraint of corporate power, as well as the priority principle, in what was a decidedly supporting role. Most importantly, the constitution set out clearly for the first time three central principles of the Colorado appropriation doctrine: public ownership of the state's surface waters, the beneficial use requirement, and the complete abolishment of riparian privileges.[23]

Colorado's Constitution spells out the framework for the public's water resource ownership, the creation of nonspeculative beneficial water use property rights in public and private users, and prior appropriation water administration.[24] Shortly after admission to the Union in 1876,

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P.3d 710, 718–19 (Colo. 2005).

22. David B. Schorr, *Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights*, 32 ECOLOGY L.Q. 3 (2005) [hereinafter *Appropriation as Agrarianism*]; DAVID B. SCHORR, THE COLORADO DOCTRINE: WATER RIGHTS, CORPORATIONS, AND DISTRIBUTIVE JUSTICE ON THE AMERICAN FRONTIER (2012).

23. *Appropriation as Agrarianism*, *supra* note 22, at 41.

24. Article XVI, section 5 of the Colorado Constitution provides, "The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided." COLO. CONST. art. XVI, § 5. Article XVI, section 6 of the Colorado Constitution provides, in part, "The right to divert the unappropriated waters of any natural

the General Assembly took an active role in formulating statutes implementing these constitutional principles.[25]

B. Adjudication Statutes

Shortly after admission to the Union in 1876, the Colorado General Assembly began to adopt a series of adjudication acts designed to restrict water appropriations to the needs of actual users. When the Territorial General Assembly enacted its first water statute in 1861,[26] it mentioned only one type of use—agriculture. In my view, this is due to the essentially nonconsumptive character of mining uses along streams in the mountains. Hydraulic and sluice-box mining were primarily nonconsumptive in nature. Most of the water diverted returned to the mountain streams that flowed downstream onto the plains. Wherever it occurred in the state, domestic use of water for drinking and stock-watering was incidentally consumptive, whereas irrigation of cropland to feed the miners required recognition of a law that allocated and protected a consumptive use share of the public's water resource.[27] By the early

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stream to beneficial uses shall never be denied." *Id.* § 6. Article XVI, section 7 of the Colorado Constitution provides:

> All persons and corporations shall have the right-of-way across public, private and corporate lands for the construction of ditches, canals and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.

Id. § 7.

25. *See generally* Gregory J. Hobbs, Jr., *Colorado Water Law: An Historical Overview*, 1 U. DENV. WATER L. REV. 1 (1997); Gregory J. Hobbs, Jr., *Colorado's 1969 Adjudication and Administration Act: Settling In*, 3 U. DENV. WATER L. REV. 1 (1999); COLO. FOUND. FOR WATER EDUC., CITIZEN'S GUIDE TO COLORADO WATER LAW (3d ed. 2009) [hereinafter COLORADO WATER LAW]. These and other water articles and writings by the author are collected in JUSTICE GREG HOBBS, IN PRAISE OF FAIR COLORADO, THE PRACTICE OF POETRY, HISTORY, AND JUDGING (2004); JUSTICE GREG HOBBS, COLORADO MOTHER OF RIVERS, WATER POEMS (2005); GREGORY J. HOBBS, JR., THE PUBLIC'S WATER RESOURCE, ARTICLES ON WATER LAW, HISTORY AND CULTURE (2007); JUSTICE GREG HOBBS, LIVING THE FOUR CORNERS, COLORADO CENTENNIAL STATE AT THE HEADWATERS (2010); and JUSTICE GREG HOBBS, INTO THE GRAND (2012).

26. *See* An Act to Protect and Regulate the Irrigation of Land, 1861 Colo. Territorial Laws § 1, 67.

27. Recognizing that in-house drinking water and sanitation use is a human necessity, Colorado statutory law contains an exemption from administration of the priority system for small capacity wells and rainwater harvesting systems for this purpose where a family does not have access to a centralized water system. *See* Justice Gregory J. Hobbs, Jr., *Protecting Prior Appropriation Water Rights Through Integrating Tributary Groundwater: Colorado's Experience*, 47 IDAHO L. REV. 5, 20–21 (2010).

twentieth century, a rapidly growing municipal and commercial economy was emerging out of farm land, requiring adjudication of all other beneficial uses in order of their decreed priorities. Consequently, in 1903 the General Assembly enacted an adjudication act applicable to all beneficial uses, not just irrigation.[28]

The 1881[29] and 1903[30] statutes required district courts in counties throughout the state to issue decrees awarding priority dates to those appropriators who had made actual, beneficial use of the state's water. Because junior appropriations often depend upon return flows from preexisting uses, case law arising under these adjudication acts required the courts to prevent senior appropriators from enlarging their consumptive use to the detriment of decreed junior rights.[31] The original intent of the appropriator regarding the extent of the acreage to be irrigated governs the scope of the appropriation.[32] Under the 1899[33] and 1943[34] Acts, changes in the point of diversion, amount, use, or place of use required adjudication, including protective conditions necessary to prevent injury to other water rights.[35]

In an 1883 case, the Colorado Supreme Court clearly articulated the fundamental beneficial use principle of prior appropriation law that no one can "appropriate more water than was necessary to irrigate his land; that he could not divert the same for the purpose of irrigating lands which he did not cultivate or own, or hold by possessory right or title, to the exclusion of a subsequent bona fide appropriator."[36] In an 1892 case, the court reiterated that "the ownership of the prior right can be acquired originally only by the actual, beneficial use of the water. The very birth and life of a prior right to the use of water is [an] actual *user*."[37]

Late nineteenth and early twentieth century Colorado

28. *See* 1903 Colo. Sess. Laws 297.
29. *See* 1881 Colo. Sess. Laws 142–46.
30. *See* 1903 Colo. Sess. Laws 278–80, 291–92.
31. *See* Ready Mixed Concrete Co. v. Farmers Reservoir & Irrigation Co., 115 P.3d 638, 642–43 (Colo. 2005).
32. *See* Cent. Colo. Water Conservancy Dist. v. City of Greeley, 147 P.3d 9, 12 (Colo. 2006).
33. 1899 Colo. Sess. Laws 235–36.
34. 1943 Colo. Sess. Laws 628–29.
35. *See* Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1149 (Colo. 2001).
36. Thomas v. Guiraud, 6 Colo. 530, 532 (1883).
37. Combs v. Agric. Ditch Co., 28 P. 966, 968 (1892) (emphasis in original).

Supreme Court cases consistently reiterated that seepage water from ditches and reservoirs and return flows from the irrigation of crops are available for appropriation in priority by other water rights.[38] Decisions of the Colorado Supreme Court have since read into every decree an implied limitation that actual, beneficial use of the water diverted is the scope, measure, and limit of any water right.[39]

Through a 1919 Act, the legislature provided for adjudication of all previously undecreed water rights to occur through court filings made within the next two years; if not, their original appropriation dates would be presumed abandoned.[40] The 1943 Act provided for supplemental adjudications throughout the state.[41]

C. The Role of Government to Conserve the Public's Water Resource and Enforce Adjudicated Water Use Rights

In their article published by the University of Colorado's Natural Resources Law Center, Clyde Martz and Bennett Raley articulated the government's responsibility to conserve and manage water and protect vested water use rights through priority administration.[42] Citing the Mining Act of 1866[43] and the water provisions of the Colorado Constitution, they characterized it as a trusteeship role of government officials for water administration.[44] This responsibility includes conservation of the public's water resource and enforcement of adjudicated water rights:

> Colorado declared that all of the waters of natural streams are the property of the public and dedicated to public use.

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38. *See, e.g.*, Comstock v. Ramsay, 133 P. 1107, 1110 (1913).
39. *See* Weibert v. Rothe Bros., Inc., 618 P.2d 1367, 1371 (Colo. 1980).
40. *See* 1919 Colo. Sess. Laws 487–89.
41. *See* 1943 Colo. Sess. Laws 614–18.
42. Clyde O. Martz & Bennett W. Raley, *Administering Colorado's Water: A Critique of the Present Approach, in* TRADITION, INNOVATION AND CONFLICT: PERSPECTIVES ON COLORADO WATER LAW 41 (1986). Clyde Martz was a distinguished natural resources professor at the University of Colorado School of Law and later a partner of Davis, Graham & Stubbs and Solicitor of the Department of Interior under President Jimmy Carter. Bennett Raley was also a partner of Davis, Graham & Stubbs, served as Assistant Secretary for Water Science in the U.S. Department of Interior, and currently practices water law for Trout, Raley, Montaño, Witwer & Freeman.
43. *See* Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251, 253 (codified at 43 U.S.C. § 661 (2006)).
44. Martz & Raley, *supra* note 42, at 42.

> By such declaration with respect to waters in which it had no proprietary interest, the state assumed a trusteeship role to administer the waters of the state for the benefit of the public. As such, it became responsible not only for minimal administrative functions but also for administration of the kind a trustee owes to the beneficiary of the trust. Its responsibilities include, first and foremost, the conservation of the estate and avoidance of waste; second, the promotion of beneficial use by assisting the appropriator in achieving use objectives to the maximum extent feasible; third, the representation of beneficiaries in a *parens patriae* capacity and maintaining the use regimen on the river system; and fourth, the promotion of efficiency and prudence of the kind expected of a trustee.[45]

The General Assembly has defined and implemented such a role for public agencies and officials. It has empowered and directed public officials in the performance of their water duties through numerous statutes, in particular but not limited to the 1969 Water Right Determination and Administration Act (1969 Act).[46] Therein it has codified basic tenets of Colorado water law, an important component of which is the integration of tributary groundwater and surface water into the prior appropriation adjudication and administration system.[47] Colorado statutes establish seven geographical water divisions, each having a division engineer and a water judge.[48] These water judges adjudicate water right applications on a case-by-case basis, providing notice to other water users and the public through the state's unique resume notice system.[49]

The State Engineer, seven Division Engineers, and local Water Commissioners have the duty to enforce the seven water court judgments and decrees.[50] The value of any water right, whether a prior appropriation water right or federal agency or tribal reserved right, depends on its ranking in order of decreed

45. *Id.*

46. The Water Right Determination and Administration Act of 1969, 1969 Colo. Sess. Laws ch. 373, 200.

47. COLO. REV. STAT. §§ 37-92-102, 37-80-102, 37-80-105, 37-80-117 (2011).

48. *Id.* §§ 37-92-201, -203.

49. *Id.* § 37-92-302. *See, e.g.*, S. Ute Indian Tribe v. King Consol. Ditch Co., 250 P.3d 1226 (Colo. 2011).

50. COLO. REV. STAT. §§ 37-92-501 to -502, 37-80-102(a) (2011); Vaughn v. People *ex rel.* Simpson, 135 P.3d 721, 723 (Colo. 2006).

priority system in times of short supply.[51] Without enforcement of the priority system, the value of a water right diminishes or disappears and the adaptability of the market to reallocate water to different uses through willing buyer/seller transactions flounders for lack of reliability.[52]

D. The Role of Reservoirs and Voluntary Water Transfers

The doctrine of prior appropriation is a rule of scarcity, not of plenty. When the call for priority administration is in effect, which is often in most of Colorado's river basins, even in average water years, the inevitable needs of a growing population's need for water has pitted water rights holders against each other. Senior water rights holders call out juniors through priority administration, and juniors seek to improve the reliability of their water supply by buying or leasing senior water rights or providing replacement water through exchange, augmentation, or substitute supply plans. This struggle pits the rural economy—which typically holds the senior water rights—against the urbanizing economy—which has sufficient financial resources to purchase senior agricultural priorities—often resulting in the dry-up of agricultural lands, which adversely impacts the rural economy.[53]

During the twentieth century, importation of western slope water from the Colorado River basin through the Continental Divide into the Platte and Arkansas River basins ameliorated the impact of overappropriation of the native waters of these two Front Range basins where the bulk of Colorado's population resides.[54] The U.S. Bureau of Reclamation constructed reservoir projects in connection with repayment contracts involving local conservancy districts, such as the Colorado-Big Thompson Project, serving northeastern Colorado (Northern Colorado Water Conservancy District), and the

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51. Navajo Dev. Co., Inc. v. Sanderson, 655 P.2d 1374, 1380 (Colo. 1982); *see also* Kobobel v. State Dept. of Natural Res., 249 P.3d 1127, 1130 (Colo. 2011) (stating that one does not own water but owns right to use water within limitations of prior appropriation doctrine).

52. *See* Gregory J. Hobbs, Jr., *Priority: The Most Misunderstood Stick in the Bundle*, 32 ENVTL. L. 37, 49–52 (2002).

53. *See generally Colorado's Water Supply Future: Cooperation vs. Competition*, HEADWATERS, Spring 2009, http://www.cfwe.org/index.php?option=com_content&view=category&layout=blog&id=49&Itemid=149. (This issue is devoted to Colorado's water planning process commenced through the Colorado Water for the 21st Century Act. *See* COLO. REV. STAT. § 37-92-101 (2011)).

54. *Colorado's Water Supply Future*, *supra* note 53, at 4–7.

Frying Pan-Arkansas Project, serving southeastern Colorado (Southeastern Colorado Water Conservancy District).[55] Cities such as Denver, Aurora, Colorado Springs, and Pueblo built their own transmountain diversion and storage projects.[56] Supplementing the relatively meager native waters of the Platte and Arkansas River basins, these importations utilized compact-apportioned water available to the state out of its Colorado River interstate apportionment. The additional water was absolutely indispensable to the agricultural, municipal, and commercial economies of the Front Range.[57]

Such importations bridged and muted agricultural and urban conflicts even as irrigated agricultural ground gave birth to the great and growing cities.[58] As the cities have grown and recreation and the environment have taken their place in prior appropriation adjudication and administration, the market in transferring senior priority agricultural water rights to municipal and environmental uses has accelerated.[59] The long-standing water market in Colorado is more active than ever. The 1891 *Strickler* decision[60] of the Colorado Supreme Court recognized that the valuable water use property rights of farmers could be transferred to other uses, provided that changes of water rights would be accomplished through the court process without injury to other water rights:

> We grant that the water itself is the property of the public. Its use, however, is subject to appropriation, and in this case it is conceded that the owner has the paramount right to such use. In our opinion this right may be transferred by sale so long as the rights of others, as in this case, are not injuriously affected thereby.[61]

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55. *See* Hobbs, Jr., *supra* note 25, at 13–14.

56. *Id.* at 15–16.

57. *See* JUSTICE GREG HOBBS, FOREWORD TO COLORADO WATER LAW BENCHBOOK ix (Carrie L. Ciliberto & Timothy J. Flanagan eds., rev. ed. 2012).

58. COLORADO WATER LAW, *supra* note 25, at 20–21.

59. *See generally A Decade of Colorado Supreme Court Water Decisions: 1996-2006*, HEADWATERS, Fall 2006, at 12–14, http://www.cfwe.org/index.php?option=com_content&view=category&layout=blog&id=49&Itemid=149 (discussing recent change of water rights cases).

60. Strickler v. City of Colorado Springs, 26 P. 313 (Colo. 1891). In this case, a city successfully obtained recognition of the right to purchase a senior agricultural priority and change it to municipal use subject to protection against injury to other water rights.

61. *Id.* at 316.

As a result of *Strickler*, Colorado's one-hundred-twenty-year-old water market underscores the value and flexibility of private water use rights. As need and opportunity dictates they can be voluntarily reallocated to other types and places of use, subject to notice and the opportunity to oppose a transfer that does not conform to the applicable legal standards governing a change of water right.

E. Balancing Land and Water Resources

If any resource is as valuable as the air we breathe, it is water. Water flows where it will and blesses everyone and everything it touches. As Professor Mark Fiege says about Western settlement, "water, deer, and similar commons resources moved, and they moved in relation to the land or a habitat."[62]

Water is the quintessential fluid resource requiring a common understanding of how it shall be shared by means of a possessory interest that does not constitute ownership of the resource itself. Good snowpack propels our hope; drought levels our dreams. The great dust bowl drought of the 1930s sobered up any lingering romantic notions about the amount of water available for use in the hard times.

Professor Susan Schulten describes how the Federal Writers' Project Guide to Colorado restrains the lyrical romanticism evident in prior guides describing this state's allures.[63] This guide presented a leaner, more factual description of this semi-arid land, its varied peoples, and labor conflicts that spread to the state's irrigated sugar beet fields.

In twenty-first century Colorado and into the future, we must learn to share between human economies and the environment what is predominantly—save pockets of unappropriated water here and there—an already-developed water resource. The Colorado General Assembly has declared the goals of the water law to include "optimum use,"[64] sustainability,[65] and protection against injury to water

62. Mark Fiege, *The Weedy West: Mobile Nature, Boundaries, and Common Space in the Montana Landscape*, 36 THE W. HIST. Q., Spring 2005, at 26.

63. Susan Schulten, *How to See Colorado: The Federal Writers' Project, American Regionalism, and the "Old New Western History"*, THE W. HIST. Q., Spring 2005, at 63.

64. COLO. REV. STAT. § 37-92-501(2)(e) (2011).

65. *Id.* § 37-92-501(4).

rights.[66] Accordingly, the state's policy of water use does not require a single minded endeavor to squeeze every drop of water out of surface streams and tributary aquifers. Instead, these goals can only be achieved by optimum use through proper regard for "all significant factors, including environmental and economic concerns"[67] and a "balancing of land and water resources."[68]

The sextuplet of cases I examine in this article demonstrate judicial and legislative fidelity to the trusteeship role that Martz and Raley articulated.[69] The early twenty-first century drought, the overappropriated status of three of Colorado's major stream systems (the Platte, the Arkansas, and the Rio Grande), and the limited availability of unappropriated water remaining in the Colorado River under the state's 1922 Colorado River Compact and 1948 Upper Colorado River Basin Compact apportioned share have all revived the public ownership, antispeculation, and beneficial use moorings of Colorado water law.

II. CONTEMPORARY CASE LAW DECISIONS ILLUSTRATING APPLICATION OF ORIGINATING PRINCIPLES OF COLORADO PRIOR APPROPRIATION WATER LAW

A. Empire Lodge*: Regulating Out-of-Priority Diversions to Prevent Injury to Adjudicated Water Use Rights*

Empire Lodge[70] is a 2001 case illustrating enforcement of Colorado's prior appropriation doctrine in an overappropriated stream system. It teaches that augmentation plans are legislatively created devices engineered to provide replacement water for senior water rights and thereby allow junior appropriators to divert water when they otherwise would be curtailed under strict prior appropriation administration. This decision became highly significant in the very next year when a deepening drought caused the curtailment of wells lacking decreed augmentation plans.

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66. *Id.* § 37-92-501(4).

67. Alamosa-La Jara Water Users Prot. Ass'n v. Gould, 674 P.2d 914, 935 (Colo. 1983).

68. San Antonio, Los Pinos & Conejos River Acequia Pres. Ass'n v. Special Improvement Dist. No. 1 of the Rio Grande Water Conservation Dist. (*Subdistrict No. 1*), 270 P.3d 927, 952 (Colo. 2011).

69. *See supra* note 45 and accompanying text.

70. Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139 (Colo. 2001).

This case started from a seemingly inconsequential dispute between a homeowners' association and a neighboring ranch along Empire Creek, a tributary to the Arkansas River high in its headwaters outside of Leadville. Empire Lodge Homeowners' Association, residents of a 261-lot rural subdivision, had been filling two fishing ponds (created no doubt by a long-gone developer who had departed after marketing a desirable amenity).[71] Anne and Russell Moyer owned an adjudicated irrigation right for a ranch downstream on Empire Creek.[72] The Moyers placed frequent calls for Division Engineer enforcement of their water rights in an effort to curtail the Homeowners' Association from intercepting fishing pond water the Moyers' claimed as part of their irrigation rights.[73] Due to overappropriation of the Arkansas River, junior water rights are frequently curtailed because there is not enough available water to fill all the adjudicated water rights in the basin.[74]

The Homeowners' Association decided to take on the Moyers. They filed suit in water court alleging that the Moyers had illegally enlarged the use of their water rights.[75] The Moyers responded with a counterclaim alleging that the Homeowners' Association lacked the required augmentation-plan decree authorizing their out-of-priority diversions.[76] The State Engineer had been allowing the Homeowners' Association to fill the fishing ponds under an annual "substitute supply plan" accompanied by a warning to file for an augmentation plan that would provide for suitable replacement water to protect adjudicated water rights against injury at the time, place, and in the amount the Moyers' right was in priority.[77] Injury typically takes the form of a diminution in the amount of water a senior would otherwise receive were it not for the interception of the water by persons taking the water out of priority.[78]

The water court and the Colorado Supreme Court sided with the Moyers, holding that the General Assembly in 1977

71. *Id.* at 1144.
72. *Id.* at 1143–44.
73. *Id.* at 1145.
74. *Id.* at 1144 n.3.
75. *Id.* at 1145.
76. *Id.* at 1146.
77. *Id.* at 1144, 1146.
78. Farmers Reservoir & Irrigation Co. v. Consol. Mut. Water Co., 33 P.3d 799, 807 (Colo. 2001).

had revoked the State Engineer's authority to approve temporary augmentation plans and there was no legislative authorization for an administratively approved substitute supply plan to accomplish the same purpose as a judicially approved augmentation plan.[79]

In resolving the *Empire Lodge* dispute, the Colorado Supreme Court identified Colorado's prior appropriation system as centering on three fundamental principles:

> (1) that waters of the "natural stream,"[80] including both surface water and groundwater tributary thereto, are a public resource subject to the establishment of public agency or private use rights in unappropriated water for beneficial purposes; (2) that water courts adjudicate the water rights and their priorities; and (3) that the State Engineer, Division Engineers, and Water Commissioners administer the waters of the natural stream in accordance with the judicial decrees and statutory provisions governing administration.[81]

The Colorado Supreme Court held that "[t]he right guaranteed under the Colorado Constitution is to the appropriation of unappropriated waters of the natural stream, not to the appropriation of appropriated waters."[82] The court said that:

> The objective of the water law system is to guarantee security, assure reliability, and cultivate flexibility in the public and private use of this scarce and valuable resource. Security resides in the system's ability to identify and obtain protection for the right of water use. Reliability springs from the system's assurance that the right of water use will continue to be recognized and enforced over time. Flexibility emanates from the fact that the right of water use can be changed, subject to quantification of the appropriation's historic beneficial consumptive use and prevention of injury to other water rights.[83]

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79. *Empire Lodge Homeowners' Ass'n*, 39 P.3d at 1150–52, 1155.

80. This is the term used in article XVI, section 5 of the Colorado Constitution.

81. *Empire Lodge Homeowners' Ass'n*, 39 P.3d at 1147.

82. *Id.*

83. *Id.*

Once an appropriator makes an actual, beneficial use, the appropriator holds a vested property right of use.[84] Thus, the property recognized as a Colorado prior appropriation water right "is a right to use beneficially a specified amount of water, from the available supply of surface water or tributary groundwater, that can be captured, possessed, and controlled in priority under a decree."[85] This right may be exercised "to the exclusion of all others not then in priority under a decreed water right."[86] It "comes into existence only through application of the water to the appropriator's beneficial use; that beneficial use then becomes the basis, measure, and limit of the appropriation."[87] "Depletions not adequately replaced shall result in curtailment of the out-of-priority diversions,"[88] a nondiscretionary duty the water administration officials must discharge.[89]

The Colorado Supreme Court reasoned that the General Assembly in the 1969 Act had "created a new statutory authorization for water uses that, when decreed, are not subject to curtailment by priority administration. This statutory authorization is for out-of-priority diversions for beneficial use that operate under the terms of decreed augmentation plans."[90] Plans for augmentation allow diversions of water out-of-priority while ensuring the protection of senior water rights.[91] Decreed water rights receive a replacement water supply that offsets the out-of-priority depletions. Replacement water can come from any legally available source of water, such as mutual ditch company shares, successive use of transmountain water, nontributary water, and/or artificial recharge of aquifers to generate augmentation credits.[92]

No one knew at the time of the *Empire Lodge* decision that Colorado had already entered into a prolonged drought that in 2002–2003 would result in the curtailment of many junior

84. *Id.*
85. *Id.*
86. *Id.*
87. Santa Fe Trail Ranches Prop. Owners Ass'n. v. Simpson, 990 P.2d 46, 53 (Colo. 1999).
88. *Empire Lodge Homeowners' Ass'n*, 39 P.3d at 1150 (citations omitted).
89. *Id.* at 1154.
90. *Id.*
91. *Id.*
92. *Id.*

groundwater wells (many drilled in the 1950s and 1960s, a century after the establishment of the senior Platte River direct surface flow ditches) that were pumping South Platte River tributary groundwater. In *Simpson v. Bijou*,[93] the Colorado Supreme Court, relying on *Empire Lodge* (a surface water dispute in an entirely different river basin) held that the General Assembly through the 1969 Act had required the wells to be integrated into the priority system. The 1969 Act introduced the concept of augmentation plans into the water law adjudication and administration design as the primary means to integrate tributary groundwater into the state priority system.[94] The Act encouraged the adjudication of existing wells by allowing well owners who filed an application by July 1, 1971, to receive a water decree with a priority dating back to their original appropriation date.[95]

As I recounted in an article for the University of Idaho Law Review,[96] Colorado's perfect prior appropriation storm hit the South Platte Basin with extraordinary force.[97] While many junior irrigation well-pumpers with priority dates as recent as the 1950s had adjudicated augmentation plans under the 1969 Act, many had not but yet they continued to enjoy State Engineer approval of annual "substitute supply plans."[98] Because the 1980s and 1990s had been relatively good water decades, senior water right owners had not pressed the issue.[99] But, when drought slammed the river, the State Engineer commenced curtailing junior surface priorities all the way back to the very earliest senior 1860–1861 South Platte River surface water rights.[100]

Meanwhile, junior wells that lacked augmentation plan decrees were creating galling green circles of growth right in the face of curtailed seniors.[101] The State Engineer's policy of nursing along wells that lacked decreed augmentation plans

93. Simpson v. Bijou Irrigation Co., 69 P.3d 50, 67 (Colo. 2003).
94. *Empire Lodge Homeowners' Ass'n*, 39 P.3d at 1140–51.
95. *Id.* at 1151.
96. Gregory J. Hobbs, Jr., *Protecting Prior Appropriation Water Rights Through Integrating Tributary Groundwater, Colorado's Experience*, 47 IDAHO L. REV. 5 (2010).
97. *Id.* at 16 (citing P. Andrew Jones, *South Platte Well Crisis, 2002–2010: Evolving Alluvial Groundwater Regulation*, 78 THE WATER REPORT 1, 8 (2010)).
98. *Id.* at 7.
99. *Id.*
100. *Id.* at 8.
101. *Id.*

imploded.[102] The Division 1 water court and the Colorado Supreme Court ordered the State Engineer to enforce Colorado's prior appropriation law in *Simpson v. Bijou*.[103]

The General Assembly enacted legislation authorizing the State Engineer to grant substitute supply plans for out-of-priority tributary groundwater diversions under limited circumstances and it approved the Arkansas River Basin amended rules governing the diversion and use of tributary groundwater in that basin.[104] Through 2004 legislation, it allowed South Platte tributary groundwater wells to operate out-of-priority under State Engineer-approved substitute supply plans, with provisos that augmentation plan applications in Division No. 1 water court must be filed by December 31, 2005, and wells not included in an adjudicated augmentation plan or State Engineer-approved substitute supply plan shall be "continuously curtailed" from operating out of priority.[105]

Unfortunately, many of the South Platte junior well owners suffered from being unable to find sufficient replacement water to take advantage of the Legislature's authorization.[106] Those who find sufficient replacement water at a price they cannot afford cannot operate their wells.[107] "Today . . . 4,500 wells are enrolled in augmentation plans, . . . though most of these are partially curtailed," and "3,700 wells have been completely curtailed."[108]

Wells that have caused depletions in the past, whose effect on the river is yet to be felt due to the lag time between the use and its impact on the river, must provide sufficient replacement water to prevent the upcoming injury.[109] Some wells now gathered together in augmentation plans cannot be

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102. *Id.*

103. Simpson v. Bijou Irrigation Co., 69 P.3d 50, 67 (Colo. 2003).

104. 2002 Colo. Sess. Laws 459–63. The General Assembly enacted legislation authorizing the State Engineer to grant substitute supply plans for out-of-priority tributary groundwater diversions under limited circumstances and it approved the Arkansas River Basin amended rules governing the diversion and use of tributary groundwater in that basin.

105. 2004 Colo. Sess. Laws 1205.

106. Jones, *supra* note 97, at 8.

107. *Id.* at 10.

108. *Id.* (explaining how augmentation decrees are being fashioned to comply with Colorado's water laws, Jones has called for a more systematic way to assist water users, avoid unnecessary cost, and stretch a severely limited water supply); *see also* Hobbs, Jr., *supra* note 96, at 16–17.

109. Well Augmentation Subdist. of Cent. Colo. Water Conservancy Dist. v. City of Aurora, 221 P.3d 399, 411 (Colo. 2009).

operated because whatever replacement water they have been able to afford must be dedicated to rectifying past depletions causing ongoing injury.[110] These plans will require additional replacement water to enable operation at precurtailment levels.[111]

At the outset of the twenty-first century, *Empire Lodge* signified that the ebullient development era of the twentieth century had run up against the inevitable necessity to share a largely already-developed water resource through replacement water supply plans and market-driven changes of water rights. *Empire Lodge* established that lack of State Engineer enforcement cannot be invoked to prevent water court enforcement of injured water use rights:

> Administrative action, forbearance of enforcement, or State Engineer acquiescence in water use practices does not substitute for judicial determination of use rights. . . . Decreed prior appropriations are entitled to maintenance of the condition of the stream existing at the time of the respective appropriation. Lacking an adjudication of its rights, *Empire Lodge* did not possess a legally cognizable right to invoke, in court, the futile call doctrine or enlargement doctrines against the Moyers' water use. These are rights that only decreed water rights holders have standing to assert. Exercise of the State Engineer's enforcement discretion does not obviate the requirement that those making water uses must obtain a decree adjudicating their rights if they desire to have standing to enforce them.[112]

Accordingly, *Empire Lodge* teaches that the right to share in a portion of the public's water resource allocated to Colorado under the applicable nine interstate compacts and two equitable apportionment decrees[113] is dependent upon faithful enforcement of water rights in order of their adjudicated priorities when there is not enough water available to meet all needs. This applies to every water use, consumptive or nonconsumptive, state appropriative right, or federal or tribal

110. *Id.*
111. Jones, *supra* note 97, at 10.
112. Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1156–57 (Colo. 2001).
113. *See generally* INTERSTATE COMPACTS, *supra* note 13, at 3.

reserved right, so that the public's interest in a stable, reliable, and adaptable water law system may be served.[114]

B. Park County Sportsmen's Ranch*: Affirming the Public's Water Resource Ownership of the Water-Bearing Capacity of Streams and Aquifers*

Park County Sportsmen's Ranch establishes that the public, not the overlying landowner, owns the water-bearing capacity of Colorado's aquifers throughout the state as part of the public's water resource.[115] This capacity may be used to store and convey water appropriated by both public agencies and private persons.

The case arose when the mushrooming City of Aurora, located east of Denver on the plains, looked to South Park, high in the headwaters of the South Platte River, for additional water. Through a conditional water right application in the Division 1 water court, the City of Aurora proposed what it characterized as an innovative conjunctive use plan, which involved the use of tributary groundwater and surface water.[116] Contracting with a private property owner of 2,307 acres of land in South Park—Park County Sportsmen's Ranch—the city would pump tributary groundwater from twenty-six wells located on the ranch.[117] In return, the city would artificially recharge the aquifer underlying lands in South Park by placing surface water into six unlined surface reservoirs also located on the ranch.[118] As planned, this water would percolate into the ground, collect in the aquifer, and migrate into the upper South Platte River system to replace water for senior priorities.[119]

On behalf of Aurora and itself, the Park County Sportsmen's Ranch claimed the right to use the saturated and unsaturated portions of the aquifer underlying land others owned.[120] Attempting to block this project, neighboring South Park property owners claimed ownership of the aquifer storage space underneath their lands.[121] Despite the fact that the wells

114. Navajo Dev. Co. v. Sanderson, 655 P.2d 1374, 1380 (Colo. 1982).
115. Bd. of Cnty. Comm'r of the Cnty. of Park v. Park Cnty. Sportsmen's Ranch, 45 P.3d 693, 707 (Colo. 2002).
116. *Id.* at 696.
117. *Id.* at 696–97.
118. *Id.* at 697.
119. *Id.*
120. *Id.*
121. *Id.* at 700.

and recharge reservoirs would not be located on their lands, they brought a declaratory judgment trespass action asserting that Aurora and Park County Sportsmen's Ranch had:

> no right to occupy the space beneath the lands of the Plaintiffs to store water or other substances on or below the surface of the lands. Any such placement or storage of water or other substances on or below the surface constitutes a trespass for which the Defendant may be liable for damages.[122]

However, the General Assembly had enacted conjunctive use statutes authorizing issuance of a conditional decree for appropriations involving storage of water in underground aquifers and artificial recharge into aquifers.[123] In addition, decreed augmentation plans up and down the South Platte River depended upon using aquifers for generating replacement water recharge credits by means of unlined ditches and ponds.[124]

In resolving this dispute, *Park County Sportsmen's Ranch*[125] plumbs the profound depths of the rubrics "water is a public resource" and "waters of the natural stream, including surface water and tributary ground water."[126] Relying on the appropriation provisions of the Colorado Constitution, the case held that Colorado law had wholly supplanted the riparian and *cujus*[127] common law ownership doctrines that tie water use rights to ownership of overlying or adjoining lands. This break from the common law was so complete as to render all surface water and groundwater—along with the water-bearing capacity of streams and aquifers—a public resource dedicated to the establishment and exercise of water use rights.[128]

Accordingly, the Colorado Supreme Court held that the "Colorado Doctrine" includes these primary features:

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122. *Id.* at 696.

123. *See* COLO. REV. STAT. §§ 37-92-305(9)(b)–(c), 37-87-101(1)–(2), 37-92-103(10.5) (2011).

124. *Park Cnty. Sportsmen's Ranch*, 45 P.3d at 714–15.

125. *Id.* at 696.

126. *Id.* at 706, 709.

127. "To whomsoever the soil belongs, he owns also to the sky and to the depths." *See id.* at 696 n.1 (citing Norman W. Thorson, *Storing Water Underground: What's the Aqui-Fer?*, 57 NEB. L. REV. 581, 588 (1978)).

128. *Park Cnty. Sportsmen's Ranch*, 45 P.3d at 706.

> (1) water is a public resource, dedicated to the beneficial use of public agencies and private persons wherever they might make beneficial use of the water under use rights established as prescribed by law; (2) the right of water use includes the right to cross the lands of others to place water into, occupy and convey water through, and withdraw water from the natural water bearing formations within the state in the exercise of a water use right; and (3) the natural water bearing formations may be used for the transport and retention of appropriated water.[129]

In so holding, the court relied on a water act adopted by the first Colorado Territorial General Assembly in 1861[130] and a series of United States Congress public domain acts, including the 1866 Mining Act[131] and subsequent acts. Together, these past state and federal acts had:

> (1) effectuated a severance of water from the land patents issuing out of the public domain; (2) confirmed the right of the states and territories to recognize rights to water established prior to the federal acts; and (3) granted the right to states and territories to legislate in regard to water and water use rights.[132]

Although the state's water and water-bearing formations constitute a public resource, the Colorado Supreme Court also recognized that constructing a water feature on another person's land—such as a ditch, reservoir, or well—requires either the consent of the landowner or the exercise of the private right of condemnation over private lands upon payment of just compensation.[133]

Construing the General Assembly's conjunctive use statutes, the Colorado Supreme Court held that the applicant for an underground storage and recharge appropriative right must meet certain conditions. The applicant:

> (1) must capture, possess, and control the water it intends

129. *Id.*
130. 1861 Colo. Territorial Laws 57–68.
131. Mining Act of 1866, ch. 262, § 9, 14 Stat. 253 (1866); 43 U.S.C. § 661 (2006).
132. *Park Cnty. Sportsmen's Ranch*, 45 P.3d at 708.
133. *Id.* at 711, 713–14; *see also* COLO. CONST. art. XVI, § 7; *id.* art. II, §§ 14, 15 and implementing statutes.

> to put into the aquifer; (2) must not injure other water use rights, either surface or underground, by appropriating the water for recharge; (3) must not injure water use rights, either surface or underground, as a result of recharging the aquifer and storing water in it; (4) must show that the aquifer is capable of accommodating the stored water without injuring other water use rights; (5) must show that the storage will not tortiously interfere with overlying landowners' use and enjoyment of their property; (6) must not physically invade the property of another by activities such as directional drilling, or occupancy by recharge structures or extraction wells, without proceeding under the procedures for eminent domain; (7) must have the intent and ability to recapture and use the stored water; and (8) must have an accurate means for measuring and accounting for the water stored and extracted from storage in the aquifer.[134]

Those opposed to the City of Aurora's proposed conjunctive use project ultimately succeeded in defeating that project, but not on their aquifer space ownership theory.[135] Instead, in its subsequent decision involving the Aurora and Park County Sportsmen's Ranch proposal, the Division 1 water court found that the applicants' groundwater model failed to produce sufficiently reliable results to permit a reasonably accurate determination of the timing, amount, and location of depletions, or the timing and amount of aquifer recharge.[136] The water court further found that the surface water model failed to produce sufficiently reliable results to permit a reasonably accurate determination of either average stream flow or the legal availability of augmentation water.[137] In upholding the water court's dismissal of the conditional decree application, the Colorado Supreme Court relied upon the water court's findings that the models were unsuitable in the case and did not assist reliably in meeting the applicant's burden of predicting and protecting against injury to other water rights.[138]

Park County Sportsmen's Ranch demonstrates the public's

134. *Park Cnty. Sportsmen's Ranch*, 45 P.3d at 705 n.19.
135. City of Aurora v. Colo. State Eng'r, 105 P.3d 595, 617 (Colo. 2005).
136. *Id.* at 612–13.
137. *Id.* at 616.
138. *Id.*

water resource ownership interest in streams and aquifers for the purpose of serving the prior appropriation doctrine, but this interest is not a manifestation of the public trust doctrine. Referring to one of its earlier decisions, the Colorado Supreme Court ruled that the adjoining property owner owns the bed of the stream subject to others' use of the stream for water conveyance purposes:

> In *People v. Emmert*, we held that the beds of nonnavigable streams in Colorado are not held by the state under a public trust theory; this holding, however, did not affect the right of appropriators to conduct their appropriated water through the natural channel across the landowner's property without interference.[139]

Emmert[140] has been a controversial case in Colorado. Landowners seek to invoke it for the proposition that they may exclude rafters from passing over streambeds they own. Rafters counter that they may travel on the public's water. In my view, *Emmert* is best read for the proposition that the Colorado Constitution does not address the recreational use of water and that this subject is properly a matter for legislative consideration. The common ground of agreement between the majority and dissent in *Emmert* resides in the majority's statement that "[i]f the increasing demand for recreational space on the waters of this state is to be accommodated, the legislative process is the proper method to achieve this end."[141] Justice Carrigan's dissent agrees with this proposition: "[t]he majority opinion expressly acknowledges that 'it is within the competence of the General Assembly to modify rules of common law within constitutional parameters.'"[142]

While the majority opinion cites the General Assembly's codification of a portion of the common law *cujus* doctrine—that the space above the land and waters is controlled by the

139. *Park Cnty. Sportsmen's Ranch*, 45 P.3d at 709 n.29 (citing People v. Emmert, 597 P.2d 1025, 1027 (Colo. 1979)).

140. *Emmert*, 597 P.2d at 1025.

141. *Id. See generally* Cory Helton, *The Right to Float: The Need for the Colorado Legislature to Clarify River Access Rights*, 83 COLO. L. REV. 845 (2012); *Conflict on the Rocky Mountain Playground*, HEADWATERS, Fall 2010, http://www.cfwe.org/index.php?option=com_content&view=category&layout=blog&id=108&Itemid=149.

142. *Emmert*, 597 P.2d at 1033.

owners of the surface beneath[143]—it also recognizes the right of the General Assembly to change both the common law and statute if it wishes to address the matter of rafters using recreational space on flowing stream waters.

Emmert is clear on the point that title to the beds of nonnavigable streams in Colorado belongs to the adjoining landowners, not the state, and that the Colorado Supreme Court will not rely on public trust theory to resolve the issue of recreational use of the public's flowing water resources as it runs through the beds and banks of the stream.[144] As a recent United States Supreme Court decision holds, the applicability of public trust doctrine to nonnavigable streams is a matter consigned to the states under their own laws, subject to the federal power to regulate vessels and navigation under the Commerce Clause and admiralty power.[145] In sum, the Supreme Court leaves the formulation and applicability of public trust doctrine to the individual states:

> Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while the federal law determines riverbed title under the equal-footing doctrine.[146]

Threaded between the lines of the 1979 *Emmert* decision, Justice Mullarkey's dissent in *Aspen Wilderness Workshop*[147] and my dissent in the recent public trust ballot title cases[148] are a recognition that the public trust doctrine, particularly as applied by the California Supreme Court, is fundamentally incompatible with the Colorado Constitution's design for allocation of valuable water use property rights to public entities and private persons in order of their adjudicated priorities. In holding that the Colorado Water Conservation Board must enforce the instream flow water rights it

143. *See* COLO REV. STAT. § 41-1-107 (2011); *Emmert*, 597 P.2d at 1097.
144. *See supra* note 143.
145. PPL Montana, LLC v. Montana, 132 S.Ct. 1215, 1235 (2012).
146. *Id*.
147. Aspen Wilderness Workshop Ltd. v. Colo. Water Conservation Bd., 901 P.2d 1251, 1260 (Colo. 1995).
148. *See*, *e.g.*, *In re* Title, Ballot Title, Submission Clause for 2011–2012 #3, 274 P.3d 562, 570 (Colo. 2012) (Hobbs, J., dissenting); *In re* Title, Ballot Title, Submission Clause for 2011–2012 #45, 274 P.3d 576, 583 (Colo. 2012) (Hobbs, J., dissenting).

appropriates, the initial majority opinion in *Aspen Wilderness Workshop* contained language referencing the public trust doctrine; on rehearing, the majority opinion was modified as follows to enunciate a "unique statutory fiduciary duty" to enforce those rights.[149]

> The Conservation Board has a unique statutory fiduciary duty to protect the public in the administration of its water rights decreed to preserve the natural environment. . . . [B]oth the Board's duty and its authority to appropriate instream flow find their source in the Water Rights Determination and Administration Act of 1969 . . . Thus, we can only view the Board's actions regarding such appropriations as involving water matters reserved for our water courts.[150]

Justice Mullarkey's dissent in *Aspen Wilderness Workshop* emphasizes that Colorado has never recognized the public trust doctrine:

> This court has never recognized the public trust doctrine with respect to water. Furthermore, whatever the nature of the fiduciary duty recognized by the majority in this case, I do not understand the majority to mean that a breach of this fiduciary duty would support a public claim for damages.[151]

While Colorado does not recognize the public trust doctrine, it nevertheless adheres to a strong, state constitutionally based public water ownership doctrine. This doctrine serves the public interest by allowing public and private entities to appropriate water for beneficial use, subject

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149. In particular, this language in the California Supreme Court's 1983 Mono Lake public trust case provides for the involuntary, uncompensated reallocation of beneficially used water allocated to vested water rights, a concept foreign to Colorado's jurisprudence:

> Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.

Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty., 658 P.2d 709, 728 (Cal. 1983).

150. *Aspen Wilderness Workshop Ltd.*, 901 P.2d at 1260–61.

151. *Id.* at 1263.

to exercise of the state's police power in making those uses. The *Park County Sportsmen's Ranch* case illustrates just how much Colorado differs from states, like Texas,[152] that adhere to a common law doctrine of groundwater controlled by or being owned outright by the overlying landowner as an incident to land ownership. In Colorado, the public owns surface water and all forms of groundwater;[153] in turn, the Colorado Constitution, statutes, and case decisions provide for the creation of private use rights to the public's resource.[154]

C. High Plains *and* ISG*: Applying the Antispeculation and Beneficial Use Doctrines to Changes of Water Rights*

High Plains applies the antispeculation doctrine to water transfer cases. In order to change a senior agricultural priority and retain it for use elsewhere, the application to the water court must identify where the water will actually be used.[155] The case arose when a group of investors purchased one-third of the shares of the Fort Lyon Canal Company in the lower Arkansas River Valley, a ditch company that operates an extensive system of canals and reservoirs with direct flow and storage water rights irrigating nearly 93,000 acres of agricultural land located between La Junta and Lamar.[156] The investors filed a change of water right application in Division 2 water court, seeking to sell water to any municipal or quasimunicipal water supplier in twenty-eight counties along Colorado's Front Range.[157]

However, the investors did not identify the need, amount, or place where these senior water rights would be utilized under the change of water rights decree they sought.[158] Accordingly, the Colorado Supreme Court upheld the water court's dismissal of the application for violating the state's

152. *See* Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 832 (Tex. 2012).
153. State v. Sw. Colo. Water Conservation Dist., 671 P.2d 1294, 1307 (Colo. 1983); Bd. of Cnty. Comm'rs of the Cnty. of Park v. Park Cnty. Sportsmen's Ranch, 45 P.3d 693, 707–08 (Colo. 2002).
154. Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1147–49 (Colo. 2001).
155. High Plains A & M, LLC v. Se. Colo. Water Conservancy Dist., 120 P.3d 710 (Colo. 2005).
156. *Id.* at 714.
157. *Id.* at 715.
158. *Id.* at 721.

antispeculation doctrine.[159] The court held that, in order to retain the benefit of the original appropriation's senior priority (the aim of any change of water rights proceeding), the applicant has the burden of demonstrating where and how the water right will continue to be put to actual, beneficial use.[160]

Citing Professor Schorr's work in its decision, the court stated, "[t]he roots of Colorado water law reside in the agrarian, populist efforts of miners and farmers to resist speculative investment that would corner the water resource to the exclusion of actual users settling into the territory and state."[161] The court pointed out that the High Plains change of water right application involved the following factors:

> (1) the water resource is the property of the public; (2) the priority of a use right obtained by irrigating a particular parcel of land is a property right that can be separated from the land; (3) the owner of the use right may sell it to another person or governmental entity; and (4) the courts may decree a change in the point of diversion, type, time, and/or place of beneficial use, subject to no injury of other water rights.[162]

Because actual, beneficial use defines the genesis and maturation of every appropriative water right, every decree recognizing a right to use the public's water resource includes an implied limitation that diversions cannot exceed those that can be beneficially used; the right to change a point of diversion, or time, type, or place of use, is limited in quantity by the appropriation's historical beneficial consumptive use.[163] Quantification of the amount of water beneficially consumed in acre-feet by the exercise of the appropriator's adjudicated right over a representative period of time guards against speculation, expanded use, or rewarding wasteful practices.[164] "Hence, the fundamental purpose of a change proceeding is to ensure that the true right—that which has ripened by beneficial use over time—is the one that will prevail in its changed form."[165]

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159. *Id.* at 724.
160. *Id.* at 721–22.
161. *Id.* at 719 n.3.
162. *Id.* at 718.
163. Santa Fe Trail Ranches v. Simpson, 990 P.2d 46, 54–55 (Colo. 1999).
164. *Id.*
165. *Id.* at 55.

Just as with the original appropriation, the change of water right applicant must demonstrate a legally vested interest in the land to be served and a specific plan and intent to use the water for designated purposes under the change decree.[166] This requirement can be satisfied by a showing that the water will be used by a governmental agency or a person who will use the changed water right for his or her own lands or business or through an agreement to provide water to a public entity and/or private lands or businesses to be served.[167]

The Colorado Supreme Court reasoned that every water right includes a specific *situs* identified by the point of the diversion and the time, type, amount, and place of use to which the water is delivered for actual, beneficial use.[168] A water right requires both an appropriator and a place where the appropriation is put to actual, beneficial use.[169] Accordingly, the function of a change decree is to recognize a new *situs* for the appropriation.[170] The application must therefore contain a sufficiently described actual, beneficial use at an identified location or locations under the change decree.[171]

For failure to meet these criteria, the Colorado Supreme Court upheld the water court's dismissal of High Plains's applications without prejudice, stating that its applications could be re-filed "when a definite location or locations for beneficial use of the water can be identified in the applications and confirmed in the water court proceedings."[172]

The companion *ISG* decision,[173] announced the same day as *High Plains,* provided the Colorado Supreme Court with the opportunity to discuss new legislation that provides an alternative to permanent changes of water rights. This new legislation allows a variety of means to temporarily change water use upon the State Engineer's approval.[174] Permitted temporary water right changes include: (1) water banking programs for leasing, loaning, and exchanging stored water rights; (2) exchanges of water between streams or between reservoirs and ditches; (3) loans between agricultural water

166. *High Plains A & M, LLC*, 120 P.3d at 720.
167. *Id.* at 717.
168. *Id.* at 718.
169. *Id.* at 720.
170. *Id.*
171. *Id.*
172. *Id.* at 714.
173. ISG, LLC v. Ark. Valley Ditch Ass'n, 120 P.3d 724 (Colo. 2005).
174. *Id.* at 732.

users in the same stream system for up to 180 days in a year; and (4) temporary interruptible water supply agreements for up to three out of ten years.[175]

Temporary change-of-use proceedings are directed by State or Division Engineers.[176] Each temporary change requires particular evidence to be presented regarding the timing, duration, purpose, and volumetric measure of the temporary change to be made and approved.[177] For example, the applicant for an interruptible water supply agreement is required to submit a written report estimating historical consumptive use, return flows, and potential for injury.[178] The State Engineer provides copies of approval or denial to all parties and the water court can review the decision.[179] On appeal, the water court reviews questions of injury.[180] The water court may review the applicant's initial estimate of the historical consumptive use of water and the State Engineer's determination that no injury to other users will result.[181]

Thus, the General Assembly has authorized short-term water right changes that do not penalize the appropriator owning the water right in any subsequent change of water right proceeding.[182] The methodology for calculating historical consumptive use of the water rights over a representative period of time for a permanent change will not count or discount the years of authorized temporary use.[183] Statutes provide that temporary nonuse of water under state conservation programs, municipal conservation programs, approved land fallowing programs, or water banks does not indicate intent to abandon or discontinue permanent use.[184]

The legislature clearly intended to promote flexibility in the administration of water rights, especially in the circumstances of temporarily transferring water from agricultural use to municipal use on a contract basis. It did not intend to penalize owners of decreed appropriations for properly taking advantage of these statutes in accordance with

175. *Id.* at 732–34.
176. *Id.* at 733.
177. *Id.* at 733–74.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*; *see also* COLO. REV. STAT. § 37-92-103(2) (2011).

their terms.[185]

In its 2006 session, the Colorado General Assembly authorized rotational crop management contracts that may be the subject of change of water right applications and decrees.[186] These are written contracts in which owners or groups of owners of irrigation water rights agree, by fallowing and crop rotation, to implement a change of rights to a new use by foregoing irrigation of a portion of the lands historically irrigated, without injury to other water rights.[187]

This innovative string of legislation demonstrates the legislature's concern about preserving irrigated agriculture in Colorado while, at the same time, addressing the needs of Colorado's growing population. The *High Plains* and *ISG* decisions amply demonstrate the interplay between the judicial and legislative branches of Colorado government in applying the antispeculation and beneficial use principles of prior appropriation water law to water transfer cases. The details of implementing the doctrine of prior appropriation evolve as the needs of the people do.[188]

D. Pagosa I *and* Pagosa II*: Restraining Municipal Monopolization of the Remaining Unappropriated Water*

Pagosa I and *II* demonstrate that conditional water right decrees will be increasingly difficult to obtain and maintain through subsequent diligence periods, as Colorado's remaining unappropriated water shrinks and competition for a share in the public's water resource intensifies.[189] The case arose when two public water districts in southwestern Colorado filed a conditional water right application for municipal water from

185. *ISG, LLC*, 120 P.3d at 733–34.

186. COLO. REV. STAT. §§ 37-92-103(10.6), -305(3) (2011).

187. *Id.*

188. *See generally* Reed D. Benson, *Alive but Irrelevant: The Prior Appropriation Doctrine in Today's Western Water Law*, 83 U. COLO. L. REV. 675 (2012). This is a fine article demonstrating how different states adjust the implementation of their prior appropriation doctrine to account for the geography, mix of water uses, and legal precedent within their jurisdictions. I question only the "but irrelevant" thesis. In my view, the enforcement of state and federal water rights in accordance with their adjudicated priorities will always be the most relevant premise to protecting the values incorporated into water law.

189. Pagosa Area Water & Sanitation Dist. v. Trout Unlimited (*Pagosa I*), 170 P.3d 307 (Colo. 2007); Pagosa Area Water & Sanitation Dist. v. Trout Unlimited (*Pagosa II*), 219 P.3d 774, 777 (Colo. 2009).

the San Juan River to fill their ideal 35,000 acre-foot reservoir site. What started out as a claim for 64,000 acre-feet annually of fully consumable water, by fill and re-fill with the right of re-use, became a conditional decree the water court entered for storage of 11,000 acre-feet annually to address a fifty-year planning period.[190]

These decisions involved two public entities—a water and sanitation district and a water conservancy district—that applied jointly for an one-hundred-year supply of water for consumptive use to address possible residential growth in their service areas.[191] Unlike other parts of the state, there is unappropriated water in the San Juan River available for appropriation within Colorado.[192] However, recognition of the claims sought by the two districts would have made them senior to potential but yet-unfiled instream flow and kayak course water right appropriations by other public entities.[193] In fact, the large size of the conditional right sought appeared to be in reaction to the possibility that nonconsumptive use rights might be obtained by other public entities, in particular, the Colorado Water Conservation Board ("CWCB") for an instream flow right and the City of Pagosa Springs for a kayak course right.[194]

Colorado Trout Unlimited filed a statement of opposition in the Division 7 water court challenging the population projections, the planning period, and the need requirements for the claimed conditional water rights.[195] Citing prior cases and, most importantly, construing a Colorado statute providing for a limited exception to the present need requirement, the Colorado Supreme Court identified the considerations and parameters governing the "great and growing cities" doctrine.[196]

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190. On October 31, 2011, the Water Court for Water Division 7 in Case No. 2004CW085 entered a judgment and decree to this effect that incorporated a stipulation of the parties following remand from the *Pagosa II* decision.

191. *Pagosa I*, 170 P.3d at 317–18.

192. *Id.* at 315 (stating that appropriator must have a nonspeculative intent to appropriate unappropriated water). The entire case turned on the proposition that there was unappropriated water remaining in the San Juan within Colorado's interstate water compact allocation. The only question concerned how much of that water should be conditionally decreed to the applicant districts.

193. *Id.* at 318 n.11.

194. *Id.*

195. *Id.* at 311–12.

196. *See generally* Derek L. Turner, *Pagosa Area Water & Sanitation District v. Trout Unlimited and an Anti-Speculation Doctrine for a New Era of Water Supply*

Again citing Professor Schorr's work[197] and relying on an act of the Colorado General Assembly,[198] the Colorado Supreme Court in *Pagosa I* held that:

> [A] governmental water supply agency has the burden of demonstrating three elements in regard to its intent to make a non-speculative conditional appropriation of un-appropriated water: (1) what is a reasonable water supply planning period; (2) what are the substantiated population projections based on a normal rate of growth for that period; and (3) what amount of available un-appropriated water is reasonably necessary to serve the reasonably anticipated needs of the governmental agency for the planning period, above its current water supply.[199]

Pagosa II articulates:

> four nonexclusive considerations relevant to determining the amount of the conditional water right: (1) implementation of reasonable water conservation measures during the planning period; (2) reasonably expected land use mixes during the planning period; (3) reasonably attainable per capita usage projections for indoor and outdoor use based on the land use mixes during the planning period; and (4) the amount of consumptive use reasonably necessary to serve the increased population.[200]

In addition, the applicant must show that "it can and will put the conditionally appropriated water to beneficial use within a reasonable period of time."[201] In the initial conditional decree proceedings, followed by any six-year diligence proceeding that follows:

> The factors the water court considers under the can and will requirement include, but are not limited to: (1)

Planning, 82 U. COLO. L. REV. 639 (2011).

197. *Pagosa I*, 170 P.3d at 313 n.5; David B. Schorr, *The First Water-Privatization Debate: Colorado Water Corporations in the Gilded Age*, 33 ECOLOGY L.Q. 313, 319–20 (2006).

198. COLO. REV. STAT. § 37-92-103(3)(a)(I)–(II) (2011).

199. *Pagosa I*, 170 P.3d at 309–10.

200. Pagosa Area Water & Sanitation Dist. v. Trout Unlimited (*Pagosa II*), 219 P.3d 774, 780 (Colo. 2009).

201. *Pagosa I*, 170 P.3d at 309–10.

> economic feasibility; (2) status of requisite permit applications and other required governmental approvals; (3) expenditures made to develop the appropriation; (4) ongoing conduct of engineering and environmental studies; (5) design and construction of facilities; and (6) nature and extent of land holdings and contracts demonstrating the water demand and beneficial uses which the conditional right is to serve when perfected.[202]

As the Colorado Supreme Court explained, the applicable statute[203] "excuses governmental water supply agencies from the requirement to have a legally vested interest in the lands or facilities served, but the exception does not completely immunize municipal applicants" from a speculation challenge.[204] "A governmental agency need not be certain of its future water needs; it may conditionally appropriate water to satisfy a projected normal increase in population within a reasonable planning period."[205]

"The conditional appropriation must be consistent with the governmental agency's reasonably anticipated water requirements based on substantiated projections of future growth within its service area."[206] "Only a reasonable planning period for the conditional appropriation is allowed."[207] Based on prior cases, the court concluded that a planning period in excess of fifty years should be closely scrutinized.[208] The conditional water right decree should include volumetric (acre-feet) numbers for the anticipated municipal need, as well as "reality checks" to reassess and adjust the decree amount when a diligence application is made to keep the conditional decree in effect.[209]

The Colorado Supreme Court emphasized that the "reason for continued scrutiny of the conditional appropriation through diligence proceedings is to prevent the hoarding of priorities to the detriment of those seeking to use the water beneficially."[210] The effect of a long-term conditional right, a placeholder in the

202. *Id.* at 316.
203. COLO. REV. STAT. § 37-92-103(3)(a)(I) (2011).
204. *Pagosa I*, 170 P.3d at 315.
205. *Id.*
206. *Id.*
207. *Id.* at 317.
208. *Id.*
209. *Id.* at 316.
210. *Id.*

priority system pending perfection of the water right by beneficial use, is "to preclude other appropriators from securing an antedated priority that will justify their investment."[211] "Those in line behind a conditional appropriation for a long planning period risk losing any investment they may make in the hope that the prior conditional appropriation will fail," in whole or in part.[212] Because of the chilling effect of senior conditional appropriations, they may not be able to raise the necessary funds in the first instance that will enable them to proceed in light of their subordinated status.[213]

Pagosa II again returned the case to the water court for further findings.[214] It required the water court to closely examine the population and water supply projections the two water supply districts were asserting, in light of considerably lower population and water supply and demand studies for the year 2050 conducted by the CWCB as part of a statewide planning process initiated by the Colorado General Assembly.[215] The Colorado Supreme Court rejected the "speculative nature" of the local water districts' "claims for appropriation of water to counter hypothetical recreational in-channel diversion, instream flow, and/or bypass flows."[216] It refused to accept the position of the water supply districts and the amicus "municipal water suppliers that they act in a legislative capacity" and are entitled to deference in the "claimed amounts of water the suppliers deem reasonably necessary for their future use":

> While the General Assembly has made an accommodation to governmental water suppliers by allowing their conditional appropriations to be made and decreed for a future reasonable water supply period in reasonably anticipated amounts, it has assigned to the courts the responsibility to conduct the necessary proceedings for these determinations under a de novo standard of review.[217]

211. *Id.*
212. *Id.*
213. *Id.* at 316–17.
214. Pagosa Area Water & Sanitation Dist. v. Trout Unlimited (*Pagosa II*), 219 P.3d 774, 777 (Colo. 2009).
215. *Id.* at 786–87.
216. *Id.* at 782.
217. *Id.* at 788.

A significant aspect of *Pagosa I* and *Pagosa II* is the emergence of nonconsumptive instream flow and kayak course water rights as legitimate competitors to consumptive uses in obtaining a right to the public's remaining unappropriated water resource. Trout Unlimited was able to vindicate the public's interest in keeping water in the stream unadjudicated while governmental entities examined the possibility of making nonconsumptive appropriations. In particular, Trout Unlimited was interested in the CWCB initiating additional instream flow appropriations on the San Juan River to supplement its existing ones, as well as the City of Pagosa Springs making a new recreational in-channel appropriation. A successful effort by the two water districts to obtain a 100-year water supply conditional priority would have jeopardized the viability of either or both of these possible nonconsumptive appropriations. In the context of the *Pagosa* decisions, the law of Colorado instream flow water rights and kayak course rights illustrates how Colorado's prior appropriation law has adapted to accommodate the changing customs and values of the people.

The CWCB is authorized to appropriate instream flow and lake level water rights.[218] These rights are creatures of statute; they do not require points of diversion, and they cannot be appropriated by any person or entity other than this state agency. The Board holds these rights in the name of the people for flow in a stream segment between an upstream point and a downstream point, and it has a duty to enforce them.[219]

The CWCB may also acquire interests in other water rights to supplement its appropriated junior instream flow water rights through grant, purchase, donation, bequest, conveyance, lease, exchange, or other contractual agreement. It may not, however, use eminent domain or deprive the people of Colorado of their beneficial use allocations under interstate law and compact.[220] Instream flow water rights must be protected against injury by changes of water rights and augmentation plans.[221] Despite its relatively junior status in the priority system, the primary value of an instream flow right is its constraint on changes of water rights that might interfere with

218. COLO. REV. STAT. § 37-92-102(3) (2011).

219. Aspen Wilderness Workshop Ltd. v. Colo. Water Conservation Bd., 901 P.2d 1251, 1260 (Colo. 1995).

220. COLO. REV. STAT. § 37-92-102(3) (2011).

221. Colo. Water Conservation Bd. v. City of Central, 125 P.3d 424, 439–40 (Colo. 2005).

the appropriated instream flow. Any water right, including an instream flow water right, is entitled to the maintenance of stream conditions existing at the time of its appropriation.[222] The CWCB is authorized to "resist all proposed changes in time, place, or use of water from a source which in any way materially injures or adversely affects the decreed minimum flow in the absence of adequate protective conditions in the change of water right or augmentation decree."[223]

The Colorado General Assembly has also enacted statutory provisions for the appropriation of recreational in-channel diversion water rights.[224] These water rights for the popular kayak courses popping up across the state are limited to appropriation in priority by "a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district."[225]

Such rights involve the diversion, capture, control, and placement to beneficial use of water at a specific point defined by an in-channel structural control system designed to make waves.[226] These water rights are limited to the minimum amount of stream flow needed for "a reasonable recreational experience in and on the water from April 1st to Labor Day of each year, unless the applicant can demonstrate that there will be demand for the reasonable recreational experience on additional days."[227] They are also limited to a specified flow rate for each period claimed by the applicant.[228] Within 35 days of initiating a filing for adjudication of such a water right, the applicant must submit a copy of it to the CWCB.[229] After deliberation in a public meeting, the Board is obligated to consider a number of factors and make written findings as to each.[230]

Board findings regarding recreational in-channel diversion applications must include: (1) whether the adjudication and

222. Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1157 (Colo. 2001).

223. *City of Central*, 125 P.3d at 439–40.

224. COLO. REV. STAT. §§ 37-92-103(10.3), -102(6)(b), -305(13) (2011); *see also* Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist., 109 P.3d 585, 588–89 (Colo. 2005).

225. *Empire Lodge Homeowners' Ass'n*, 39 P.3d at 1148; COLO. REV. STAT. § 37-92-103(10.3) (2011).

226. *Upper Gunnison River Water Conservancy Dist.*, 109 P.3d at 591.

227. COLO. REV. STAT. § 37-92-103(10.3) (2011).

228. *Id.*

229. *Id.* § 37-92-102(5).

230. *Id.* § 37-92-102(6)(b).

administration of the recreational in-channel diversion would materially impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements; (2) whether exercise of the right would cause material injury to instream flow rights appropriated by the Board; and (3) whether adjudication and administration of the right would promote maximum utilization of the waters of the state.[231]

The water court must consider the Board's findings of fact, which are presumptive as to such facts, subject to rebuttal.[232] In addition, the water court must consider evidence and make certain affirmative findings.[233] Water court affirmative findings must determine that the recreational in-channel diversion will:

> (I) Not materially impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements;
> (II) Promote maximum utilization of waters of the state;
> (III) Include only that reach of stream that is appropriate for the intended use;
> (IV) Be accessible to the public for the recreational in-channel use proposed; and
> (V) Not cause material injury to the board's instream flow water rights . . . .[234]

The statute contains other criteria for determining the flow rate and for State Engineer enforcement.[235] The 2006 legislative amendments occurred after the Colorado Supreme Court issued its opinion addressing a prior version of the statute, under which previous and now-grandfathered recreational water rights were established.[236] While Trout Unlimited could not claim an instream flow water right or a kayak course water right, it was successful in preventing the municipal water districts from obtaining a decree for a large amount of water that would have dampened the opportunity for the CWCB and the City of Pagosa Springs to claim such

231. *Id.* § 37-92-102(6)(I), (IV), (V).
232. *Id.* § 37-92-305(13)(a).
233. *Id.* § 37-92-305(13)(a)(I)–(V).
234. *Id.*
235. *Id.* § 37-92-305(13)(b)–(f).
236. *Id.* § 37-92-305(15); *see also* Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist., 109 P.3d 585, 591 (Colo. 2005).

rights.[237]

In my view, *Pagosa I* and *Pagosa II* stand for the proposition that there is so little unappropriated water remaining to Colorado under its interstate apportionments that the water should remain in the stream unadjudicated until such time as a viable consumptive or nonconsumptive water right proves the need for an appropriation. Restraining a rash of senior "paper water" rights that could chill the exercise of junior rights for actual, beneficial use is true to the originating antispeculation and beneficial use principles of Colorado's appropriation doctrine.

E. Burlington Ditch*: Reinforcing Prohibitions Against Illegal Enlargements and Undecreed Changes of Water Rights*

Burlington Ditch[238] plays out the consequences of an illegal early twentieth century enlargement along the overappropriated South Platte River just below the City and County of Denver. The Colorado Supreme Court disallowed this undecreed enlargement when calculating the amount of consumptive use water that could be transferred from agricultural to municipal use.

Through a 1909 agreement, the Burlington Company sold to the Farmers Reservoir and Irrigation Company ("FRICO") what that agreement described as water "in excess of the water now obtained and used for direct irrigation."[239] Eyeing FRICO shares as a source of water to fill municipal needs in the southern Denver metropolitan area, United Water and Sanitation District combined with the East Creek Valley Water and Sanitation District and FRICO filed a change of water rights application implementing a 2003 agreement they had made.[240] The water court found that the 1909 agreement and FRICO's subsequent use of water thereunder constituted an illegal enlargement of the Burlington Company's 1885 water right.[241]

Burlington upheld the water court's anti-enlargement

237. Pagosa Area Water & Sanitation Dist. v. Trout Unlimited (*Pagosa II*), 219 P.3d 774, 788 (Colo. 2009).

238. Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist., 256 P.3d 645 (Colo. 2011).

239. *Id.* at 657 (emphasis omitted).

240. *Id.* at 654.

241. *Id.*

judgment, pointing out that the "excess" water under the 1909 agreement belonged to the public and that FRICO lacked an adjudicated priority for use of that water: "[T]his 'excess water' belongs to the public under Colorado water law, subject to appropriation and use in order of decreed priority; any purported conveyance of water that the appropriator does not 'need' or has not put to beneficial use flags an illegal enlargement."[242]

The water court found that the Burlington Ditch Company had made only 200 cubic feet per second (c.f.s.) of diversions onto land above Barr Lake under its 1885 decreed water right, although it had originally claimed 350 c.f.s.[243] Not needing the extra 150 c.f.s. for a period of 24 intervening years, it purported to sell that amount to the FRICO company, which then built 140 miles of canal below Barr Lake to spread that water in addition to water FRICO diverts under its own 1908 and 1909 decreed rights.[244]

In the *Burlington* change of water right proceeding involving the Burlington and FRICO shares, the water court found the use of the extra 150 c.f.s. on lands below Barr Lake to be an illegal enlargement that could not be counted as allowable historical consumptive use under the 1885 Burlington right.[245] Still, the court did allow average annual releases from Barr Lake storage of 5,456 acre-feet on lands below that reservoir through ditches existing before FRICO's expansion of the irrigation works.[246] The Colorado Supreme Court upheld both findings.[247]

The change of water right and augmentation plan applications in *Burlington* sought a ditch-wide consumptive use analysis.[248] Opponents, including the City of Aurora, won on facts demonstrating a one-hundred-year-old illegal enlargement. Although the result seems shocking—that so much use could turn out useless after nearly 100 years—the court ruled that prior appropriation law in existence since the first Territorial law of 1861 compelled it.[249] The law of Colorado water is actual, beneficial use without speculation or

242. *Id.* at 665.
243. *Id.* at 656–57.
244. *Id.* at 656–58.
245. *Id.* at 657.
246. *Id.* at 656–57.
247. *Id.* at 665.
248. *Id.* at 655.
249. *Id.* at 665.

waste.[250] Colorado is an adjudication state, and its laws have consistently required slotting enlargements into the priority system through application, notice to other users and the public, and court adjudication.[251]

Accordingly, FRICO shareholders had no legally protected expectation in the enlarged use they made as a result of contract they made with the Burlington Company.[252] In fact, for nearly a century, to the detriment of intervening decreed water rights, they received more water than they were entitled to.[253] Regardless, a water right decreed for irrigation purposes cannot lawfully be enlarged beyond the amount of water necessary to irrigate the number of acres for which the appropriation was originally perfected, even though the decree stated only a flow rate of water for irrigation use.[254] In a change proceeding, the determination of transferable beneficial consumptive use does not include illegally enlarged use.[255]

To ensure that a change of water right does not injure decreed water rights, the change in use must be accomplished: "(1) 'by proper court decree,' (2) only for 'the extent of use contemplated at the time of appropriation,' and (3) 'strictly limited to the extent of formal actual usage.'"[256]

Over an extended period of time, a pattern of historic diversions and use under the decreed right at its place of use will mature and become the measure of the water right for change purposes, typically quantified in acre-feet of water consumed.[257] Thus, the decreed flow rate at the decreed point of diversion is not the same as the matured measure of the water right. Into every decree awarding priorities is read the implied limitation that diversions are limited to those sufficient for the purposes for which the appropriation was made.[258] Because water rights are usufructuary in nature, the measure

250. High Plains A & M, LLC v. Se. Colo. Water Conservancy Dist., 120 P.3d 710, 719 (Colo. 2005).

251. *Burlington*, 256 P.3d at 661–62.

252. *Id.* at 665.

253. *Id.*

254. *Id.* at 662.

255. Water Rights of Cent. Colo. Water Conservancy Dist. v. City of Greeley, 147 P.3d 9, 14, 17–19 (Colo. 2006).

256. Farmers Reservoir & Irrigation Co. v. City of Golden, 44 P.3d 241, 246 (Colo. 2002) (quoting Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 53 (Colo. 1999)).

257. Williams v. Midway Ranches Prop. Owners Ass'n, Inc., 938 P.2d 515, 521 (Colo. 1997).

258. *Burlington*, 256 P.3d at 662.

of a water right is the amount of water historically withdrawn and consumed over time in the course of applying water to beneficial use under the appropriation, without diminishment of return flows upon which other water rights depend.[259]

Determining the historical usage of a water right is not restricted to change and augmentation plan proceedings. "[E]quitable relief is available, upon appropriate proof, to remedy expanded usage which injures other decreed appropriations."[260] When historical usage has been quantified for a ditch system by previous court determination, the yield per share removable for use in a change of water right or augmentation plan is not expected to differ from case to case absent a showing of subsequent events which were not previously addressed by the water court but are germane to the injury inquiry.[261] Colorado statutes address six features of a judgment and decree involving changes of water rights and augmentation plans. These six features include:

> (1) the judgment and decree for changes of water rights and augmentation plans must contain a retained jurisdiction provision for reconsidering the question of injury to the vested rights of others; (2) the water judge has discretion to set the period of retained jurisdiction; (3) the water judge has discretion to extend the period of retained jurisdiction; (4) the water judge's findings and conclusions must accompany the condition setting forth the period of retained jurisdiction; (5) all provisions of the judgment and decree are appealable upon their entry, including those relating to retained jurisdiction or extension of retained jurisdiction; and (6) the water judge has discretion to reconsider the injury question.[262]

The terms and conditions of a change of water right decree must include provisions for revegetation of lands from which water is removed.[263] The water court can also impose transition mitigation payments to offset reduced property tax revenues, as well as bonded indebtedness payments, due to the

259. *Id.* at 661.
260. *Williams*, 938 P.2d at 523.
261. *Id.*
262. Farmers Reservoir & Irrigation Co. v. Consol. Mut. Water Co., 33 P.3d 799, 808 (Colo. 2001); Upper Eagle Water Auth. v. Wolfe, 230 P.3d 1203, 1212–13 (Colo. 2010).
263. COLO. REV. STAT. § 37-92-305(4.5)(a) (2012).

removal of agricultural water from one county for use in another.[264]

Even if the FRICO change of water right had been for a handful of shares instead of a ditch-wide analysis, it is likely the issue of an illegal enlargement would have been raised and litigated. Whether changed by share in different proceedings or all of the shares in one proceeding, no more consumptive use water of a ditch company may be transferred than was needed under the original matured appropriation.[265] Requantification of an irrigation water right from rate of flow to acre feet of water lawfully consumed under an adjudicated decree is the essence of a change proceeding.[266]

The purpose for allowing a senior priority to be retained through a change decree, typically moving the consumptive use water from agriculture to municipal or instream flow use through voluntary transactions, is to reward a true and continuing beneficial use appropriation of the public's water resource without causing injury to other decreed water rights.[267]

Burlington demonstrates that municipalities and businesses seeking to have the benefit of senior agricultural water rights priorities will be limited, in a change of water right proceeding, to the amount of water actually utilized beneficially in accordance with the adjudicated water right for which the transfer is sought. The Colorado Supreme Court's holding eliminates reliance on unadjudicated water use practices, no matter how long they have occurred. The court's ruling plainly discourages speculation in shares of mutual ditch company stock; a potential investor in such stock must make a diligent inquiry regarding its potential value in light of its past and future contemplated uses within the prior appropriation system.

F. Subdistrict No. 1*: Respecting Legislative Rulemaking Choices for Sustaining Aquifers While Preventing Injury to Other Water Rights*

264. *Id.* § 37-92-305(4.5)(b)(I).

265. *Consol. Mut. Water Co.*, 33 P. 3d at 814–15.

266. Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist., 256 P.3d 645, 662 (Colo. 2011).

267. High Plains A & M, LLC v. Se. Colo. Water Conservancy Dist., 120 P.3d 710, 719 (Colo. 2005).

Sustainability joins optimum use and protection against injury as goals of the water law in 2011. This is the result of General Assembly legislation as applied by the Colorado Supreme Court in *Subdistrict No. 1*.[268] In the ten years between *Empire Lodge* and the *Burlington* decisions, competition for water has resulted in tightened administration of the priority system and the creation of innovative methods and means for managing the public's water resource, as shown by case decisions and legislative acts discussed above in this article.

In *Subdistrict No. 1*, the water court and the Colorado Supreme Court approved a locally adopted management plan for sustaining aquifer levels in the San Luis Valley while protecting against injury to senior decreed surface rights and ensuring compliance with Rio Grande Compact delivery obligations.[269] This plan includes using fees paid by landowners in the Subdistrict to fallow up to 40,000 acres of currently irrigated land and replace approximately 6,000 acre-feet of water annually to the Rio Grande River in order to protect against ongoing injury to surface water rights.[270] A series of statutory amendments and much work by the people of the San Luis Valley made approval of this plan possible.[271]

The Sangre de Cristo Range on the east and the San Juan Range on the west encapsulate this lovely and historical Colorado place that opens on the south towards Taos as the Rio Grande River winds its way from San Juan Mountain sources. Senior irrigation surface water rights in the valley include Hispano acequia rights located on the Sangre de Cristo Land Grant, which came to Colorado by virtue of the 1848 Treaty of Guadalupe Hidalgo and the creation of Colorado Territory in 1861.[272]

Later Anglo settlers brought under cultivation the two aquifers underlying the Closed Basin portion of the valley

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268. San Antonio, Los Pinos & Conejos River Acequia Preservation Ass'n v. Special Improvement Dist. No. 1 of the Rio Grande Water Conservation Dist. (*Subdistrict No. 1*), 270 P.3d 927 (Colo. 2011).

269. *Id.* at 935.

270. *Id.* at 942–43.

271. *Id.* at 937–39.

272. *See generally* Gregory A. Hicks & Devon G. Peña, *Community Acequias in Colorado's Rio Culebra Watershed: A Customary Commons in the Domain of Prior Appropriation*, 74 U. COLO. L. REV. 387 (2002); Tom I. Romero, *The Color of Water: Observations of a Brown Buffalo on Water Law & Policy in Ten Stanzas*, 15 U. DENV. WATER L. REV. 329 (2012).

north of the Rio Grande River.[273] Today, this land continues to be irrigated by junior priority groundwater wells aided by recharge importation through junior Rio Grande surface ditches.[274] These two aquifers, the unconfined and the confined aquifers, are tributary to the Rio Grande River. Use of Rio Grande surface and tributary groundwater is subject to the Rio Grande River Compact administration among Colorado, New Mexico, and Texas and the U.S.-Mexico Treaty of 1944.[275]

The Closed Basin has seen depletions of nearly a million acre-feet due to the late twentieth century, early twenty-first century drought, resulting in unsustainable groundwater conditions. In 1998, the General Assembly adopted HB 98-1011 to address the lack of collective knowledge about the valley's aquifers and their connection to the surface streams.[276] Pursuant to this directive, the State Engineer and the Colorado Water Conservation Board initiated the Rio Grande Decision Support System ("RGDSS").[277] RGDSS is based on the widely accepted MODFLOW model designed to simulate the occurrence and movement of groundwater.[278] Using a central database of observed climatological, hydrological, and agricultural data, RGDSS models and projects the movement of groundwater between aquifers, water consumption, and the effect of groundwater withdrawals on surface water.[279]

Drought increased the urgency for a sustainable water supply solution. In 2004, the General Assembly adopted SB 04-222, providing guidance to the State Engineer in drafting rules for Division 3 underground water use.[280] The management

273. *Subdistrict No. 1*, 270 P.3d at 932 n. 2, 933–34.

274. *Id.* at 933–34.

275. *Id.* at 931.

276. 1998 Colo. Sess. Laws 852–53; COLO. REV. STAT. §§37-90-102, -137 (2011).

277. For more information and ongoing updates of RGDSS, see *Rio Grande River Basin, Colorado's Decision Support Systems*, COLO. WATER CONSERVATION BD., http://cdss.state.co.us/basins/Pages/RioGrande.aspx (last visited Aug. 8, 2012). RGDSS is the effort of numerous engineering contractors working with the State Engineer and the Colorado Water Conservation Board. As the Colorado Supreme Court noted in *Cotton Creek Circles*, the water court called the study "one of the most comprehensive studies of the Valley's geology and hydrology that has ever been undertaken." Simpson v. Cotton Creek Circles, LLC. 181 P.3d. 252, 257 (Colo. 2008).

278. MODFLOW stands for "modular three-dimensional finite-difference groundwater model" and it was first developed by the United States Geological Survey in 1984. *See MODFLOW and Related Programs*, U.S. GEOLOGICAL SURVEY, http://water.usgs.gov/nrp/gwsoftware/modflow.html (last visited Aug. 8, 2012).

279. *Subdistrict No. 1*, 270 P.3d at 943.

280. *See* 2004 Colo. Sess. Laws 777; COLO. REV. STAT. § 37-92-501(4) (2011).

plan the Colorado Supreme Court approved in *Subdistrict No. 1* involves a program to fallow land in the Closed Basin to promote recovery of a sustainable aquifer system while replacing injurious well depletions causing impacts to Rio Grande River surface water rights.[281]

In accordance with a provision of the 1967 Rio Grande Water Conservation District Act,[282] a majority of landowners within the boundaries of the proposed Subdistrict obtained its formation through a petition process in the Alamosa County District Court. Lands included within Subdistrict boundaries comprise around 174,000 irrigated acres relying on approximately 3000 wells, 300 pumping from the confined aquifer and the rest from the unconfined aquifer. The Subdistrict's board of managers drafted a management plan that contained a groundwater management plan under provisions of the Rio Grande Water Conservation District Act, requiring State Engineer approval.[283]

The State Engineer approved the plan, triggering a right of review in the Alamosa District Court and Division 3 water court.[284] Trial judge John Kuenhold, the water judge and chief judge for the judicial district, consolidated the two cases.[285] After two trials, the first of which resulted in an order by which the trial remanded the plan to the Subdistrict for revisions, the trial court approved the groundwater management plan and decree with conditions.[286]

The applicable provision of the 1969 Act, as amended, defines a "plan of water management" as:

> a cooperative plan for the utilization of water and water diversion, storage, and use facilities in any lawful manner, so as to assure the protection of existing water rights and promote the optimum and sustainable beneficial use of the water resources available for use within a district or a subdistrict, and may include development and implementation of plans of augmentation and exchanges of water and ground water management plans under section 37-92-501(4)(c).[287]

281. *Subdistrict No. 1*, 270 P.3d at 944–45.
282. COLO. REV. STAT. § 37-48-123 (2011).
283. *Id.* § 37-48-126(2).
284. *Id.* §§ 37-48-126(3)(b), -92-501.
285. *Subdistrict No. 1*, 270 P.3d at 931.
286. *Id.* at 944–45.
287. COLO. REV. STAT. § 37-48-108(4) (2011) (emphasis added).

Thus, a plan may, but need not, include a plan for augmentation. In order to fund such plans of water management and other improvements contained in the official plan, the subdistrict—a political subdivision of the state—is empowered to fix and collect rents, rates, fees, and tolls from any owner or occupant of real property that is connected with, served by, or benefitted by the improvements or water management plan.[288]

The State Engineer has jurisdiction to administer, distribute, and regulate Colorado's waters and may also promulgate rules and regulations to assist in these duties.[289] The authorizing statute lays out several principles to guide the Engineer in the adoption of such rules, including:

> (a) Recognition that each water basin is a separate entity . . . [;]
> (b) Consideration of all the particular qualities and conditions of the aquifer;
> (c) Consideration of the relative priorities and quantities of all water rights . . . [;]
> . . .
> (e) That all rules and regulations shall have as their objective the optimum use of water consistent with preservation of the priority system of water rights . . . .[290]

In *Subdistrict No. 1*, the Colorado Supreme Court ruled that the General Assembly's 2004 act, specific to the State Engineer's administration of groundwater use in Division 3,[291] provides for the conjunctive use of groundwater and surface water. The statute takes into account the unique geologic conditions underlying the Rio Grande watershed, Colorado's annual delivery obligations under the Rio Grande Compact, and the consequent need for greater flexibility in water management.[292]

Under these new provisions, the General Assembly gave the State Engineer "wide discretion to permit the continued use

288. *Id.* § 37-48-189(1)(a)–(b).
289. *Id.* § 37-92-501.
290. *Id.* § 37-92-501(2)(a)–(e).
291. 2004 Colo. Sess. Laws 777–79.
292. COLO. REV. STAT. § 37-92-501(4) (2011).

of underground water consistent with preventing material injury to senior surface water rights."[293] When regulating the aquifers of Division 3, the statute requires that the State Engineer consider the following principles:

> (1) the aquifer systems are to be maintained at sustainable levels;
> (2) unconfined aquifers serve as valuable underground storage reservoirs;
> (3) fluctuations in the artesian pressure in the confined aquifer occur and shall be allowed to continue;
> (4) the preceding shall not be construed to relieve wells from the obligation to replace injurious depletions to surface flows; and
> (5) the division's groundwater use shall not unreasonably interfere with the Rio Grande Compact.[294]

The statute further requires that, when adopting rules pursuant to the power to regulate underground water, the State Engineer shall:

> (I) Recognize contractual arrangements among water users, water user associations, water conservancy districts, ground water management subdistricts, and the Rio Grande water conservation district . . . ;
> (II) Establish criteria for the beginning and end of the division 3 irrigation season . . . ;
> (III) Not recognize the reduction of water consumption by phreatophytes as a source of replacement water for new water uses or to replace existing depletions, or as a means to prevent injury from new water uses; and
> (IV) Not require senior surface water right holders with reasonable means of surface diversions to rely on underground water to satisfy their appropriative water right.[295]

So long as the groundwater management plan meets the applicable statutory criteria and the water court approves it, the State Engineer may not curtail underground water

293. *Id.* § 37-92-501(4)(a).
294. *Id.* § 37-92-501(4)(a)(I)–(V).
295. *Id.* § 37-92-501(4)(b).

withdrawals made pursuant to the plan.[296] Upon entry of a final decree approving the plan, the statute requires the water judge to retain jurisdiction over the water management plan "for the purpose of ensuring that the plan is operated, and injury is prevented, in conformity with the terms of the court's decree approving the water management plan."[297]

Adoption of the plan through a public process is quasilegislative in nature. Propounding a plan of water management requires the subdistrict and district—and the State Engineer when a groundwater management plan component is included—to exercise their policy judgment, considering and balancing a number of policy goals.[298] These include provisions to "assure the protection of existing water rights and promote the optimum and sustainable beneficial use of the water resources." [299]

Rejecting the opposers' primary contention in *Subdistrict No. 1,* the Colorado Supreme Court distinguished an approved water management plan from an augmentation plan.[300] The opposers invoked the requirements for augmentation plan review and approval that necessitate a judicial finding of no material injury to adjudicated senior water rights prior to approval of the application.[301] The court countered that the no-injury finding and other requirements of the augmentation plan statute applied in the case law decisions did not apply to approval and review of a subdistrict plan unless the plan includes application to the water court for adjudication of an augmentation plan.[302]

Despite their differences, the augmentation statutes and subdistrict plan statutes aim to accomplish a similar ultimate goal: integration of tributary groundwater and surface water into the priority system of water rights in a manner that protects against injury to decreed senior rights from out-of-priority diversions. Augmentation plans are initiated by application to a water court under the 1969 Act.[303] In contrast,

296. *Id.* § 37-92-501(4)(c).
297. *Id.*
298. San Antonio, Los Pinos & Conejos River Acequia Preservation Ass'n v. Special Improvement Dist. No. 1 of the Rio Grande Water Conservation Dist. (*Subdistrict No. 1*), 270 P.3d 927, 939–40 (Colo. 2011).
299. COLO. REV. STAT. § 37-48-108(4) (2011).
300. *Subdistrict No. 1*, 270 P.3d at 945–46.
301. COLO. REV. STAT. § 37-92-305(3)(a), (5), (8) (2011).
302. *Id.* §§ 37-48-123(2)(g), -48-126(1), -92-305(6)(c).
303. *Id.* §§ 37-48-123(2)(g), -48-126(1), -92-305(6)(c).

the subdistrict's plan proceeded through an extensive approval process involving the subdistrict, the Rio Grande Water Conservation District, the State Engineer, the Alamosa County District Court, and the water court for Division 3.[304]

The Colorado Supreme Court held that the subdistrict's plan and the water court's decree complied with all the applicable statutes.[305] The approved plan as decreed, with conditions, requires annual replacement of injurious depletions to senior adjudicated surface rights.[306] The court concluded that the General Assembly had enacted a new procedure designed to protect senior uses and the aquifers in the San Luis Valley, in light of its historical conjunctive water use practices and its unique hydrogeology.[307] The statute upholds the no-injury principle, an essential part of Colorado's prior appropriation system.[308] In doing so, the overall design of the subdistrict plan approval statutes provide an alternate means for protecting adjudicated senior surface rights in Division 3 against material injury:

> The General Assembly fashioned section 37-92-501(4)(a) and (b) to promote aquifer sustainability, protect senior rights, and avoid unnecessary curtailment of well pumping in Water Division No. 3. Section 37-92-501(4)(a) limits curtailment of groundwater use within that division to "the minimum necessary to meet the standards of this subsection." It directs pursuit of the goal of a sustainable water supply in each aquifer system, recognizes that the unconfined aquifers serve as valuable underground water storage reservoirs, and provides that the unconfined and confined aquifers may fluctuate with due regard for the daily, seasonal, and long-term demand for underground water.[309]

The trial court found that the accuracy of the RGDSS model and response functions for predicting injurious depletions at present is within a margin of error of fifty acre-feet.[310] Based on the evidence, the trial court found this margin

304. *Subdistrict No. 1*, 270 P.3d at 934–35.
305. *Id.* at 932.
306. *Id.* at 945.
307. *Id.* at 947.
308. *Id.* at 947–48.
309. *Id.* at 946.
310. *Id.* at 943–44.

of error to be within the present state of the art, and its continued refinement will likely produce closer accuracy in the future.[311] The Colorado Supreme Court upheld use of the model and its response functions as an acceptable tool for determining the annual replacement requirements. The trial court found that total average stream depletions from 1996 through 2005, the study period, were 6,101 acre-feet annually.[312]

Under the statutes and the water court's decree, the burden of showing that the annual replacement plan operates to protect adjudicated senior surface water users against material injury remains with the subdistrict.[313] When a surface water right holder properly alleges material injury under the plan as decreed, the subdistrict bears the burden under retained jurisdiction of going forward with evidence, as well as sustaining its burden of proof, to demonstrate noninjury.[314]

The penultimate import of *Subdistrict No. 1* is that the Colorado General Assembly may fashion and cultivate new tools for surface water and tributary groundwater management consistent with the Colorado Constitution's prior appropriation provisions. Sustainability joins optimum use and protection against injury as goals of Colorado water law.

CONCLUSION

Innovation is a product of living together in community; the history of Colorado water law change and management methods chronicles this proposition amply. The resiliency of Colorado's prior appropriation law is demonstrable. Its continued suitability requires faithful performance by state officials of their responsibilities in constant service to the people's existing and changing need. The decade commencing with *Empire Lodge* in 2001 circling through *Subdistrict No. 1* in 2011 leads us into this new century of challenge and change.

Empire Lodge illustrates enforcement of Colorado's prior appropriation doctrine in an overappropriated stream system. It teaches that augmentation plans are a legislatively created device engineered to provide replacement water for senior water rights and thereby allow junior appropriators to divert water when they otherwise would be curtailed under strict

311. *Id.*
312. *Id.* at 947–48.
313. *Id.*
314. *Id.*

prior appropriation administration.

Park County Sportsmen's Ranch establishes that the public, not the overlying landowner, owns the water bearing capacity of aquifers as well as streams throughout the state as part of the public's water resource, and this capacity may be used to store and convey water appropriated by public agencies and private persons.

High Plains applies the antispeculation doctrine to water transfer cases. In order to change a senior agricultural priority and retain it for use elsewhere, the application to the water court must identify where the water will be actually used. *ISG* announced the same day as *High Plains* discusses new legislation the General Assembly has enacted providing an alternative to permanent changes of water rights.

Pagosa I and *II* demonstrate that conditional water right decrees will be increasingly difficult to obtain, and maintain through subsequent diligence periods, as Colorado's remaining unappropriated water shrinks and competition for a share in the public's water resource intensifies. Public water supply agencies will have to justify their future projections of water need.

Burlington Ditch disallows undecreed enlargement of water use, no matter how long they have occurred.

Subdistrict No. 1 recognizes that sustainability joins optimum use and protection against injury as goals of the water law resulting from General Assembly legislation. Groundwater management plans are now an alternative or a supplement to augmentation and substitute supply plans allowing groundwater pumping while protecting adjudicated surface water rights.

As these case decisions illustrate, Colorado water law is based on conservation of the public's water resource and its use by private persons, public entities, federal agencies, and Native American tribes. Colorado's prior appropriation doctrine started off recognizing only agricultural uses of water. Now it embraces environmental and recreational use, in addition to serving over five million persons, most of who live in urban and suburban areas.

Colorado's population is expected to double over the next fifty years. Serving that population will require more, not less adherence to the principles of prior appropriation, public ownership of the water resource, nonspeculative creation and preservation of private and public beneficial water use rights,

enforcement of the priority system, and statutory mechanisms for water sharing through leases, crop rotational fallowing plans, exchanges, augmentation, substitute supply, and management plans.

Actual, not speculative, need must be the basis for new water appropriations and water transfers. Sharing the risks of water shortage in times of drought between urban and rural areas, while sustaining stream habitats, will likely become a goal of water law and policy through collaborative agreements spurred by executive and legislative action. Development and use of whatever unappropriated water remains to Colorado under its interstate apportionments will likely occur. Increased water conservation at all levels will be a necessity. Erratic flood and drought affecting snowpack runoff dictate the need for interconnected infrastructure construction and operation. Our capacities for adaptation due to climate will be plumbed.

I undertook this article as part of the David Getches symposium. He dedicated his life to education, the environment, equity in our relationships with each other, and protection of the under-protected environment and Native American peoples. He accomplished much for a work in progress. He wore a big pair of boots and broke them in well. But we cannot really walk in his. We need some wiggle room and a good fit in our own shoes as we stride for a homeland we can proudly share and inhabit.

Wiggle Room

You can't really walk in another person's boots or moccasins,
but you can borrow their sinew and give thanks.

If you put their shoes on and try any trailhead straight off,
your ache will blister and fester.

To shape a good piece of leather into your own, you'll need
some wiggle room breathing space for the long haul.

A few minutes a day of shaping your own sinew in their
image gardening your own back yard may help.

A PHILOSOPHY OF HOPE AND A LANDSCAPE OF PRINCIPLE: THE LEGACY OF DAVID GETCHES'S FEDERAL INDIAN LAW SCHOLARSHIP

REBECCA TSOSIE*

In this essay, Professor Tsosie documents two important aspects of David Getches's work in the field of federal Indian law. First, Professor Tsosie observes that David Getches was a strong proponent of guiding principles and a consistent structure in the law. Consequently, he was one of the first scholars to observe the ways in which the contemporary Supreme Court was "remapping" the field of federal Indian law, apparently in service of the Court's commitment to states' rights and the protection of mainstream values. David noted the dangers of this "subjectivist" approach and urged a return to the foundational principles of federal Indian law, which recognize the historic political relationship between Indian nations and the United States and the continuing sovereignty of Indian nations. Secondly, David Getches had a great deal of love for the lands and peoples of the West, including the landscape of the Colorado Plateau, which inspired Professor Tsosie's remarks at the Symposium. David understood the relationship between indigenous peoples and the land as encompassing an "ethics of permanence," and he believed that traditional indigenous land ethics could provide the necessary counterweight to the dominant society's exploitive "ethic of opportunity" and foster

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* Professor of Law and Willard H. Pedrick Distinguished Research Scholar, Sandra Day O'Connor College of Law, Arizona State University. This essay is a longer version of the remarks that Professor Tsosie presented at *A Life of Contributions for All Time: Symposium in Honor of David H. Getches* at the University of Colorado Law School in Boulder, CO (April 26–27, 2012). Professor Tsosie would like to thank the Dean and faculty of the University of Colorado Law School for sponsoring this outstanding conference, as well as Jeanne Whiteing, Carole Goldberg, and Matthew Fletcher, who co-presented on the panel devoted to David's Indian law scholarship. Professor Tsosie also thanks the members of the University of Colorado Law Review and the Native American Law Students Association for their tremendous assistance with all aspects of the Symposium. Finally, Professor Tsosie is very grateful to David Gay and Tara Mospan, librarians at the ASU Ross-Blakely Law Library, for their excellent and timely assistance in gathering sources relevant to the comments presented in this essay.

a more sustainable framework for the management of public lands. In these ways, David's federal Indian law scholarship offered "a philosophy of hope and a landscape of principle," and both features mark his important and enduring legacy in the field.

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INTRODUCTION

I am very thankful and honored to be part of this conference celebrating the life and work of David Getches. As I thought about my remarks today, several memories of David came into my mind. He was someone who had a profound impact upon me, as he did on so many people. I first met him when I was in my final year as an undergraduate at UCLA, where I had the good fortune to study with my mentor and fellow panelist, Professor Carole Goldberg, who was one of David's good friends and colleagues. In his characteristically kind and supportive manner, David was one of the faculty members who encouraged me to attend law school. His work influenced me as a law student, and later as a law professor. I respected and appreciated his careful and thoughtful voice, and I marveled at his scholarly mind. I saw his influence in the lives of Native people when I served on the Board of the Native American Rights Fund. Most recently, I had the privilege to serve along with David Getches and Charles Wilkinson as a member of the Board of Directors of the Grand Canyon Trust ("GCT"). David's dedication to that organization was legendary and spanned many years, long before I ever became a member.

The last time I saw David was at a GCT board meeting. I had no idea that he was ill. He always brought so much depth to our discussions and was a constant positive force within our group. We discussed energy policy and environmental protection. We recalled the beauty of the land on the Colorado

Plateau, its windswept canyons and its red and sandy hues. David had spent a great deal of time upon these lands, and he loved this place, which is very powerful, yet somehow fragile in a modern world committed to "development." David understood the cultural value of this landscape, not only to the Native people who belong to these lands, but to all of the different people who come to this place, with their own needs, their own values, and their own understanding of what the land represents. It was this memory of David that inspired me to write this essay on the legacy of David's Indian law scholarship.

At the outset, I want to thank Sarah Krakoff and Charles Wilkinson for organizing this amazing conference, and also give a special thanks to Sarah for generously sharing this photo of the Colorado Plateau as the beautiful backdrop for my presentation. I also want to thank my distinguished colleague, Professor Matthew Fletcher, also a fellow panelist, who recently designed a rich agenda for the 2012 Federal Bar Association Indian Law Conference built around the theme of "mapping," giving me much to think about.[1] There are many spirits that are part of the landscape that we call the Colorado Plateau. It is a landscape that inspired David, and it is the landscape that inspired this essay, which uses David's scholarship as a lens to map our field of federal Indian law, the physical and cultural landscape that informs our field, and our future, which is dedicated to protecting the sovereignty of Native people on these lands. We were and are united in that appreciation of a sacred landscape that endures generation after generation and embodies the circles of life within a universe that is far more complex than we will ever know.

I. MAPPING THE FIELD: THE CONNECTIONS BETWEEN KNOWLEDGE AND PLACE

The landscape of the Colorado Plateau reflects a central truth: knowledge is deeply embedded within places. Jim Enote, another colleague on the Board of the GCT and the Director of the Zuni Pueblo's A:shiwi A:wan Museum, recently curated a

1. Professor Fletcher served as a conference co-chair, along with Venus McGhee Prince, Patrice Kunesh, and Andrew Adams III. I thank all of them for the excellent theme and set of presentations at the Federal Bar Indian Law Conference. *Mapping Indian Law and Policy*, Fed. Bar Ass'n, 37th Annual Indian Law Conference (Apr. 19–20, 2012).

wonderful exhibit of Zuni map art, depicting the relationship of the Zuni people to the sacred lands within the Grand Canyon and associated places.[2] Through these stunning visual images, observers come to understand that for the Native peoples who belong to the lands on the Colorado Plateau, there is a great deal of knowledge "intertwined with the places where people have lived and the lands they have repeatedly traversed over many centuries."[3] As Leslie Marmon Silko has noted in the context of Pueblo cultures, the oral narratives that are part of these places act as "maps" of the physical and cultural worlds that people share, binding communities together and facilitating their survival.[4] However, what happens after these lands are "settled" by other nations and other peoples? What happens when the indigenous peoples who share this cultural landscape are removed to other lands within other states? As Jim Enote observes:

> [O]ver the past 500 years we have been remapped. Our names of places and their meanings have been all but eliminated from mainstream use. In their place we've been given a new set of maps, with a new set of names that reflect other values and ways of seeing the world that has been our home for generations.[5]

Building on Jim Enote's observation, as well as the theme of the recent Federal Bar Association Indian Law Conference, I want to suggest that David's scholarship illuminated another "remapping" that is taking place, this one, of course, within the field of federal Indian law. As we all know, David understood the importance of guiding principles and a consistent structure in the law, and he saw federal Indian law in its original inception as having those attributes. David was one of the most articulate critics of the Supreme Court's "new subjectivism" in the field of federal Indian law, which started with the

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2. I was fortunate to view the exhibit at the Museum of Northern Arizona in spring of 2011 and to hear Jim Enote's narrative about Zuni artists who created the works within the exhibit. Mr. Enote was also a speaker at the 2012 Federal Bar Conference.

3. Jennifer McLerran, *Mapping Memory*, *in* A:SHIWI A:WAN ULOHNANNE: THE ZUNI WORLD 10, 10 (Jim Enote & Jennifer McLerran eds., 2011).

4. *Id.* (citing Leslie Marmon Silko, *Landscape, History, and the Pueblo Imagination*, 57 ANTAEUS 83 (1986)).

5. Jim Enote, *A:shiwi on A:shiwi: Zuni on Zuni*, *in* A:SHIWI A:WAN ULOHNANNE: THE ZUNI WORLD 4, 4 (Jim Enote & Jennifer McLerran eds., 2011).

Rehnquist Court and continues to the present day. His 1996 article, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, made the important observation that the Supreme Court had in fact assumed the role formerly conceded to Congress, carefully limiting tribal sovereignty through its constrained readings of tribal jurisdictional authority.[6] The result of this new "subjectivist approach" was to sever "tribal sovereignty from its historical moorings, leaving lower courts without principled, comprehensive guidance."[7] In his article, David encouraged a return to the foundational principles of federal Indian law, which he felt would be possible if some of the newer justices on the Court would assume "intellectual leadership in Indian cases."[8]

However, by 2001, when David wrote *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice, and Mainstream Values*, he had accepted the reality that the Court was committed to its subjectivist path, and he suggested that the more important question was to assess "where Indian law may be headed."[9] David realized that our field was being "remapped" by the Supreme Court, and not in a way that reflected the original principle that Indian nations had the sovereign right to reach agreement with the United States on the terms of their political relationship. Instead, the judicial branch was unilaterally taking the power to determine the contours of that relationship, and David understood that it was necessary to understand their motivations for doing so. In other words, what would the "coordinates" of the new "map" look like? David suggested that it was necessary to "look beyond Indian law to search for and test trends and directions evinced by the Court's decisions in other fields and assess whether they offer guidance on the future of Indian law."[10] After a fascinating and provocative exploration of the Court's jurisprudence, David concluded that three consistent trends could be determined from the record of wins and losses in the Court: "Virtually without exception, state interests prevail;

6. David Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996).

7. *Id.* at 1573.

8. *Id.* at 1652.

9. David 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) [hereinafter Getches 2001].

10. *Id.*

attempts to protect specific rights of racial minorities fail; and mainstream values are protected."[11] He further pointed out that nearly every Indian law case directly implicated one of these interests, and therefore, these trends appeared to explain recent decisions in Indian law. This time, David's prognosis was a bit more grim: "Absent a judicial rediscovery of Indian law, Congress will have to legislate to correct the Court's misadventures."[12]

That powerful realization launched a scholarly discourse among federal Indian law scholars, including many present today, about: the tensions between judicial and congressional "plenary power;" legal realism; the tensions between tribal and federal perspectives on self-determination; the meaning of inherent sovereignty; and a plethora of other topics.[13] I will not attempt to summarize this considerable body of scholarship, and will only say that the robust discourse more than proved the central truth of David's observation about the role of the current Supreme Court as a "change-maker."

In particular, David's 2001 article illuminated the central problems with the Court's approach and also the values that the Court was using to decide Indian law cases. First, David observed that the Court's approach to Indian law was essentially an "activist" approach, which lacked any "inherent philosophical content."[14] The lack of any identifiable philosophy, coherent policy, or set of principles deeply troubled David because it indicated that the Court was acting purely on the basis of its power to instantiate the justices' own "values and preferences."[15] The Court turned its back upon the established principles of Indian law in a way that lacked integrity or even a basic sense of justice.

According to David, the Rehnquist Court was most interested in "considering and weighing tribal rights in the context of modern circumstances."[16] In his view, this reflected a

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11. *Id.*
12. *Id.* at 269.
13. There is a complex body of scholarship within federal Indian law that is not easily sorted into theoretical camps, although the authors of one of the leading Indian law textbooks have done an admirable job of describing some of these perspectives in this manner. *See* ROBERT T. ANDERSON, BETHANY BERGER, PHILIP P. FRICKEY & SARAH KRAKOFF, AMERICAN INDIAN LAW: CASES AND COMMENTARY 945–51 (2nd ed. 2010). In this work, the authors associate David Getches with the "foundationalist scholarship" within the field. *Id.* at 946.
14. Getches 2001, *supra* note 9, at 291.
15. *Id.* at 298.
16. *Id.* at 303.

commitment to "pragmatism," or the notion that the judiciary is capable of deciding what result best conforms to "society's current values."[17] Of course, as he further observed, this approach assumes that the judiciary has the intellectual ability and cultural sensitivity to understand the full range of consequences that will ensue from its opinion. And it was this assumption that seemed most problematic in the context of federal Indian law because, as David noted, the Court would first have to understand that tribal governments are sovereigns that predate the U.S. Constitution and have been in a political relationship with European sovereigns and then the United States for their entire history.[18] They would also have to confront a significant "cultural divide" in their attempt to locate the best "legal answer" to a factual circumstance. As David noted, no member of the Court shares any of the values or experiences found within tribal communities, and yet, the Court's decisions operate "on people distinguished by their cultures" and their unique institutions, and people "shaped by different histories."[19]

David identified the values that the Court was using to decide its Indian law cases and found that the Court's decisions in fact reflected certain broad, collective attitudes of the political, social, and cultural majorities within the United States. Thus, across the board, the Court "tends to disfavor claims of racial minorities[,] . . . protect the interests of states, and . . . promote mainstream values."[20] Not surprisingly, tribal interests could be seen to contravene each of these commitments, and thus, "Indian law has become a crucible for forging a larger agenda."[21] The examples that David gave illustrate the point. In *Nevada v. Hicks*, the Court stretched to find a justification to disclaim tribal authority to adjudicate an alleged civil rights violation by state law enforcement officials who conducted a search of a tribal member's home on tribal land.[22] Remarkably, the Court found that "[s]tate sovereignty does not end at a reservation's border."[23] In *Seminole Tribe v. Florida*, the Court invalidated the provision of the Indian Gaming Regulatory Act authorizing tribes to sue recalcitrant

17. *Id.*
18. *Id.* at 304.
19. *Id.* at 305.
20. *Id.* at 317.
21. *Id.* at 329.
22. 533 U.S. 353 (2001).
23. *Id.* at 361.

states in federal court to obtain an order compelling the state to negotiate a gaming compact in good faith.[24] The Court overruled its earlier decision in the *Union Gas* case to find that Congress lacked the constitutional authority to abrogate the states' sovereign immunity, which is protected by the Eleventh Amendment, and interpreted the Indian Commerce Clause power to be coextensive with the Interstate Commerce Clause power.[25] The Court's analysis served its states' rights agenda, in the process ignoring the fact that the complex political relationship between Indian nations and the United States was structurally set apart by the Framers in much the same way as is the federal government's foreign affairs power.

David also pointed out the Court's discomfort with sustaining the special treatment of Native Americans under domestic law. David pointed to *Rice v. Cayetano* as a prime example of the Court's purported "color-blind approach" to racial justice.[26] In that case, the Court held that the state of Hawaii, which administers the share of the proceeds of the "ceded lands trust" allocated by federal law for the benefit of Native Hawaiians, could not conduct a "Natives-only" election to administer that trust without violating the Fifteenth Amendment.[27] The Court ignored the relevant political history, including the United States' own violation of international and domestic law in annexing the lands by joint resolution after the Hawaiian Monarchy was overthrown by a group of American insurgents backed by U.S. Marine.[28] Instead, the Court offered a paternalistic acknowledgement that "the culture and way of life" of the Native Hawaiians has been "engulfed by a history beyond their control," and therefore, the state of Hawaii has a duty to "seek . . . political consensus" based on a shared purpose: namely that "[t]he Constitution of the United States, too, has become the heritage of all citizens of Hawaii."[29]

Finally, David discussed a series of cases favoring the perceived supremacy of majoritarian values, perhaps best illustrated by the infamous case of *Employment Division v.*

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24. 517 U.S. 44 (1996).

25. *Id.*

26. Getches 2001, *supra* note 9, at 343 (citing Rice v. Cayetano, 528 U.S. 495 (2000)).

27. *Rice*, 528 U.S. 495.

28. Rebecca Tsosie, *Engaging the Spirit of Racial Healing Within Critical Race Theory: An Exercise in Transformative Thought*, 11 MICH. J. RACE & L. 21, 32, 32 n.11 (2005).

29. *Rice*, 528 U.S. at 524.

Smith.[30] In *Smith*, the Court decimated the First Amendment Free Exercise balancing test by finding that the state was free to apply its "neutral laws" (in this case, criminalizing the use of peyote, including by Native practitioners) even if the effect was to foreclose the religious practice of a minority religion.[31] According to the Court, this did not pose a constitutional issue, but rather was an "unavoidable consequence of democratic government."[32] The Court further found that any harm to "religious practices that are not widely engaged in" is justifiable, because the alternative—protecting freedom of conscience for all by selectively issuing exemptions—would promote "anarchy" and make the judges arbiters of society's interests as weighed against the "centrality" of an individual's religious belief.[33]

The Court's overt disregard of its own precedent on religious freedom, as well as its blatant favoring of majoritarian values to the detriment of minority religions, provoked a strong outcry from many groups, leading Congress to pass the Religious Freedom Restoration Act ("RFRA").[34] The Court ultimately invalidated RFRA as applied to the states, thus continuing its states' rights agenda.[35] The statute continues to apply to federal actions and to the administration of federal lands. Today, the substantive issue for Native peoples—whether RFRA is more protective than the First Amendment, for example, in relation to sacred sites protection on federal lands—is still open at the Supreme Court level. In *Navajo Nation v. U.S. Forest Service*, dealing with the Forest Service's decision to allow a ski resort to use reclaimed wastewater to manufacture artificial snow on the San Francisco Peaks, the Ninth Circuit found that RFRA is no more protective than the First Amendment, returning Native litigants to the world of *Lyng*.[36] Other courts have expressed a different view,[37] and the issue will probably come to the Court

30. Emp't Div. v. Smith, 494 U.S. 872 (1990).
31. *Id.*
32. *Id.* at 890.
33. *Id.*
34. *See* Pub. L. 103-141, 107 Stat. 1488 (1993) (codified at 28 U.S.C. § 1988 & 42 U.S.C. § 2000bb-4).
35. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding that Congress lacked power under Section 5 of the Fourteenth Amendment to limit state authority that might impair religious practice).
36. 535 F.3d 1058 (9th Cir. 2008) (en banc) (citing Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988)).
37. *See, e.g.*, Comanche Nation v. United States, No. CIV-08-849-D, 2008 WL

in the near future.

David's critique of the Supreme Court's federal Indian law jurisprudence identified the new coordinates of the "cultural frontier" that the Supreme Court is forging. In this process, as David demonstrated, the Court is "remapping" the field of federal Indian law, disclaiming the political principles that have long defined the political relationship of Indian nations to the United States, ignoring the legal principles that articulated this relationship as Indian nations were incorporated into the political boundaries of the U.S. as separate nations, and paving over the cultural principles that comprise the heart of Native self-determination. There is a deep cultural conflict implicated by this process of remapping, as the next section of this essay demonstrates.

II. MAPPING THE WEST: THE IMPORTANCE OF HISTORICAL CONTEXT AND INTERCULTURAL CONFLICT

For this discussion, I will return to the physical landscape of the Colorado Plateau, specifically its location in another place, which we call "the West." The West occupies a central place in the imagination of many Americans, and it is the subject of a set of narratives that informed the manifest destiny of the United States and sanctioned the country's creation as a new nation carved out of a foreign landscape. The mythology of the American frontier and the settlers who came to these lands, displacing indigenous peoples and annexing lands from the Atlantic to the Pacific coasts, is a vivid image in the cultural memory of America. I wanted to revisit what David had written about this place, and so I reread his 1990 essay, *A Philosophy of Permanence: The Indians' Legacy for the West*.[38] In that essay, David notes that Indians "survived on the American continents for thousands of years based on a pervasive set of cultural values integrating human life with other forms of life."[39] David maintained that these same values continued to guide Indian nations in the modern era, and he claimed that these values are "crucial for the future of a region

4426621 (W.D. Okla. Sept. 23, 2008) (unreported decision enjoining federal defendants from commencing construction on a military installation pending examination of impacts to Comanche practitioners who sought to protect sacred site near Medicine Bluffs in Oklahoma).

38. David Getches, *A Philosophy of Permanence: The Indians' Legacy for the West*, 29 J. WEST 54 (1990) [hereinafter Getches 1990].

39. *Id.* at 54.

where resource issues are intertwined with economic and social survival."[40] In particular, the most valuable legacy of these enduring values is "a philosophy of permanence."[41] Within this philosophy, human actions are limited by the obligation to ensure that the natural world maintains a healthy balance. In some cases, he said, this would mean that the human drive to exploit natural resources would be constrained by an ethic of conservation. The central idea of a philosophy of permanence, after all, is that the rights of the current generation are limited by the responsibility to future generations.

David's article presents a careful historical analysis of tribal environmental values, which documents that Indian nations practiced environmental science and developed sustainable agricultural and fishing practices, as well as a sophisticated understanding of medicine plants and herbs. David pointed out that these systems of knowledge continued to guide modern tribal governments, such as the Pyramid Lake Paiute, as they fought for recognition of tribal water rights sufficient to maintain the fish resource of Pyramid Lake. David also acknowledged that Indian nations are not adverse to using natural resources, and some tribes, such as the Navajo Nation, were in fact building an energy economy out of their coal and gas resources. David's essay was written just as tribes were authorized to manage environmental programs on the reservation, and he saw this drive toward environmental self-determination as entirely consistent with the philosophy of permanence. The destructive leasing practices encouraged by the federal government in the 19th and early 20th centuries had harmed the reservation environment, and by asserting sovereign authority over mining and commercial activity, tribal governments were ensuring that more prudent stewardship practices would occur.[42] David also noted that tribal governments, such as the Mescalero Apache Tribe were managing fish and wildlife resources with a conservation ethic in mind.

David concluded the essay in his characteristically hopeful

40. *Id.*

41. *Id.*

42. *See also* Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225 (1996) (discussing the legacy of the nineteenth and early twentieth century federal policies promoting leasing on tribal lands, as well as the resurgence of indigenous land ethics within modern tribal environmental management programs).

manner, noting that, for the first time, Westerners had begun to develop a more suspicious view of resource development, particularly forms of development that would "insult or diminish their notion of the West."[43] David noted the burgeoning national effort to preserve wilderness, including wild and scenic rivers and national parks. David claimed that a sense of reverence for the land was developing among many Americans and that this could become a driving force for policy innovations if embraced by politicians, educators, and religious leaders. If this occurred, "the West finally could throw off the unrealistic and destructive dream of eternal expansion and stop tolerating those engaged in a rootless quest for the next conquest."[44] This would be an "evolutionary step" toward realization of the Indians' ethical ideal of permanence.[45]

What David advocated in this article is an intercultural understanding of value and sustainability in the management of our shared lands and resources in the West. The ethic of permanence would become our guiding philosophy for the management of environmental and cultural resources, and the ethic of opportunity that had driven westward expansion and resources exploitation in the West would gradually give way to a more sustainable view of our relationship to the land and to future generations.

Note, however, that the dichotomy represented by indigenous and Anglo-American land ethics embodies a deeper conflict in cultural narratives. As Historian Patricia Limerick observed, the dominant narrative in the United States questions "how long human beings have lived in North America."[46] Some archaeologists contest the claim that Indians are the "original" peoples of the lands in North America, advancing theories that suggest that Indians are just "earlier" immigrants to these lands, perhaps crossing the Bering Strait, or perhaps constituting the "second wave" of human inhabitation in the "New World."[47] The latter theory is

43. Getches 1990, *supra* note 38, at 67.

44. *Id.*

45. *Id.*

46. Patricia Nelson Limerick, *Here to Stay*, 10 WILSON Q. 99, 100 (1986).

47. *See*, *e.g.*, Editorial, *Who Owns the Past?*, SCI. AM., Apr. 2012, at 9 (arguing that the Native American Graves Protection and Repatriation Act is too favorable to Native claimants and that scientific values are being compromised as a result); *see also* Duane Champagne, *A New Attack on Repatriation*, INDIAN COUNTRY TODAY MEDIA NETWORK (Apr. 9, 2012), http://indiancountrytodaymedianetwork.com/2012/04/09/a-new-attack-on-repatriation-107181 (Dr. Champagne is a Native

bolstered by claims that ancient skeletal remains, such as those of the Kennewick Man in Washington, do not bear any physical or genetic resemblance to modern day Indian populations.[48]

Not surprisingly, the "question of who settled the Americas" continues to be one of the "most contentious issues in human prehistory."[49] If Native peoples are, as they assert, the original occupants of these lands, and if they in fact belong to these lands, then justice is best served by a respectful political relationship between Indian nations and the United States. Justice in this view is "equity" between nations. On the other hand, if Native peoples are just another "immigrant" group (albeit from a much earlier time), then justice is best served by ensuring that individual Indians have an "equal right" to participate in the American democracy. Under this view, justice is served by "equality of opportunity" for all American citizens within American democracy. The operative theory here is that all citizens agree to a shared set of constitutional values, and "equality under the law" is the only requirement for justice to be served.

David's federal Indian law scholarship demonstrates his belief that federal Indian law was structured to preserve justice between nations. The political relationship was the guiding force for the construction of laws that validated tribal sovereignty within the American federal system. However, the Supreme Court's most recent jurisprudence adopts the second narrative. Under this reading, state sovereignty is paramount,

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sociologist at the University of California, Los Angeles, who criticizes the attempt of scientists to block repatriation of ancestral human remains to contemporary tribes and observes that "the time has come for more multicultural, government-to-government negotiations about repatriation that aim to address both scientific and indigenous values"); *see also* Rebecca Tsosie, *Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values*, 31 ARIZ. ST. L. J. 583, 599, 621–24 (1999) (discussing the competing scientific theories about the "peopling of the Americas").

48. The newest case on this topic is *White v. University of California*, which was filed by a group of scientists in a California Superior Court in an effort to preclude the repatriation of ancestral human remains by the University of California to the Kumeyaay Nation, a coalition of twelve Native American tribes who are affiliated with the lands where the so-called "La Jolla Skeletons," dated to approximately 10,000 years ago, were excavated. White v. Univ. of Cal., No. C12-01978 (N.D. Cal. Apr. 20, 2012), *available at* http://dockets.justia.com/docket/california/candce/3:2012cv01978/254098/; *see also* Bonnichsen v. United States, 367 F.3d 864, 871–72 (9th Cir. 2004). The University has petitioned for removal to federal court. *See White*, No. C12-01978 (N.D. Cal. Apr. 20, 2012).

49. *See* Ann Gibbons, *The Peopling of the Americas*, 274 SCI. 31, 31 (1996).

and minorities should not be given any "special" rights within the American legal system. Native Americans, like all Americans, are perceived to share a common heritage under the U.S. Constitution.

While David Getches identified the "cultural frontier" created by federal Indian law within American constitutional jurisprudence, historian Patricia Limerick identified the "symbolic frontier" of the West within American consciousness. Limerick claims that "[c]onquest forms the historical bedrock of the whole nation, and the American West is a preeminent case study in conquest and its consequences."[50] Limerick asserts that there is a moral burden for the West comparable to the moral burden placed upon the South in the wake of the Civil War. The South evokes "failure" in the minds of many Americans because of its brutal legacy of slavery and its vehement denial of civil rights to African Americans even after the Constitution was amended. Similarly, in the West, one can see a "lingering injustice that an invading, conquering people did, and are still doing, to the resident native peoples and ethnic minorities." That conquest has two aspects: first, a competition for natural resources, which left white Americans holding the majority of the land and profits within the region; second, a competition for cultural dominance "which has made the white way of life and point of view the only legitimate one."[51] Using this lens, a different form of failure takes place as white property owners lose "the very property they won to the forces of environmental deterioration," and as they lose cultural dominance "to the resurgence of minority self-confidence and influence." If the West loses its "self-esteem," Limerick argues, so does "the white majority of the entire American nation."

If Limerick is correct, then the activist agenda of the Supreme Court within federal Indian law makes perfect sense as a bulwark against failure for the white majority of the American nation. Of course, on the lands of the Colorado Plateau, this "social, environmental, and legal history" is alive and well, as the final section of this essay reveals.

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50. PATRICIA NELSON LIMERICK, THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST 27–28 (1987).

51. Donald Worster et al., *The Legacy of Conquest, A Panel of Appraisal*, 20 W. HIST. Q. 303, 305 (1989).

III. MAPPING THE FUTURE: THE PHILOSOPHY OF HOPE

I return to the memory that inspired this essay, which was based on the last conversation I had with David at our board meeting of the GCT. The current issues on the Colorado Plateau still involve a conflict between the dominant society's "ethic of opportunity" and the indigenous peoples' "ethic of permanence." Unfortunately, this conflict between ethics is not localized according to the respective identities of the parties who assert interests in these lands, which makes the work of an organization like the GCT quite challenging. A simple commitment to "environmental preservation" may, in fact, be perceived as antagonistic to tribal governments who favor development. It is also overly simplistic to imagine that by favoring the view of a particular tribal government, this serves the interests of all tribal governments. In fact, there are multiple, conflicting sovereign interests present on the Colorado Plateau, represented by several federal agencies, the States of Arizona and Utah, and several tribal governments. Each of these governments represents the interests of constituent citizens, and each must interact with the others in a way that promotes their respective interests, and hopefully, respects the integrity of the landscape. It is not always clear, however, that the integrity of the landscape is perceived to be the paramount goal.

The Grand Canyon National Park and its adjacent lands are by now widely recognized as being a unique and precious resource for the entire country, meaning that aesthetic and recreational interests are valued and, in fact, serve as the basis for tourism in this area. There are many Indian nations that claim a cultural affiliation with these lands, including the Havasupai Tribe (whose reservation is at the bottom of the Grand Canyon), the Hualapai, the Navajo Nation, the Hopi Tribe, and the Zuni Pueblo. There are, as Jim Enote has stated, many stories associated with this landscape, some of them represented by rock carvings on the canyon walls and sandstone cliffs. There are also prayers, ceremonies, sacred springs, sacred sites, burial sites, and migration trails throughout the Plateau. Some of these spiritual and cultural values are visible to outsiders, but most are not. They are "real" in the lives and consciousness of the Native people who belong to these lands, but they are also embedded in a landscape that holds considerable material value.

The lands that comprise the Colorado Plateau have been and always will be part of the American drive for energy dominance. In that sense, they have considerable economic and commercial value. There are rich deposits of uranium, coal, and gas on these lands. The water resources associated with this landscape are vital to the survival of the communities and species that are indigenous to these lands. However, the water also fuels development, including the Central Arizona Project, which delivers affordable energy to huge cities in the Southwest, including Phoenix, Las Vegas, and Los Angeles.[52] These resources also deliver the water promised to tribes in the southern portion of the state, such as the Gila River Indian Community, which finally succeeded in obtaining a congressionally authorized water settlement, enabling the community to utilize its legal water rights.[53] In short, in 2012, the development agenda of some tribal governments is at odds with the cultural values of land-based indigenous communities throughout the region. Tribal political sovereignty sometimes clashes with tribal cultural sovereignty, and the disparate land ethics create a sense of chaos and confusion within many indigenous communities.[54]

It was this clash of values and interests on the landscape of the Colorado Plateau that occupied the last conversation I had with David Getches at our GCT board meeting. David was an avid proponent of tribal sovereignty and he did not favor a paternalistic attempt by non-Indian environmentalists to instruct tribal governments on what they "ought" to do. On the

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52. *See generally* INDIANS & ENERGY: EXPLOITATION AND OPPORTUNITY IN THE AMERICAN SOUTHWEST (Sherry L. Smith & Brian Frehner eds., 2010).

53. Arizona Water Settlements Act, Pub. L. 108-451, 118 Stat. 3478 (codified in scattered sections of 43 U.S.C.); *see also Once-Mighty River Hurt by Drought, Pollution, Growing Water Demand*, ASSOCIATED PRESS (Aug. 9, 2006), http://www.uswaternews.com/archives/arcsupply/6oncerive8.html; *see also* Shaun McKinnon, *Mines, Farms Put Gila River on Life Support Despite Lack of Regulation, Some Trying to Restore River to its Natural Beauty and Wonder*, ARIZ. REPUBLIC (Aug. 9, 2006), http://www.azcentral.com/specials/special06/articles/0809rivers0809NEW.html

54. The distinction between political and cultural sovereignty is important to understanding the complexity of indigenous rights claims, both within domestic U.S. law and within international human rights law. *See* Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191 (2001). The term "cultural sovereignty" is used to describe the core of tribal inherent sovereignty, which is defined according to an internal tribal construction of values, rather than the dominant society's account of the powers of a "domestic dependent nation" under U.S. law.

other hand, David truly respected the traditional leadership of tribal governments, and he had worked with elders and traditional leaders in Alaska, California, Arizona, and the Pacific Northwest. David understood the value of traditional indigenous land ethics, not just for indigenous peoples, but for everyone, because they were the only ethical system founded upon a "philosophy of permanence." In that sense, indigenous land ethics could provide the necessary counterweight to the dominant society's exploitive ethic of opportunity.

It is interesting to note that David began his essay, *A Philosophy of Permanence: The Indians' Legacy for the West*, with the famous quote attributed to Chief Sealth from 1855:

> This we do know: the earth does not belong to man, man belongs to the earth. All things are connected like the blood that unites us all. Man did not weave the web of life, he is merely a strand in it. Whatever he does to the web, he does to himself.[55]

In my opinion, David's life and his work were dedicated in service of that central idea: we are all related because we share the central feature of being living beings on a landscape that must nurture all of us. This observation is increasingly important in an era of climate change because we can see the effects of an international governance system in which sovereign nation-states can engage in any level of development, unconstrained by the impacts of their emissions on others. We see the interconnections of the global biosphere, including the forests, the oceans, and the atmosphere, none of which obey a "territorial" dividing line corresponding to the sovereign lands claimed by the nation-states. When things shift, the attendant floods, fires, and hurricanes affect hundreds of thousands of people across national boundaries. And finally, we see the interconnections of human beings throughout the world, observing the deadly pathways of disease epidemics and food safety concerns caused by an increasingly mobile and interdependent global society. In 2012, the words of Chief Sealth enjoy ample scientific documentation as a matter of fact.

So, what does that portend for our collective future? Here, I want to draw on the words of another esteemed scholar, the late Vine Deloria, Jr., who wrote of "religion" as being "a force

55. Getches 1990, *supra* note 38, at 54.

in and of itself" that called for the "integration of lands and peoples in harmonious unity."[56] In his widely acclaimed book, *God is Red*, Deloria wrote:

> Who will find peace with the lands? The future of humankind lies waiting for those who will come to understand their lives and take up their responsibilities to all living things. Who will listen to the trees, the animals and birds, the voices of the places of the land? As the long-forgotten peoples of the respective continents rise and begin to reclaim their ancient heritage, they will discover the meaning of the lands of their ancestors. That is when the invaders of the North American continent will finally discover that for this land, God is red.[57]

Of course, any reference to "religion" in association with governance or public land management is certain to remove the utility of the idea from public discourse. So, I will take the liberty of recasting this statement as a set of ethical principles. In fact, as we sit here today, at this conference, there is another conference taking place at the University of Arizona in Tucson. Professor James Anaya, who is also the U.N. Special Rapporteur on the rights of indigenous peoples, is holding a consultation with indigenous leaders and representatives from communities throughout the U.S.-Mexico border region. One of the points of discussion will center around the meaning of Article 25 of the U.N. Declaration on the Rights of Indigenous Peoples, which was adopted by the U.N. General Assembly in 2007.[58] Article 25 provides that, "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."[59]

I want to suggest that the reference in Article 25 to a "distinctive spiritual relationship" between indigenous peoples and their traditional lands reflects the ethical principles of respect, responsibility, and relationship that are pivotal to the

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56. VINE DELORIA, JR., GOD IS RED: A NATIVE VIEW OF RELIGION 292 (2d ed. 1994).
57. *Id.*
58. G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007).
59. *Id.* at Art. 25.

realization of a "philosophy of permanence." The notion of respect between nations is central to achieving justice, and the notion of responsibility—to the land and its resources, to all living beings, and to the future generations—is pivotal to our collective survival. By acknowledging these relationships and their attendant responsibilities, David suggested that we could move into a more productive and beneficial mode of land management that could serve our mutual interests into the future. David also identified the key components of the institutional changes that must take place by promoting the development of governmental capacity to effectively manage lands and resources, and by promoting the education of students and policymakers about the need to transition from an "ethic of opportunity" to an "ethic of permanence."

Vine Deloria also favored an enhanced direction for education, and he went further to suggest that we should overcome the intellectual barriers that were imposed by the respective academic disciplines that informed Western rationalist epistemologies. Deloria wrote:

> We are actually in the midst of a "Dark Age" of intellectual activity. The Darwinian-Freudian-Marxist synthesis that has dominated the century has long since come apart but Americans refuse to admit it. We have a duty to move beyond it—ethic demands of personal integrity require it—but I see almost no one willing to undertake such a task—or even nibble at the edges of the current synthesis to begin a critique.[60]

In short, David Getches and Vine Deloria both recognized that the economic lens that fueled European colonialism and westward expansion in the United States now cripples our effort to deal effectively with the challenges of the future. If the foundational principles of federal Indian law, which require justice between nations, are conjoined with the emerging principles of indigenous rights as a matter of international law, we may have the opportunity to expand our understanding of how to live on the lands of the Colorado Plateau. I invite us to consider the narratives that ought to guide us on this journey, including our understanding of sacred places, the ancestral

60. Vine Deloria, Jr., *Thinking in Public: A Forum*, 10 AM. LITERARY HIST. 1, 25 (1998).

connections to territory, and the right of future generations to experience the beauty and power of these unique lands. I invite us to adopt a broader understanding of what it will take to "adapt" to the challenge of climate change on the lands of the Colorado Plateau, and how our various epistemologies will either promote adaptation or destroy our ability to adapt. And, finally, I would invite us to describe the philosophies that will inform our journey. Are we going to limit ourselves to the mechanistic, scientific, and economic models that have informed "development" as it exists today? If so, our ability to adapt will be conditioned by its economic feasibility, as we currently assess those models. Or will we finally transcend those limited notions of our relationship to these lands and understand the vibrant, spiritual essence of a sacred landscape? Where the land is damaged, we are damaged. Where the land needs healing, it is our obligation to ensure that it is healed.

Robert Yazzie, the eminent former Chief Justice of the Navajo Nation Supreme Court, wrote that "Navajo concepts of justice are related to healing because many of the principles are the same."[61] Chief Justice Yazzie described the fundamental law of the Navajo People as "something that is absolute and exists from the beginning of time," and which was given to the Navajos by the Holy People "for better thinking, planning, and guidance."[62] The system that Chief Justice Yazzie describes links the destiny of human beings to each other and to the land in a principled way. The principles are important because they identify when harm has occurred, and they also help reveal what is necessary to set things right. At the heart of the matter is the observation that all transgressions require correction, whether the consequences of the act are intended or not.[63]

To understand these ethical constructs as a system of law is pivotal to the utility of the principles as a mechanism to achieve intercultural justice. As a matter of American constitutional theory, "religion" cannot come into the public sphere as "law." In fact, religion often dominates American politics, as demonstrated by the continual outcry against

61. Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. REV. 175, 180 (1994).

62. *Id.* at 175.

63. *Id.* at 188 (noting that "[t]here are always consequences from wrongful acts" and that "harm must be repaired").

women's reproductive rights as well as the position that gay partners ought to have a right to marry.[64] Thus, religion has a profound impact upon the law because of its influence on American politics. However, the formalistic view that religion must be separated from the "law" poses a continual challenge for Native peoples seeking to protect their sacred sites on public land and removes an entire category of knowledge from public policymaking. Yet if the essence of a human life has a sacred dimension, as most would agree, then we must be very concerned about our collective future within a society that does not allow us to acknowledge spiritual values or spiritual harms. In fact, Chief Justice Yazzie also observed that many social problems on the reservation today, including domestic violence, substance abuse, and criminal activity, all share a common origin, which is "loss of hope."[65] Chief Justice Yazzie described the loss of self-respect and attendant loss of hope as a "disease of the spirit."[66] Without healing this disease, it would be difficult to overcome the harms caused by these social problems.

We have only to look at the social indicators throughout the United States to understand that the problems noted by Justice Yazzie are commonplace in communities throughout the country. They are not unique to reservation communities. Is it possible that, as a global society, we are experiencing a loss of hope? The Occupy Wall Street movement suggested a profound degree of disaffection with American capitalism, and the various political extremists that have dominated the media tend to promote an equal degree of doubt that elected officials have the best interests of Americans at heart. Many Americans think it is hopeless to do anything to avoid climate change or to secure a better life for the future generations to come. Contrast this dismal picture with the sense of inspiration and renewal that we experience when we come to places like the Grand Canyon and other national parks. These are the places that many people return to year after year as a means of renewing their spirits and witnessing something greater than the limitations of an ordinary life. I think that David wanted us to

64. *See, e.g.*, *California Ban on Same-Sex Marriage Ruled Unconstitutional*, ARIZ. REPUBLIC (Feb. 7, 2012), http://www.azcentral.com/arizonarepublic/news/articles/2012/02/07/20120207ruling-california-gay-marriage-ban-due-today.html?nclick_check=1.

65. Yazzie, *supra* note 61, at 177.

66. *Id.*

remember that this sacred landscape embodies a philosophy of hope and a set of principles that foster sustainability, permanence, and life itself. To me, that is the central legacy of his scholarship.

CONCLUSION

This magnificent conference has illuminated the tapestry of a remarkable life, making apparent the many aspects, commitments, and qualities David possessed in a way that is now visible to all of us who knew him, as well as those who only knew of him. It has been a privilege to honor David Getches, his life, his words, his family, and his work. Thanks to all of you who have come to this place in a spirit of love for this incredible man, who was our colleague and our friend. Together we have shared our experiences, our stories, and our memories, and in this moment, David Getches's legacy lives on. Indeed, his legacy will thrive in our own determination to remember and to make sure that others remember what he gave to us: a philosophy of hope and a landscape of principle.

HERO FOR THE PEOPLE, HERO FOR THE LAND AND WATER: REFLECTIONS ON THE ENDURING CONTRIBUTIONS OF DAVID GETCHES

CHARLES WILKINSON*

This is a complicated world and as a community we need to pause and take time to celebrate our successes, be inspired by them, and understand and learn from them so that we can apply them to other situations in the years to come. David's accomplishments and the way he led his life are quintessential examples of this. My aim is to present one person's perspective on David's professional career. I have worried about the title of this talk, with its identification of a "hero," for fear that some might wonder if it would stray off into hero worship. But this is a factual matter. There are heroes, and the question is whether a particular person has earned such standing as a matter of fact. At the memorial service for David that overflowed the law school's large, open courtyard back in August 2011, Billy Frank, Jr., the Nisqually tribal leader from the Puget Sound area, was one of the speakers. Billy told all of us, in a halting voice, that "David is our hero."[1] His statement was based on facts, facts I will return to, and I think that Billy Frank's belief, and mine also, is that not only are there heroes, there are also some heroes with a capital *H*.

In the early afternoon of June 9, 1971, I drove across the high and graceful San Francisco-Oakland Bay Bridge on a sunny, magical Bay Area day, headed for a job interview in Berkeley. I had been given the address and the assurance that the office was easy to find—"It's right above the bagel bakery."

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* Distinguished Professor and Moses Lasky Professor of Law, University of Colorado Law School. This essay was prepared for the University of Colorado Law School symposium *A Life of Contributions for All Time: in Honor of David H. Getches* that took place in April 2012. I give thanks to Julia Guarino, Travis Bruner, Cynthia Carter, Dennis Donald, John Echohawk, Bruce Greene, and the editors of the University of Colorado Law Review for their help on this article.

1. Billy Frank, Jr., Chairman, Nw. Indian Fisheries Comm'n, Remarks at the Memorial Service for David Getches, Boulder, Colo. (Aug. 11, 2011) [hereinafter Frank Remarks], *available at* http://lawweb.colorado.edu/events/mediaDetails.jsp?id=3450 (last visited Aug. 25, 2012).

There I met with Bruce Greene, Joe Brecher, John Echohawk, and David Getches, the blue-jeaned attorneys of a fledgling law firm, just a year old, the Native American Rights Fund ("NARF"). I was swept away, and still am, by their idealism, terrific lawyer skills, docket of important cases, and, surprisingly, the organized, business-like administration of the nonprofit firm. This was plainly due to David. I learned not only that the firm was about to move to Boulder, Colorado, but that David had obtained a grant from the Ford Foundation for eight—*eight!*—more lawyers.

As I drove back over the Bay Bridge at the end of the day, my heart—in the end that is what you look to in decisions like this—sang over the possibility of leaving my San Francisco firm to join NARF if an offer came through. It was the combination of a compelling cause and the seeming stability, the solidity of NARF despite its youth. As I soon learned, it all came back to David, the director.

And on my drive back I kept thinking that there was something else about him. What was it? What *was* it? Ahhh, yes . . . . It was his lustrous, mahogany-rich hair, dropping down neatly to his shoulders in perfect page boy fashion.

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On my very first day in the Boulder office that fall, I came face-to-face with a metaphor for David's administrative approach and high standards. "Jen Evans! What are you doing here?" Jen was the super office administrator for Lewis & Roca, the Phoenix law firm I had worked for several years before. "Well, Mr. Getches called me and asked if I could take a two-week leave and come up and set up all the administrative systems—filing, calendaring, finances, and so forth. I've just loved working with the staff here. I almost hate to go back."

In just two years, David made NARF into a mature, full-blown law firm substantial in every way, with fourteen attorneys and an office in Washington, D.C. He negotiated a two-year option to purchase the building on Broadway in Boulder and the building next door as well. At the time, the idea of a nonprofit legal services firm owning its own office building was unheard of. Still, he exercised both options and, forty years later, those buildings still house the main NARF offices and the National Indian Law Library.

Other formative issues came up at the very beginning. The

Ford Foundation balked at NARF's proposals for a strong Indian preference in hiring and an all-Indian Board of Directors. The Ford program officer was convinced that Indians were not yet ready for so much responsibility. David dug in his heels, arguing that, while it was true that there were few Indian lawyers at the time, the program should aim for the best and take risks in close calls. As for the Board, nonlawyers could serve on it as well as lawyers, and the Board had to be Indian to pass muster in Indian country. This was a matter of self-determination. The grant hung in the balance for a while, but Ford finally relented.

Then there was the passion for the cause. A fierce commitment to bringing tribes the highest quality legal representation was palpable—it filled up the building. This was a moral crusade, not a job. The passion for the work was intensified by the newness of the project. Law in America had never before seen this kind of law firm for Indians. To be sure, this was not all David's doing, but he inspired the staff at firm meetings and in individual discussions. And talk about high standards: he embraced them and displayed them by his example, day in and day out, then and for four more decades.

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As David carried out his duties as executive director, he was an active practicing lawyer handling several large matters. Number one on the list was serving as lead counsel in *United States v. Washington*,[2] soon to be known as the "Boldt Decision" after District Judge George Hugo Boldt who handed down the central ruling in the complex and historic litigation.

By the late 1960s, the so-called "Salmon Wars" had been waging since the end of World War II, with the intensity steadily rising. The United States negotiated treaties with the tribes of northwest Washington in the mid-1850s, with the tribes reserving the exclusive right to take salmon on their reservations and, as well, the right to harvest off-reservation at their traditional sites "in common with all citizens of the territory."[3] As the population (and the number of commercial

2. 384 F.Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

3. The treaties and affected tribes are cited at *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 661–662 (1979).

and sports fishers) surged, the state cracked down on off-reservation Indian fishing ever more severely.[4]

There was plenty at stake: the three biggest industries in the region were timber, Boeing, and salmon. State officials and non-Indian fishing groups denied the continuing validity of the treaties and branded the tribal treaty fishers—who insisted on fishing under the treaties and their own laws and not state seasons, bag limits, and gear restrictions—as poachers and renegades. The state enforced its position with tear gas, billy clubs, and high-tech crowd control equipment, including high-speed power boats. Between 1945, when he was fourteen, and 1974, Billy Frank endured some fifty arrests and confiscations of his nets, canoes, and catches.[5] This was not done to preserve the runs—there were no instances of tribal fishers' wasting fish. Rather, the state was acting purely on behalf of its non-Indian constituents who wanted to eliminate the three or four percent of the total harvest that tribal fishers managed to harvest in between the arrests.

Northwest tribes refer to themselves as "Salmon People." Traditionally, the fish were a mainstay in the Native way of life, providing large parts of Indians' diets (one-quarter to one-third). They had a spiritual relationship, with tribes holding "first salmon ceremonies" in the fall to welcome back the runs once again. The ties to the runs continued. Billy Frank explained that "[w]e lived with the salmon. He'd tell us about the weather—the droughts, the floods. If he came back at the normal time, that told us everything was normal. If he came early or late, you'd know something was changing."[6] The United States Supreme Court emphasized this comprehensive relationship in 1905, writing that the salmon "were not much less necessary to the existence of the Indians than the atmosphere they breathed."[7] Sid Mills, a Yakama resister at the time, reflected that "[t]here is no reason why Indian people should not be permitted to fish in the waters where these

4. For more information on the Salmon Wars and related issues, see TROVA HEFFERNAN, WHERE THE SALMON RUN: THE LIFE AND LEGACY OF BILLY FRANK JR. (2012); CHARLES WILKINSON, MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY (2000); MARY ISLEY ET AL., UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS (1970).

5. Interview with Billy Frank, Jr., Chairman, Nw. Indian Fisheries Comm'n, in Olympia, Wash. (Sept. 5, 1997).

6. Frank Remarks, *supra* note 1.

7. United States v. Winans, 198 U.S. 371, 380 (1905).

rights exist. There is no reason why Indians should spend their lives in the courts, in jail, or under the dominion of fear."[8]

In the exceedingly complex litigation that *United States v. Washington* and associated cases would become, David served as lead trial counsel for the several tribes; conceived of the argument that the tribal right "in common with" non-Indian fishers meant a fifty-fifty split; participated in convincing the Nixon White House to file "United States" against Washington (with the individual tribes then coming in as interveners) to gain the prestige of the national government on the tribes' side; presented the opening and closing arguments; and helped create a seamless relationship between the tribes and the United States. How seamless? Stan Pitkin, the United States Attorney for western Washington, gave the tribal attorneys the key to his office so they could spread out in Pitkin's conference room during evening work sessions. The final trial brief, a joint filing by the tribes and the United States, carried just one signature, "David H. Getches, for the Plaintiffs."[9] At this point, he was a full thirty-two years old.

Judge Boldt handed down his blockbuster 203-page decision on February 12, 1974, intentionally choosing Lincoln's birthday. The Supreme Court affirmed it in 1979[10] in a six-to-three decision, but Judge Boldt's opinion was the great moment in American law and history. The Supreme Court majority almost surely took note of his comprehensive, carefully supported opinion and his reputation as an eminent, conservative judge. The Boldt Decision belongs in the company of America's brightest emblems of justice with its respect for the rights of a small, dispossessed minority, its honoring of an ethic of promising, and its full and fair consideration of the relevant history.

Further, the Boldt Decision, which made several important rulings in addition to the fifty-fifty split, made all the difference in the real world. The tribes steadily increased their take up from the single digits to the 50 percent share guaranteed by the treaties. The northwestern Washington

8. Sidney Mills, *I am a Yakama and a Cherokee Indian, and a Man, in* RED POWER: THE AMERICAN INDIANS' FIGHT FOR FREEDOM 22, 26 (Alvin M. Josephy, Jr. et al. eds., 2d ed. 1971).

9. Plaintiffs' Post-Trial Brief, United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974) (No. 9213).

10. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979). This case was a collateral attack on Judge Boldt's decision in *United States v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974).

tribes, with their sovereignty reaffirmed in such dramatic fashion, quickly established or greatly expanded fisheries management systems with scientists, codes, enforcement capability, and tribal courts. They developed commercial operations. Collectively, they founded the Northwest Indian Fisheries Commission as a substantial organization for research, policy development, and relations with federal and state agencies and legislatures.[11] For tribes across the country, it was inspiration of the first order right when the modern Indian revival was beginning to pick up speed. It was a time when the heroes came forward.

David took on several projects at NARF other than *United States v. Washington* and his duties as director, but the following are notable because they reflected how, from his vantage point as director of the national Indian legal services firm, he could identify the most acute needs for legal services among the country's Native communities. He gave special attention to Alaska Natives and Native Hawaiians, have-nots in the extreme in the struggle for sovereignty.

The Alaska Native Claims Settlement Act of 1971 ("ANCSA"), supposedly designed to resolve land claims fairly, is often called "termination in disguise."[12] The Native leadership did manage to achieve a grant of forty-four million acres (two-thirds the size of Colorado) and a financial payout. But Indian fighters in Congress exacted a heavy price: the lands would be owned not by sovereign Native governments but by twelve Native regional corporations and over two hundred village corporations, all chartered under state law. Further, the ANCSA terminated all hunting and fishing rights of these Native resource-based communities. In one case, David successfully sued to overturn a decision by the Bureau of Indian Affairs ("BIA") and vindicate the right of nonresident Alaska Natives to form a "13th Regional Corporation" to receive ANCSA distributions, invest them, and distribute the dividends to shareholders.[13]

He also represented Alaska Natives in a true *tour de force.* Inupiats have always lived on the North Slope of Alaska, the

11. For information regarding the Northwest Indian Fisheries Commission, see generally NW. INDIAN FISHERIES COMM'N, http://nwifc.org/ (last visited June 21, 2012).

12. For more on ANCSA and Alaska Native rights, see DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS (2d ed. 2002).

13. Alaska Native Ass'n of Oregon v. Morton, 417 F.Supp. 459 (D.C. Circ. 1974); CASE & VOLUCK, *supra* note 12, at 160.

frigid land above the Arctic Circle. As of the early 1970s, with the forced move into the cash economy and a foreign culture, their economic and social circumstances were dire. There was not a single hospital. As bad or worse, of the five schools, only the Barrow School reached tenth grade. Dropout rates were off the chart, and the children who wanted to get an education past eighth or tenth grade had to go to BIA boarding schools in Anchorage or the lower forty-eight states. How could a young person possibly make her way in this new and chaotic world?[14]

With the mammoth oil strikes on the North Slope at Prudhoe Bay in the 1960s, Inupiat leaders saw a path. In the early 1970s, they began circulating a petition to establish a borough under Alaska law. Boroughs—invented in old England but alive and well in modern Alaska—can tax. The state Local Boundary Commission held field hearings in Barrow and was blown away by the Natives' testimony. At an Anchorage hearing in 1972, the commission ratified the petition, giving the go-ahead. The oil companies were not amused.

The Natives called in David during the commission process, and he represented the new Borough when the seven oil companies sued.[15] The Superior Court upheld the Borough designation, and for the Supreme Court, David, along with the Alaska Attorney General's Office, briefed and argued the case for the new but still uncertain Borough. On January 16, 1974—just twenty-eight days before the Boldt Decision came down—the Supreme Court of Alaska unanimously ruled in favor of the Borough.[16]

What a difference it has made. Among many other things, the North Slope now has nine K-12 schools and the drop-out rate is just a few points above the national average of 7.4 percent.[17] No less an authority than *Parade Magazine* has

14. For more on the situation before the creation of the Borough and on the establishment of the Borough, see generally BILL HESS, TAKING CONTROL: THE NORTH SLOPE BOROUGH—THE STORY OF SELF DETERMINATION IN THE ARCTIC (1993); and David H. Getches, *The North Slope Borough, Oil, and The Future of Local Government in Alaska*, 3 UCLA ALASKA L. REV. 55 (1974).

15. *See* HESS, *supra* note 14, at 56.

16. Mobil Oil Corp. v. Local Boundary Comm'n, 518 P.2d 92 (Alaska 1974).

17. *See Fast Facts*, NAT'L CENTER FOR EDUC. STAT., http://nces.ed.gov/fastfacts/display.asp?id=16 (last visited Sept. 4, 2012) (National dropout rate of 7.4 percent); NORTH SLOPE BOROUGH SCHOOL DISTRICT, REPORT CARD 2010–2011, http://nsbsdbeta.schoolwires.net/cms/lib01/AK01001879/Centricity/Domain/38//ReportCards/NSBSD-REPORT-CARD-092611.pdf (last visited Sept. 7, 2012) (North Slope dropout rate of 11.3 percent). For more information on the North Slope Borough School District education statistics, see

called Mayor Edward Itta, whose government raises $250 million in tax revenues each year, "one of America's most powerful mayors."[18]

This is not your grandfather's borough. Stretching across some eighteen million acres of terrain, at once forbidding and spectacular in terms of sheer beauty and wildlife, the North Slope Borough is bigger than thirty-eight states and is the largest local government in the United States and probably the world.

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When David and John Echohawk went out to Hawaii at the behest of traditional islanders, they found an accelerating revival as on the continent, but the particulars differed. Hawaiians had no political relationship with the United States ever since the forced overthrow of Queen Liliuokalani in 1893. The grievances were many, including the continuing anger regarding the overthrow of the beloved queen; access to spiritual places on high Mauna Loa, other sites in the national parks, and on sacred Kahoolawe, made into a Navy bombing range; and water rights to sustain the taro that produced poi, a staple both for the diet and the spirit.

From the many meetings emerged a consensus for a legal institution to meet some of the needs and help coordinate responses to others. A nonprofit legal services firm, the Native Hawaiian Legal Corporation ("NHLC"), was born in 1974 (its original name was the Hawaiian Coalition of Native Claims). The longtime director of NHLC Mahealani Wendt reports that David and John "literally mentored the Native Hawaiian founders" on matters such as funding, attorney recruiting, and priority setting, "so that it could be the 'Hawai'i NARF.'"[19]

North Slope Borough School District, EDUCATION.COM, http://www.education.com/schoolfinder/us/alaska/district/north-slope-borough-school-district/ (last visited June 6, 2012).

18. *The Mayor at the Top of the World*, PARADE MAG. (July 18, 2010), http://www.parade.com/news/ 2010/07/18-the-mayor-at-the-top-of-the-world.html.

19. Email from Mahealani Wendt, former Dir. Native Hawaiian Legal Corp., to author (Apr. 3, 2012) (on file with author). For information on Getches's other work for Native Hawaiians, see Melody Kapilialoha MacKenzie, *Ka He'e Director's Column: In Honor of David H. Getches*, KA HE'E (Nov. 2011), http://www2.hawaii.edu/~nhlawctr/November%202011%20Newsletter/1_Directors_Column.html (Ka He'e is the Online Newsletter for Ka Huli Ao Center for Excellence in Native Hawaiian Law at the University of Hawaii at Mānoa William S. Richardson School of Law in Honolulu, Hawawii).

Today the NHLC remains a stalwart for Native Hawaiians.[20]

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Almost from the beginning of NARF there was a widely held belief, which David himself held, that an Indian should head up the national Indian law firm. David and John, neither being ambitious to be the director but both fully willing to serve when needed, worked closely together to develop a smooth transition. By 1973, it was time, and David stepped down. He continued on as a staff attorney for three years before forming a partnership with Bruce Greene. He also began teaching at the law school, first as an adjunct, then as a visitor. In 1979, he joined the faculty fulltime as an associate professor.

Admittedly, sometimes the excitement of that heady era overflowed a bit. In 1979, David and I were finishing up our Indian law casebook, the first book for each of us.[21] He flew out to Eugene so we could go through the galleys together in my office at the law school. Without going into detail, let us just say that we agreed on most matters relating to the book but not all matters, including how to write a simple declarative sentence. We worked way past dinnertime and finally ordered in two medium pizzas. A contentious point came up. Voices were raised. Personal insults, some not profane, followed. All of a sudden, one of us—I honestly do not remember which—found that editing had become more difficult due to the slice of pizza that had been firmly implanted on his face. The food fight was on, to the great disadvantage of hair, clothing, and the office walls and carpet. With that done, we cleaned up in the restroom, ordered two more pizzas, and returned to our editing in good cheer. The wonder and saving grace of it was that beer, of which plenty was at hand, was never invoked.

Food fights aside, David dove into his teaching and scholarship. He quickly became known as a willing and productive member on faculty committees. Over time, he also built a broad-based set of relationships in the outside world of western resource management that blended with his research and teaching and complemented his many contacts in Indian country. He came to know many of the state engineers; the

20. For more information on the NHLC, see NATIVE HAWAIIAN LEGAL CORP., http://www.nhlchi.org/ (last visited Sept. 6, 2012).

21. The current version is DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS & MATTHEW L.M. FLETCHER, CASES AND MATERIALS ON FEDERAL INDIAN LAW (6th ed. 2011).

powerful heads of state water agencies; Interior Department officials; environmental leaders; tribal leaders; practitioners in the natural resources bar; colleagues in other disciplines at the University of Colorado ("CU") and beyond; and western governors, senators, and other political leaders. He learned from them and was credible in their eyes. Two of his greatest assets, in addition to just knowing a lot, were his humility and his transparency: people thought, "This guy has a passion for reform, but he listens to me and respects my views."

One core area of David's expertise was the Colorado River Basin that drains parts of seven states, serves some thirty million people, flows through spectacular southwest country including the Grand Canyon, and is home to twenty Indian tribes. He spoke and wrote widely on the subject, and, characteristic of all his western resources work, his approach was both practical and philosophical. He knew the geography cold, the natural landscape—the tributaries, wildlife, vegetation, the flows, the deepest canyons—and, as well, the built landscape—the mines, power plants, water diversions, tunnels, and farmland. At bottom, he explained—respectfully—that traditional water law continues to have virtues but that it needs to be reformed in areas such as conservation and instream flows, free from diversion.[22] On a more theoretical level, David urged a move to a new basin "governance" designed to reduce the current, far-ranging federal authority.[23]

The Colorado River was probably preeminent, but David was seen quite early on as an observer of great stature on western resources issues across the board. A person who felt obligations to act, he brought his accumulated knowledge—his wisdom—to the classroom and the journal pages, but he also felt obligated to contribute directly to the making of public policy.

This was an exciting, transformational time in American law. When David went to law school in the mid-1960s, law was mostly a field of private law—disputes and negotiations over money or property between citizens and often businesses. Soon, building on *Brown v. Board of Education*, the civil rights movement and the "Great Society" legislation of the Kennedy

22. *See, e.g.*, David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States' Role?*, 20 STAN. ENVTL. L.J. 3 (2001).

23. David H. Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a New Institution*, 68 U. COLO. L. REV. 573 (1997).

and Johnson years, public law was coming on strong. NARF, of course, is illustrative.

David believed profoundly in the worth of institutions. For him, federal, state, and nonprofit offices can be the best breeding and proving grounds. When done right, institutions can inspire people, help them reach, and bring out the best in them. They can be main engines of social progress.

The nonprofit organizations in the fields closest to David's heart—Indians, water, and the public lands—all boomed during the 1970s. Now, at the beginning of the 1980s, they remained at once dynamic and also in need of shoring up the foundations after such rapid growth. There was another aspect to this. Much of the progress had come at the national level. David was a Westerner and, ever since his days and nights in the Sierra Nevada as a boy, an outdoorsperson. The creation and growth of robust western institutions had lagged behind, in part because of greater fundraising potential at the national level. At the same time, and critically, the west had distinctive, pressing issues due to the aridity, Indian country, high percentage of federal lands, and explosive growth since World War II.

A consistent thread through the last thirty years was David's dedication—as already evidenced by his roles in founding NARF and the Native Hawaiian Legal Corporation—to nonprofits, especially institutions that are environmental, Indian, and Western. It is necessary to provide details here because describing his work with nonprofits generally, without the detail, would not properly raise the real question: Has anyone else ever done this much?

In 1982, David and fellow faculty member Jim Corbridge founded the Natural Resources Law Center here at the law school that, for three decades, has produced valuable research and annual conferences that have been main forums for improving western water and land laws. In 1989, he began serving a ten-year stint as the first board chair of the LAW Fund (now Western Resource Advocates). From 1989–1990, on a sabbatical in Costa Rica, he helped found and served as a board member for CEDARENA, an environmental law nonprofit, and Derecho Indígena de Talamanca, an indigenous-rights law nonprofit. Both were the first in those fields in that country.[24] In 1991, he joined the Board of Trustees of the

24. For more information on the founding of the two organizations, see

Grand Canyon Trust and served a seven-year term as board chair. He was a member of the Board of Trustees for the Rocky Mountain Mineral Law Foundation continuously beginning in 1991. He served on the American Rivers' Scientific and Technical Advisory Committee beginning in 1991. The Trust for Public Land appointed him to its National Advisory Board in 1991. In 1999, he joined the boards of two leading national environmental organizations—The Wilderness Society and Defenders of Wildlife. In 2001, he became a member of the inaugural board of the Colorado Water Trust. In all cases, unless otherwise mentioned, he remained on these boards until his passing last year.

As people in those organizations know, David was a premier board member—as good as they get—hardworking, creative, and knowledgeable. He was a bear on budgets, pressed for efficiency, insisted on using mission statements to keep the workload focused, volunteered for the difficult work of searching for new executive directors when necessary, and blessed the organizations with his extraordinary strategic sense for public issues, his contacts, and his talent for fundraising.

And know that he loved these nonprofits and their work. In 2003, he left the Grand Canyon Trust board because of term limits. At his last meeting, he wanted to stay past the end of the meeting to walk slowly through the Trust's new, handsome, and green building just north of Flagstaff and the ponderosa pine forest outside. I said it was about time to head for the airport. He said, "OK," and we started walking back to the car. Then I realized he was not next to me. I turned around, and he was sobbing convulsively, overcome by the sadness of leaving the Trust behind.

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David applied for his first two jobs after law school as an associate in a San Diego law firm and as a staff attorney with California Indian Legal Services ("CILS") (NARF was soon

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CEDARENA—The Environmental and Natural Resources Law Center, 3 Colo. J. Int'l. Envtl. L. & Pol'y 615 (1992). For more information on CEDARENA, see CEDARENA, http://www.cedarena.org/003/? (last visited Sept. 6, 2012). Derecho Indigena de Talamanca continues as a project of CEDARENA and has been inactive in some years. CEDARENA, *Proyectos*, http://www.cedarena.org/003/?i=4 (last visited Oct. 9, 2012).

spun off from CILS). Ever since, even with the directorship at NARF and the deanship, jobs always came to him. This included, to my knowledge, the many nonprofit board positions. His lack of personal ambition fascinated me. He invariably had future projects in mind to do in his current position and made sabbatical plans. But he never looked out over the landscape for a new position.

And so it was in 1983. Tom Brown, former interim dean of the law school, knew that Governor Dick Lamm was looking for a new Executive Director of the Colorado State Department of Natural Resources ("DNR"). Brown suggested David to Roy Romer, the state Treasurer who was overseeing the search. Romer ended up recommending David for the job, and Lamm offered him the position.

David served for four years until Lamm's term ended in 1987. The DNR was a busy place at the time. The agency, with twelve hundred employees, was one of the largest state natural resources agencies in the west.[25] He loved his tenure there—indeed, he loved every job he ever had.

He took on the seemingly intractable Animas-La Plata project in southwestern Colorado—an old-style reclamation project designed to pump water uphill from the Animas River in Durango to create a reservoir for supplying water to irrigators, the two Ute tribes, and planned residential development west of Durango.[26] The irrigators, tribes, environmentalists, and a citizen's group opposing the subsidized project on fiscal grounds were all far apart and negotiations had stalled. David managed to bring the parties to the table, and a settlement, based on a project downsized by two-thirds, finally emerged in 1986.[27] While this settlement was later refined further to address additional Endangered

25. Interview with Dennis Donald, former Deputy Dir. of the Colo. Dept. of Nat. Res., Boulder, Colo. (Mar. 30, 2012) [hereinafter Donald Interview] (notes on file with author).

26. *See generally Animas-La Plata Project*, U.S. DEP'T OF INTERIOR, BUREAU OF RECLAMATION, http://www.usbr.gov/uc/progact/animas/ (last visited June 5, 2012); *Animas-La Plata Project*, APPLEGATE GROUP, INC. (Aug. 2009), http://www.applegategroup.com/articles/animas-la-plata-project; *Animas-La Plata Project Collection*, FT. LEWIS C., CENTER OF SW. STUDIES, http://swcenter.fortlewis.edu/finding_aids/ Animas_La_Plata_Project.shtml (last visited June 21, 2012).

27. Donald Interview, *supra* note 25; *Animas-La Plata Project: Implementation of the Colorado Ute Settlement Act Amendments of 2000*, U.S. DEP'T OF INTERIOR, BUREAU OF RECLAMATION, http://www.usbr.gov/uc/progact/animas/overview.html (last visited July 2, 2012).

Species Act concerns, and while it is hard to imagine any resolution to the tangled Animas-La Plata controversy that could come even close to pleasing everyone, the ultimate settlement did eliminate a toxic conflict that had been plaguing the southwestern Colorado community since the 1960s.

Another major issue at the DNR was making the critical decisions, along with two other cabinet-level officials, on which sites would be cleaned up under the CERCLA Superfund program. The final list included the Rocky Mountain Arsenal near Commerce City and numerous old mining sites, two on the Arkansas River and one on Clear Creek.[28] Rather than delegate the analysis to staff, David burned the midnight oil to go through the voluminous files himself.[29] In addition to ruling on specific issues, David used the office as a bully pulpit, giving talks across the state. Water, contentious though the subject is in Colorado, was his favorite topic.

I should mention two other decisions, one he would change and one he would not. Governor Lamm asked him to head up the United Way Campaign for all state offices. David, as always, took the assignment seriously and creatively designed a lottery system to give employees an incentive to sign up and give generously. He should have read the state lottery laws more closely. The Secretary of State did.[30] The other decision was his choice, when giving an after-dinner address at a Cattlemen's Association annual meeting on the Western Slope, to order—he was a vegetarian—fish instead of beef. This may have happened more than once.

I spoke with Dennis Donald, David's Deputy Director at the DNR, about David's DNR years. In a reflective moment, Dennis offered this: "David led by example. He was so earnest. He always wanted to do the right thing. You never wanted to disappoint him because he was your hero."[31]

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28. *See Colorado Site Locator*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/region8/superfund/co/index.html (last visited Aug. 25, 2012) (listing all Colorado Superfund cleanup sites, including California Gulch and Lincoln Park, which are the Arkansas River sites).

29. Donald Interview, *supra* note 25.

30. *See* Bill McBean & Cindy Parmenter, *Official Unruffled in Raffle Row: Secretary of State May File Charges Against Resources Director*, DENVER POST, Oct. 27, 1984, at 1A; Bill McBean, *Meyer Says Raffle Still Breaks Law*, DENVER POST, Nov. 1984, at 6A.

31. Donald Interview, *supra* note 25.

The experience at the DNR of seeing resources law and policy from the inside, and actually making it, left a deep and lasting imprint on David's scholarship. Now he knew that water, and especially the Colorado River, was, along with Indian law, his greatest public policy and academic passion. The DNR propelled him. Starting in 1985, when he was still in government service, over a four-year period he authored no fewer than six articles and two papers on water.[32] They are rich in his first-hand knowledge of place, conviction of the need for reform, and experience with the agencies that grind out the real law through the granting and administering of water rights.

One of the many places where David's stature made a mark was in the so-called Long's Peak Report, entitled *America's Waters: A New Era of Sustainability*.[33] With Bill Clinton's election in 1992, David, collaborating with others, including Larry MacDonnell, director of the NRLC, obtained spur-of-the-moment funding from the Ford Foundation to produce, in a matter of weeks, a comprehensive report to the new administration putting forth recommendations on water law and policy.

A call went out to potential participants, and a group of thirty experts from around the country put aside other obligations and came to a lodge in Allenspark, up on the Peak-to-Peak Highway, to put together such a report. You can call it a political document, and in truth, most of the participants were Democrats. But you can also call it a focused, well-thought-out program for moving away from excesses in a system that, in many respects, had outlived its usefulness. The

32. The following articles and papers were authored by David H. Getches: *Controlling Groundwater Use and Quality: A Fragmented System*, 17 NAT. RESOURCES L. 623 (1985); *Competing Demands for the Colorado River*, 56 U. COLO. L. REV. 413 (1985); *Legal and Administrative Framework: Is it Adequate?*, *in* COLO. WATER ENG'G AND MGMT. CONF. INFO.: FEB. 17–18, 1987 (Colo. State U., Dep't of Civil Eng'g ed. 1987); *Water Planning: Untapped Opportunity for the Western States*, 9 J. ENERGY L. & POL'Y 1 (1988); *Management and Marketing of Indian Water: From Conflict to Pragmatism*, 58 U. COLO. L. REV. 515 (1988); *Water Use Efficiency: The Value of Water in the West*, 8 PUB. LAND L. REV. 1 (1987); *Learning From the Colorado River Basin Experience*, *in* BOUNDARIES CARVED IN WATER: 5 MO. RIVER BASIN SERIES 1 (Northern Lights Research and Educ. Inst. ed. 1988); and *Focus: Clean Water Act's Section 404*, 60 U. COLO. L. REV. 685 (1989).

33. LONG'S PEAK WORKING GROUP ON NAT'L WATER POL'Y, NAT. RESOURCES L. CENTER, AMERICA'S WATERS: A NEW ERA OF SUSTAINABILITY (1992), *reprinted in* 24 ENVTL. L. 125 (1994).

Long's Peak Report had its critics in the state legislature, and Dean Gene Nichol, accompanied by Larry MacDonnell and Jo Clark, had to justify the effort at a committee hearing in Denver. But the report articulated a modern approach to water and became a respected guide in the Secretary's office, the Bureau of Reclamation, and other reaches of the Interior Department.

Interior Secretary Bruce Babbitt had discussions in early 1993 with David about joining the administration, but the timing did not work out. Then, in 1996, Babbitt asked David to act as a special consultant to advise the Secretary on departmental initiatives during the second term. Babbitt was not assuming that there would be a second term, just making sure that he would have plans in place in case there was. David put in quite a lot of time on that report, making several trips to Washington to interview departmental employees. David thrived on the work, and Babbitt liked the report.

Shortly thereafter, at the end of the first Clinton administration, David came under active consideration for an assistant secretaryship in the Interior Department. It was unclear whether the position would be filled by the Secretary or the White House. Babbitt nominated him and sent his name over to the White House, but Washington is the place where great ideas go to die and, for reasons not fully understood, this never came to pass.[34] David would have welcomed the chance to make a difference in the nation's capital, but he and Ann were quite happy to continue their established lives in Boulder.

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Judging deans is a precarious enterprise because there are major and sometimes controlling influences external to the law school; because moving parts such as statistics bounce around from year to year; because there are intangibles as well as tangibles; and because of blind luck, bad and good. Acknowledging all of that, I believe that David was a great dean, a transformational dean, and I believe that most people in the broad law school community, including alumni, agree with that. These are some of my reasons.

The faculty, perhaps the group with the most information

34. The author has had several discussions over the years with former Secretary Babbitt, former Assistant Secretary of the Interior for Fish, Wildlife, & Parks Don Barry, and David H. Getches concerning these events.

and long-range perspective, graded David generously. In his last evaluation in 2008, the Boulder Faculty Assembly analyzed the data from the law school faculty questionnaires and concluded that the faculty evaluations were "very high."[35] The report added that, compared with the other deans being assessed that year, David "was rated higher . . . on every item . . . , and for many items, significantly higher."[36]

David decided to announce his retirement in August 2010 at the annual faculty retreat held on the Friday before the first day of classes. The faculty was unaware that the announcement was coming. Typical of David, he did not want to make a big deal out of this, to make the retreat be about him. Just before lunch, he basically began mumbling quickly and barely audibly. Among the mumbles were the words "step down next June." At that point he quickly tried to turn to the logistics of where lunch would be served when former dean Hal Bruff rose and shouted, "Thank you, David, for all you have done for this law school." The whole faculty stood and issued an all-out standing ovation—rolling, rolling, rolling on, on and on. To my memory, it was the longest such honoring I have experienced. Law faculties, it should be noted, are not exactly uncritical, soft audiences.

There are numerous positive numbers. David was able to convince the central administration to support many additional faculty lines, with the result that we were able to bring on eighteen new faculty members, including seven diversity hires. The endowment went from $26 to $46 million, student scholarships from $561 thousand to $3 million, student diversity from 17 percent to 22 percent, and the student-faculty ratio from 13:1 to 11.5:1. LSAT scores in our highly competitive entering classes rose from 162 to 164, a significant increase.[37]

Two numbers are not positive. Tuition has gone way up to heartbreaking levels. It is not an excuse to attribute that to the legislature's dramatic reduction of funding for higher education. In response, David took many measures to provide

35. UNIV. OF COLO. AT BOULDER, BOULDER FACULTY ASSEMBLY ADM'R APPRAISAL COMM., REPORT CONCERNING DAVID GETCHES, DEAN OF THE SCHOOL OF LAW, SPRING 2008 7, *available at* http://www.colorado.edu/FacultyGovernance/committees/REPORTS/getches08.pdf (last visited June 5, 2012).

36. *Id.* at 8.

37. *See* Dayna Bowen Matthew, Former Vice Dean, Univ. of Colo. Law School, Remarks at the Memorial Service for David Getches, Boulder, Colo. (Aug. 11, 2011), *transcript available at* http://www.colorado.edu/law/faculty/getches/speeches/MatthewDayna.pdf (last visited June 21, 2012).

student scholarships. The second bad number is our rating *vis-a-vis* other law schools that, as measured by the U.S. News & World Report, sits at forty-fourth.[38] That rating system has all manner of arbitrariness and vagaries, and David aggravated the situation by insisting that our numbers be reported honestly.

David beefed up the administrative staff in several areas, including fundraising. He asked much of the staff, and the staff responded out of respect for him. Compared with other administrators, he disciplined and criticized staff less and also praised them less. I wish he had done more of both.

These days deans have so many external responsibilities that it is hard to stay on top of relationships in the building. David probably did as well as anybody on this, simply because he was so diligent, but he did especially well with students. He hated the tuition increases and had no higher priority than student financial aid. In formal ways, he put a lot into his annual speeches to entering students and departing graduates. He went to as many student meetings as possible, usually finding ways to emphasize the imperative of absolute, unwaveringly high ethical standards in all of their relationships—one aspect being the ethical obligation to do pro bono work. They rightly saw him as a person of great dignity and honor, an image of how to do it right.

Speaking of intangibles, what about the dinner parties at the Getches home? It is true, not trite, that David and Ann were a team—she was a valued confidant and advisor. Ann happens to be a great cook, but the larger point is that she is an architect of hearty and memorable evenings. During his deanship, Ann and David hosted almost exactly one hundred dinners, an average of one per month. Sometimes out-of-town guests and Colorado notables were there. The ultimate gift from the celebratory atmosphere and engaging conversation, covering both personal matters and issues of the time, though, was to enrich the sense of community at the law school. As a demonstration of the value of these unique evenings, Ruth Wright has made a generous contribution to the law school so that Ann can continue with these salons.

Then there is the Wolf Law Building. A very large number of people from many different walks of life contributed to it, but

38. *Best Law Schools*, U.S. NEWS & WORLD REPORT, http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings/page+2 (last visited June 21, 2012).

David was far and away the force that made the building happen. Hal Bruff, the previous dean, made major contributions by completing the initial fundraising and working hand in glove with the architects to create the new law school's classic architecture, which is more faithful to the true, traditional Charles Klauder campus architectural style than any CU building since World War II. But in the cruelest turn, the legislature pulled the plug on promised state funding virtually on the eve of breaking ground.

That is how it stood when David came in. He conceived of the radical idea of having the university students themselves—all twenty-nine thousand of them—contribute four-hundred dollars apiece each year for twenty years to pick up the slack for the state in order to fund the law building and four others across campus. Working with student leader Brian Mason and others, after a long and agonizing campaign and series of meetings in 2004, the student legislature finally agreed. David raised an additional eight million dollars of private funds for construction and obtained significant contributions from the Chancellor's office.[39]

Usually deans delegate construction details to a faculty committee, which in turn defers to the various architects, engineers, contractors, and campus officials. David would have none of that (I chaired the faculty building committee and saw this first-hand). He had a strong background in construction and, while he enlisted plenty of help, took the lead at every level—from plan changes, to obtaining the gold green building designation, to no-flush urinals, to the kind of grass for the lawns. He worked closely and collaboratively with the architects, contractors, and CU building officials. They knew his word was gold and that theirs had to be too.

One of my favorite places in the building complex is the William J. Hybl Family Fountain in the courtyard at the elbow of the main walkway. At the bottom of the water feature is a quote that David came up with. It is from the journal of John Wesley Powell, the storied nineteenth-century explorer of the southwest, written as he and his men on the first Powell journey stood at the entrance to the deepest part of the Grand Canyon, the "Great Unknown," as Powell put it. The words from Powell that grace our fountain are: "We have an unknown

39. *See, e.g.*, Kasey Cordell, *CU Breaking Ground on New Law Building*, BOULDER DAILY CAMERA, Nov. 12, 2004, at A09.

distance yet to run, an unknown river yet to explore."[40]

Those words describe the emotions that our most recent law students felt when they left the building as graduates. It is what we felt when we graduated. It is what all our future graduates will feel. "We have an unknown distance yet to run, an unknown river yet to explore."

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David's future plans, made before his passing, give a further measure of him. It has to do with his burgeoning interest in international law. In 1989, in preparation for his sabbatical in Costa Rica, he set out to learn Spanish. He had never studied the language at all, not even high school Spanish. He took serial immersion courses and, toward the end of his sabbatical, was able to present formal lectures on legal matters in Spanish.

His international work, always involving water or indigenous peoples or both, continued to increase after his sabbatical. He consulted for the Interamerican Development Bank and the United Nations Economic Commission for Latin America and the Caribbean. In 1999, he published a book chapter in Spanish and another in French.[41] He gave lectures in Tunisia, South Africa, Colombia, the Netherlands, and Spain. Beginning in 2006, when he was Dean, he coauthored no fewer than three articles in Spanish.[42] He also coedited a book on international water rights with Rutgerd Boelens and Armando Guevara-Gil from Peru.[43]

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40. WALLACE STEGNER, BEYOND THE HUNDREDTH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST 96 (1982).

41. David H. Getches, Resolución Jurídica de Conflictos Sobre el Agua entre los Estados de la Union, *in* IX JORNADAS SOBRE DERECHO DE LAS AGUAS, PLANFICACIÓN HIDROLÓGICA Y POLÍTICA HIDRÁULICA (1999); La Gouvernance de Bassin-Versant: Des Limites Naturelles pour des Decisions Relatives aux Ressources Naturelles, *in* GESTION NÉGOCIÉE DES TERRITOIRES ET POLITIQUES PUBLIQUES, L'AARMATTON (1999).

42. David H. Getches et al., Conclusiones: La Complejidad de la Gestion de Agua en los Paises Adionos, *in* Agua y Derecho: Politicos Hidricas, Derechos Consuetudinarios e Identidades Locales 411 (Rutgerd Boelens, David H. Getches, Armando Guevara-Gil & Instituto de Estudios Peruanos eds., 2006); David H. Getches et al., La Defensa de los Derechos de Agua Indegenas Con las Leyes de la Cultura Dominante: El Case de los Estados Unidos, *in* Agua y Derecho, supra, at 227; David H. Getches et al., La Gestion Indigena y Campesina del Agua Frente a las Politicas Hidricas de los Paises Adinos, *in* Agua y Derecho, supra supra, at 11.

43. OUT OF THE MAINSTREAM: WATER RIGHTS, POLITICS AND IDENTITY (Rutgerd Boelens, David Getches, and Armando Guevara-Gil eds., 2010).

David had a sabbatical coming after his deanship and he talked enthusiastically about it before and after learning of his illness. He planned to study three progressive and promising watersheds—the Murray-Darling in Australia, the Rhine in Europe, and the Delaware in the eastern U.S.—and compare them with the Colorado River to see if the analysis might suggest institutional reform on the Colorado River. You know that he would have ended up recommending changes and that they would have been taken seriously. Standing up for change always carries the possibility of scaring off people comfortable with the status quo. Yet, he had such an open, straightforward, and considered way of urging reform, putting forth ideas that were undeniably bold but also entirely sensible. And he had such stature.

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One last subject. What of David the person, as opposed to David the professional? It might seem that the work must have blotted out the person. After all, he worked long hours, up early and quickly into the work day—after the one hundred push-ups and one hundred sit-ups that he did every day except Saturday. He either did not need a lot of sleep or just managed to cope with having too little of it. But he was not all work and no play.

When David was off work, he was off work. He looked relaxed and he was. He and Ann had a great marriage and, oh, how he loved his son, two daughters, and their spouses. He was enormously loyal and generous toward his friends. He loved giving gifts to people, sometimes small, sometimes substantial, but always thoughtful.

He was relentlessly funny—quick-witted funny with a gift for spontaneous puns and play on words. I cannot remember them and people I have asked recently about this cannot either, although they all remember waves of them. Maybe it is because many were groaners. The one I happen to recall was when we were out fishing in the Indian Peaks Wilderness. Somehow we got off on cases we especially hated. I mentioned Kake against Egan, a 1962 case where the Supreme Court allowed the state to regulate Native fishing—the Court gave Alaska everything it asked for.[44] David's comment? "Yeah. The state really got its Kake and Egan too."

44. Organized Vill. of Kake v. Egan, 369 U.S. 60 (1962).

I have only seen Santa Claus once. We had a group that got together often. One year, there was a family Christmas party. All the kids came. All of a sudden, out of nowhere, with great "ho, ho, hos," Santa threw the front door open and charged the room, handing out a present to each child and then leaving as quickly as he came, staying for no longer than a minute. Even the adults were speechless. It was too bad David did not see it—he arrived just a few minutes after Santa left.

On another night, the group was enthralled by the "Church Lady," but this was not the one done by Dana Carvey on Saturday Night Live. This was the real Church Lady, frowzy, curly brown hair, wire rim glasses way down on her nose, a one-woman morality enforcement machine. "Oh, you went to the night club, did you? Well, isn't that spehhhhtial? How did it feel to be so close to Ssssssatan?" David missed that one, too.

Rick Collins, a longtime faculty member, former NARF attorney, and close friend of David, said that to understand David, you had to know that he was a Boy Scout. And it is true that, in his earnestness, he embodied the Boy Scout Law: be "trustworthy, loyal, helpful, friendly courteous, kind," and all the rest. The family did, really did, have the GETCHES'S RULES posted on the refrigerator door:

(1) BE HONEST;
(2) BE RESPECTFUL;
(3) TRY TO DO OUR BEST AT EVERYTHING; and
(4) TRY TO DO OUR SHARE OF THE WORK (AND A LITTLE BIT EXTRA, TOO!).[45]

The Boy Scout phase came with great accomplishment, one disappointment, and a dash of individuality. David advanced to the rank of Eagle Scout, the highest honor, with unprecedented speed: he was literally the youngest person in the history of California to qualify. Then, the night before the award ceremony, he urinated outside of the tent. That was against the rules. The Scoutmaster delayed the award for a full year. Still, Rick had it right: you have to know about the fact of David as a Boy Scout to understand him.

On the essence of David, I believe, although we never discussed it, that he aspired to be perfect. Put a bit differently, he wanted to do everything, large and small, always right and

45. Thanks to Ann Getches for providing me with the original document.

never wrong, not just at work but as a husband, father, friend, colleague, private person, and public person. He wore it lightly. He expected a lot of others, but he never demanded it. He led by example.

No, David was not perfect, but he made a damn good run at it. His family, a great many colleagues, and friends are the beneficiaries. Indian country and the west are better places because of him. And we assume, perhaps correctly, that the rivers and the land cannot feel sorrow or give gratitude, but if they can observe, feel, and remember, then we can be sure that for all of time they will mourn his loss and cheer his lifelong commitment to them.

Thank you, David, for leaving so much behind.

REMARKS OF DAVID H. GETCHES: FEDERAL BAR ASSOCIATION INDIAN LAW CONFERENCE (APRIL 7, 2011)

DAVID H. GETCHES*

At no other occasion is there so much expertise in Indian law gathered in one place, at one time. It is a tribute to the [Federal Bar Association ("FBA")] that it does this year after year, renewing our exploration of a subject so vital and exciting to all who come together and so critical to the survival of tribal nations. Thanks to my Colorado Law colleague, Professor Kristin Carpenter, and to her cochairs, and to Professor Elizabeth Kronk, chair of the FBA Indian law section.

It is my honor to be here once again. This conference is where I have rolled out research on United States Supreme Court decisions in Indian law that later became articles, and this is where I have often updated the troubling path of recent Supreme Court decisions in Indian law.

My message this morning is that meeting and defining the continuing challenges posed by Indian law and defining best practices calls for a renewed pursuit of some venerable principles. The future of Indian law, like its past, is critical to ensuring the ability of tribes to survive and thrive in a world that is obsessed with issues that seem to many people more important.

The common cause of tribes and the United States is the continued existence of plural cultures, a kind of federal (small

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* Dean of the University of Colorado Law School from July 2003 until his untimely passing in July 2011. Before that, Dean Getches was a long-time and beloved faculty member and the Rafael Moses Chair in Water law. In his more than two decades at Colorado Law, Dean Getches became a national authority on natural resources and Indian law issues. His academic interests were prompted by his experience; prior to joining the faculty of Colorado Law School in 1979, he was the founding Executive Director of the Boulder-based Native American Rights Fund and spent several years in private practice. Dean Getches had a prolific academic career. He wrote casebooks, as well as books intended for a more general audience, and published numerous articles and book chapters, including some written in Spanish and French. He took two leaves from the University of Colorado, first to serve as the Executive Director of the Colorado Department of Natural Resources from 1983 to 1987, and then to serve as a special consultant to the Secretary of the Interior in 1996.

F) ideal of one from many. It is no threat to the United States, nor any shame to tribal people, to have groups of separate, self-governing peoples with thriving economies—tribal groups who decide how to manage their territories. In fact, it is the obligation of the national government, under our rule of law, not only to allow, but to foster that independence, that growth of tribal governing and economic power.

My message is that the rule of law commands federal support for the shared objectives of all tribes. Now, I know that lumping all tribes together is hazardous. But, I know and have worked with many tribal leaders over the past forty-plus years, and have never met one that did not want to be able to govern the people and resources of a demarked tribal territory. Additionally, I have never met one who did not aspire to a degree of economic self-sufficiency within his or her territory.

The rule of law, under United States statutory law and judicial precedent, says that these tribal aspirations shall be allowed and that the federal government should protect all lawful tribal efforts and actions to further those aspirations. The rule of law includes some hoary principles coming from cases that surprise many a law student first exposed to Indian law—ideas of self-governance free of state interference and respect for tribal territory and fulfillment of ancient promises by the government itself. Yes, I know there are some curious doctrines wrapped around those principles—doctrines of plenary power and trusteeship. These are surprising to our students and to the new practitioner entering the field. How can the government, to paraphrase Chief Justice John Marshall, arrogate to itself these powers over peoples whom it simply surrounded with a kind of constructive conquest? But, I urge that we—I urge that my students—see this as a deal. If this is the law that rules under a system of rule of law, accept the guarantees and insist that the federal powers be used to enforce them. This is the context of *Worcester* [*v. Georgia*].[1]

So, if there is to be tribal self-government, the intrusions of the states must be limited. Such intrusions have been limited in hundreds of potent Indian law decisions that exclude states from governing tribes and tribal territory. The federal government must use its plenary legislative role to advance, support, and protect tribal government from intrusions. If there is to be protection for tribal property rights, the federal

1. 31 U.S. 515 (1832).

trusteeship must be realized in proactive efforts to control individuals and state and local governments who threaten the integrity of tribal rights to land, water, and resources.

For some of my friends, it is anathema to speak of the legitimacy of such heretical concepts as plenary power in terms of its utility, let alone see it as fundamental to the future of Indian law. For many people—including in the federal government itself, and even some tribal leaders—the idea of federal trusteeship seems outmoded. The federal agencies, even the [Bureau of Indian Affairs], the one that should know best, do not really understand their responsibilities. And, tribal leaders, fed up with federal officials who historically use trusteeship to control what the tribes should be controlling, have given up on asserting a trust relationship.

Scholars, some of my dearest friends, are offended by the impurity of all this—[a] plenary power grab that is hard to justify in any way but by an assertion of raw power, and a trust relationship that came out of cases talking of Indians as wards and weak and defenseless people. I share a cynicism about the origins of these doctrines, too.

But, I believe that finding the strengths in two centuries of jurisprudence and embracing the pillars as we insist on the government following the rule of law will be a fruitful path and is consistent with our own morality. I believe in not only holding our own system and officials accountable for the transgressions of the past, but also for supporting the nation-building that tribes seek for their own future. We need to seek the shelter and the force of the rule of law. It is our starting place, and it is the engine for arguments and efforts of tribes.

That means, too, that Congress must understand that its role is to exercise plenary power positively to support tribal building with funding and to correct misguided Court decisions. The new Indian Law and Order Commission—first meeting in April[2]—will make recommendations on jurisdiction and on the federal role: legislation [and] administration.

Our challenge is one of educating those charged with wielding plenary power and fulfilling the trust relationship. As I have complained at these conferences, almost nobody on the United States Supreme Court, for fifteen years under William Rehnquist and for the past few years under John Roberts, seems to get it. It is surely the worst era for Indian law ever in

2. April 6, 2011.

the Supreme Court. It can change. Justice Sonia Sotomayor has expressed to friends her desire to understand the field. That is hopeful. She is but one, but if she can convince her colleagues that there is really something distinct known as Indian law, it is possible that the Court will stop using those cases for other agendas.

I am not one who thinks the Court has been on a mission to do in tribes or Indian people. I have written, and I think the decisions before and after my writing show, that the Court is really just using those cases to advance one of three larger ideological agendas. The three agendas are promoting so-called "colorblind justice," protecting states' rights, and adhering to mainstream values in our society. Tribes tend to lose if these things are what the Court thinks a case is about.

We should not give up on educating the Court. And, we should argue the vitality of plenary power, as in [*United States v.*] *Lara*.[3] It is the true means for restoring and expanding tribal power and Indian rights. And, if arguments in cases where tribal power confronts states' rights are to result in the triumph of tribal sovereignty, the exclusive right of Congress to extinguish tribal powers and rights—exercised in the particular case—is a strong argument. Especially strong is the exercised plenary power, upholding tribal governments or even extending it as in the Indian Child Welfare Act.

Pressing the trust responsibility is a thorny matter. It is thorny because neither the Court, nor flat-footed federal agencies, seem to understand its meaning in a modern context. Tribes are functioning governments with competent agencies. Consider the vast and well-trained machinery of, say, the water resources department at Navajo. The fisheries management capacity of the Northwest Indian Fish Commission is at least as good as the state fisheries agency. In minerals management, many tribes have overcome the incompetence of federal managers in years past with their own experts.

So what do tribes need of the trust responsibility today?

(1) fair dealing in all things—even where the government has conflicting responsibilities;
(2) consultancy—building agencies, tech assistance;
(3) financial aid—funds to implement federal laws and

3. 541 U.S. 193 (2004).

supplement old federal functions; and
(4) advocacy—in courts.

There is a great opportunity with the Secretarial Commission on Trust Responsibility that will be set up as part of the historic Cobell Settlement.[4] As momentous as that settlement is in achieving redress for a century of incompetent federal management of trust funds, it can be even more. At a minimum, Indians must demand that trust funds management be done right in the future. The Commission should ensure that. But, should not it also look at the trust responsibility in the larger context—legal representation, oversight of contracting and leasing, land protection, [and] mineral, and other resource management? Never again should we see the travesty of the Navajo coal leasing case, in which the Supreme Court allowed connivance between the Secretary of the Interior and a coal company to suppress competitive pricing of the tribe's coal in a lease where the Secretary was supposed to act as a trustee.

Why not use the Secretarial Commission to develop and propose administrative and even legislative articulation of best practices and principles for the trust responsibility? Surely the Department of the Interior needs better guidance in its fulfillment of the trust responsibility, and that could come out of a process that begins with the Trust Commission holding national hearings on the legitimate expectations of American Indians for exercise [sic] of a fiduciary relationship. How has the government failed to fulfill its responsibilities? How should it [fulfill its responsibilities] in the future? Surely, the kind of services and responsibilities expected of the trustee varies with the times and with the sophistication and capacity of the beneficiary. Educated tribal leaders do not need the federal government to substitute its judgment for theirs. [However], they should be able to expect fair dealings always, the benefit of the doubt in close cases, and advice and counsel when they need it.

While my advice to tribes and their lawyers has been, for some years now, to avoid pressing cases to the Supreme Court, sometimes there is no choice but court. So, when cases are

4. This is the proposed settlement agreement resulting from the class action case *Cobell v. Salazar*, 679 F.3d 909 (D.C. Cir. 2012), which continues to be litigated as individuals have filed petitions with the Supreme Court for a writ of certiorari.

heading through the courts, it would be foolhardy to ignore the basic principles of Indian law. Never mind that some scholar may have made a dire prediction about how an issue [would] come out if the Supreme Court [got] a hold of it. Sure, the Court has strayed, but most of its digressions from Indian law, as we learned it, and as we should continue to teach it, can be isolated as exceptions, and, yes, as mistakes. These are our *Plessys* and *Dred Scotts*.[5] They are wrong. They can be overturned by a later court. They can be remedied with congressional action.

The principles that can lead to their overruling someday and that will undergird legislation must be repeatedly asserted. We can debate in the classroom whether the Supreme Court, under Justice Marshall, grabbed too much power over Indian affairs for Congress and [used disdainful] rhetoric in early cases that sounds racist today, 170 years later, but there are powerful principles that can be argued and used to vindicate rights and to demand respect for tribal power over people and territory. And, of course, as *Lara*[6] tells us, the road to congressional restoration of tribal sovereignty, where it has been eroded by misguided Supreme Court decisions, is paved with plenary power.

Tribes today are smart and well equipped to deal with plenary power. They have—if they act collectively, with the wealthier doing more than their share—the political savvy and access to turn back negative legislation. They have [achieved] legislation that enables and funds the implementation of tribal authority and Indian rights. And, they have the ability to propose and get a fair shot at legislation that will bolster and restore powers and rights.

So, as we look up close at dealings with the continuous legal challenges that fill the conference agenda and search for best practices, let us consider what the federal responsibility in each area is and how it should be fulfilled in an era of developing tribal nations. And, consider how the impediments of tribal governance on their territories can be removed through legislation. It is tempting to write off the principles that worked to protect tribal rights and lands in the past

5. Plessy v. Ferguson, 163 U.S. 537 (1896); Dred Scott v. Sandford, 60 U.S. 393 (1856). *Plessy* was overruled by the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). *Dred Scott* was superseded by Constitutional amendment. U.S. CONST. amend. XIII; U.S. CONST. amend. XIV.

6. *See Lara*, 541 U.S. at 193.

because they have been corrupted in some applications, because they are imperfect, and because they have questionable pedigrees.

But, I urge that these principles be held up as the law of the land and made the benchmark for meeting new and continuing challenges and setting the best practices of the future. Look at what past generations of Indian people—overpowered by the larger society—did:

(1) they revised the Allotment Act;
(2) confronted by a national policy of termination to end the federal tribal relationship and trust lands, they fought; they won reversal of this misguided policy; and
(3) treaties, the engines for taking away Indian land in the country, are cherished for what they preserve, specifically or by not specifically taking away.

Just as the earlier generations did not forget the fundamental principles and fought to return to them, so should future generations.

A JUST AND HEALTHY FUTURE FOR THE 100 PERCENT

BILL HEDDEN*

Three years ago, I asked a neighbor's grown daughter why the food security movement struck such a chord with young people these days. She answered simply, "Because we know that you guys aren't going to do anything about climate change, and when everything falls apart we want to be able to feed ourselves."

Of course, we then believed that the Congress would surely pass legislation to curb our domestic carbon emissions, and somehow international agreements would pull us out of a planetary climate nosedive. But the intervening years have shown us that my neighbor's daughter was right: America set one 130 thousand new all-time records for heat, drought, and floods last year, yet as the weather gets wilder, a majority of us tell pollsters that we do not believe climate change is a problem. With February temperatures into the eighties in Chicago, and murderous tornadoes striking Illinois and Michigan during months that used to be winter, we watch a presidential campaign where nobody will even mention the fate of the diaphanous atmosphere that provides our only protection from the howling universe outside.

These are hard things to think about. The worst predictions you have ever heard about climate change still factored in forceful action to reduce emissions. Yet we look away from the enormity of the threat and the changes that must be worked in our lives if we are to respond. Give us a fig leaf of deniability and we will pretend that it is just going to get a little hotter, and that people may have to sandbag their beach houses. And so the corporations and ideologues oblige us with their campaign denying climate change, and we gratefully keep our heads in the sand.

I am not setting myself apart here. I have a good grasp of

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* Executive Director of the Grand Canyon Trust, a regional group working to protect and restore the Colorado Plateau. This talk was delivered at The University of Colorado Law School symposium *A Life of contributions for All Time: Symposium in Honor of David H. Getches* on April 27, 2012.

how much about my life must change, and I have done almost none of it. But a series of conversations with young people has awakened me to dimensions of this crisis that I did not understand, ultimately bringing me before you today to give a talk that, frankly, dismays me.

It began with a group of astonishingly bright college students tasked with studying the future of the Colorado River for an international symposium on freshwater resources in a changing climate. One of them asked me what I think of climate models that show a 15 percent decline in precipitation over the basin within the next thirty years. I said that my modest understanding of chaotic systems leads me to believe that if you just keep pumping in more energy, they will eventually fly off into a different equilibrium where the new normal could easily be an unlivable disaster.

I felt terrible for a moment, having managed to give an answer that was both dark and trivial, and then I saw the five students exchange a look that was not meant for me. It was a look that said that they knew all this far better than I, had thought far worse, and were surprised to hear somebody from my generation actually fess up to the problem. It was a look that said, "We are building our lives in the shadow of this looming reality that you guys have created and are doing nothing about."

That first insight led to many subsequent conversations in which I entered a world where our children look at a future of catastrophe, wondering how they will feed themselves and organize a society; a world where we have become, at best, irrelevant through our inaction; and a world where they have taken to the streets protesting the broken, corrupt politics we have made. I fear that we are opening up the widest, most painful gulf between generations that one can imagine. Either young people have checked out from despair, or their thought has shifted to dealing with the coming storm that is our legacy to them.

My daughters have grown used to having Dad cry silently and for no reason when I hug them or look at the beautiful wildlife in our yard. About a third of the species on earth are expected to go extinct in the chaos, and these innocents simply break my heart.

Today's world requires that we hold two images in mind at once: an unflinching view of the tragedy beginning to unfold on our present course, and a vision of an unprecedented joining

together to save ourselves using all the resources of technology and love available to us. So I will spend a few minutes giving snapshots of the world we are in, where the hour is far later than we normally allow ourselves to understand. And then I will talk about what we, along with our children, might begin to do, because heartbreak can either flatten us or give us the fierce courage and joy we will need to do the thousand things necessary to choose a different future.[1]

As I am sure you know, scientists now consider 350 ppm of atmospheric carbon dioxide as the level beyond which warming threatens the ecological support systems and severely challenges the viability of today's complex human societies. Unhappily, we are now above 390 ppm and worldwide greenhouse gas emissions are rising faster than ever before recorded.

We get numbed by numbers. How bad could a few degrees really be? Well, a few degrees are already changing atmospheric circulation so that Australia's wet westerly winds are veering south to dump their rain over the ocean. The land is in permanent drought. In January 2009, a record heat wave struck South Australia, buckling rail lines like spaghetti, infesting stagnant reservoirs with algae, and blowing out power to Melbourne. Across the city, on the hottest day ever recorded there, the Internet went down; air conditioning stopped; people were stranded in elevators; hospitals were without power; and all the traffic lights went out, trapping emergency vehicles in gridlock. Rioting broke out within hours before the power was mercifully restored. The next week, the Black Sunday bushfires sent four-story high walls of flame racing across the land, killing 175 people. Prime Minister Kevin Rudd said, "Hell and its fury have visited the good people of Victoria."[2]

Every day, with our thick new atmosphere, the earth soaks up about four hundred thousand Hiroshima bombs more energy than it radiates back into space. So, ever since 2007, the Arctic ice cap has been more than a million square miles

1. This talk borrows heavily from several sources: Bill McKibben's invaluable book, EAARTH: MAKING A LIFE ON A TOUGH NEW PLANET; Lester Brown's (Earth Policy Institute) authoritative volume, PLAN B 4.0: MOBILIZING TO SAVE CIVILIZATION; and the speeches of climate scientist James Hansen. Any errors introduced are mine.

2. *Australia's Deadliest Bushfire Kills 84*, REUTERS (Feb. 8, 2009) *available at* http://www.reuters.com/article/2009/02/08/us-australia-firesidUSTRE51610420090208?i=20.

smaller than normal—Santa's elves and the polar bears treading the open waters more than fifty years ahead of predictions. In the last five years, Greenland's ice melted more than a trillion tons. On the other side of the globe, temperatures on Antarctica are rising 75 percent faster than a decade before, faster than anywhere else on earth. Sea levels are expected to rise by six feet during this century, drowning nearly every rice-growing river delta in Asia, and inextricably linking the fate of the hundreds of millions who depend on the rice to the fate of the far away ice sheets.

Rising seas greatly amplify the damage from big storms, and storms are getting much bigger. Atlantic Hurricanes have increased 75 percent over the last decade—they are stronger and do not die out on making landfall. Typhoons in Bangladesh have increased 400 percent, flooding the dwellings of a hundred million people in 2006. Typhoon Marakot dumped nine and a half feet of rain on Taiwan in 2009. The last thirty years have yielded four times as many weather related disasters as the first three quarters of the twentieth century combined.

Temperatures in the Himalayas are rising by a degree every decade, or about the amount of variation since before the invention of agriculture ten thousand years ago. The ice sheet that provides drinking and irrigating water for billions downstream in China and India has lost three hundred vertical feet of ice since the Mallory expedition took the first photos in 1921. Early this year, the National Academy of Sciences reported that comparatively modest climate change in the past has routinely destabilized civilizations, through drought, famine, and disease. The study notes that today's societies are better resourced but more dependent on infrastructure, more densely populated, and more vulnerable. With the world's hungry already numbering more than a billion, the melting of the Himalayan glaciers presents the biggest challenge to food security humanity has ever faced.

Closer to home, the disappearance of snowpacks in the Rockies and Sierras threatens water supplies for 75 percent of the population in the western U.S. There is a fifty-fifty chance that Lake Mead will run dry in the next eight years, prompting Pat Mulroy of the Southern Nevada Water Authority to observe, "You cut off supply to the fifth-largest economy in the world."[3] And with the breadbasket of the U.S. Great Plains

3. *How the West's Energy Boom Could Threaten Drinking Water for 1 in 12*

now facing chronic drought, it may not be as easy as we always thought to transfer water from agriculture to thirsty cities.

The Colorado Plateau, where I live, is in the climate bull's-eye—projected to get at least eight degrees hotter this century. Rising temperature bakes the moisture out of the soil and throttles photosynthesis, and even most desert plants cannot adapt. Native grasses will be extirpated from the region within thirty years—taking the habitat for the rabbits and mice, which feed the coyotes, snakes, foxes, and raptors. That is what it means to wreck the base of the food chain. The plants also help hold the land together—protecting against the massive dust storms that cover the snowpack in the dreaded dark blanket that sends the water flooding off the hills six weeks early, confounding irrigators and exposing the soils to further desiccation.

Everything I have described is already underway in what we might now call garden variety climate change. Without massive action, most scientists believe we are headed toward atmospheric carbon dioxide concentration of at least 650 to 700 ppm—levels at which the fossil record shows that delicately named nonlinear scenarios kick in. I will close this depressing catalogue with just one of these horrors.

Near the poles, where things are happening fastest, the potent greenhouse gas methane exists in immense quantities in frozen tundra. Temperatures over the region have risen ten degrees in the last decade and researchers are discovering methane chimneys rising from the permafrost, further warming the air. If this vicious cycle continues to develop, the permafrost could release the equivalent of 270 years of current worldwide carbon dioxide emissions with no further help from us. And—that is not dystopian science fiction; it is just what our planet does when the atmosphere gets this far out of whack. As I said, these are hard things to think about. But do we really mean to ignore them completely?

We know all this, and we know that we need to do something about it. The problem is in knowing where to start, and in deciding that today—now—is the time.

Once you have laid out the global dimensions of the problem, all the possible solutions seem puny in comparison. It is really tempting to hope for some grand international bargain

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Americans, PROPUBLICA & THE SAN DIEGO UNION-TRIBUNE (Dec. 21, 2008) *available at* http://www.propublica.org/article/how-the-wests-energy-boom-could-threaten-drinking-water-for-1-in-12-america.

on emissions, but that is not going to happen within any meaningful timeframe . . . unless we all decide to change things. In this hyper-connected world, it may not be possible for politicians to lead anymore, but they can follow. Imagine how quickly both parties would jump on this if polling showed that 75 percent of us thought saving the planet was a top priority.

So, for each of us, starting small and close to our hearts is the key, partly because we know the issues, and partly because the essential insight is that there are innumerable portals to exactly the kind of response that is needed. The human scale, which is the only one open to us, is also the only scale that will make a difference—multiplied by seven billion. According to Desmond Tutu, God says to each of us, "[t]he only one I have is you."

The answers usually are not complicated, and generally people are already working on them. In my field, imagining an arid West beset by climate chaos, we must first protect the aquifers and watersheds as they will be the most essential things and will also be deeply threatened. Likewise, the functioning of the biggest wild places must be preserved, restored, and linked where possible, to serve as carbon sinks, water filters, and refuges for the wild creatures that will be pushed to the brink, and without whom we will go mad. In each place, we need to determine the parts of the landscape that hold the world together, and then defend them as if our lives depended on it.

The real question here, as in so many other areas, is the social one of how we will accomplish these simple acts of sanity with the urgency we might feel if we could actually see the droughts, roaring fires, tornadoes, and floods coming down over the Flatirons. How, indeed, when today we struggle for years on end to win protection for each bit of stream or forest or grassland? We need to ask ourselves what the conservation community has to look like to get this fundamental work done in real time.

There are obvious alliances we must forge with recreationists and farmers and sportsmen. We really do not have the luxury of defining our interests and parsing our differences so finely any more. This will be easier if we make conservation simple again: holding the vision of a networked landscape but keeping the work local, and embracing the chaos of many constituencies.

And, of course, our children are the most irreplaceable

allies of all. They are keen observers and networked like nothing the world has seen before. And when you get on to these subjects, the next generation might be motivated and react in ways we scarcely imagine. The key is to meet them where they are, already quietly figuring out how to share life preservers while we keep rearranging deck chairs. The title of my talk, *A Just and Healthy Future for the 100 percent*, comes from the Salt Lake [City] climate action group Peaceful Uprising, and exemplifies the inclusive, all for one and one for all, approach of people who know there might not be enough lifeboats.

Understandably, the next generation has tended to focus on recreating our communities and our systems for producing food and power so that they are distributed, equitable, climate friendly, and durable in the face of the rough times ahead. We have much to learn from them, and perhaps something to contribute.

Here again, the work is right in front of us, whether your propensity is to start a farmer's market, or don gas masks and walk the halls of Congress as part of the Beyond Coal Campaign. Others may have the training to lead the technological revolution in transportation and green energy foreseen by visionaries like Amory Lovins, or the compassion to work with the world's poorest and most vulnerable people. Perhaps, if you know any smart, young lawyers, they might bring a precedent-setting case on Black Swan events, or something else that could change the landscape like David Getches's Boldt Decision did.

I believe that a lot of the stress and malaise in our country today arises because we know we are in trouble, and we are making ourselves crazy by whistling past the graveyard. It would be an enormous relief to admit, collectively, the challenge we face, and start doing something about it. In the end, even if it becomes very difficult, remaking society into something that can endure will be the most hopeful and exciting work we could ever do.

Let me leave you with this thought: if all the climate scientists are somehow wrong, and we take forceful action, then we will have been thriftier with our resources, cleverer with our technology, more compassionate about our fellow denizens of planet earth, and more loving with our children than we really needed to be. And if the scientists are right and we have awakened a planetary geophysical wrath, where would

you rather be when it hits than arm-in-arm with your kids and community trying to do the right thing, come what may?

REFLECTIONS ON SOCIAL CHANGE AND LAW REFORM

JOHN D. LESHY*

Our dear friend David Getches was deprived of a full opportunity to take a reflective look back at his life of good works. However, as Charles Wilkinson has noted, David led by example. His career provides rich material for reflecting about law and social change. In particular, how we—and particularly rising generations—might deal with the challenges that lie before us. This brief essay offers some thoughts along that line.

The story of David's career is the story of an entire generation of activists who came of age during what is rather quaintly called the "sixties." It was the era of Martin Luther King, civil rights, Vietnam, and, a little later, the first Earth Day and the emergence of the modern environmental movement.

It was an era when a significant number of people, especially the young, became disaffected from the mainstream "establishment" because they thought that government was deaf to mighty forces of change coursing through society. Some followed Timothy Leary and tuned in, turned on, and dropped out. Others chose not to drop out and instead work to reform the established order.

Lawyers like David became advocates for people and causes underserved or disadvantaged by the status quo. One such cause concerned the rights of Native American tribes and peoples. Another concerned how we managed natural resources, particularly lands and waters.

These reform efforts were, by many measures, remarkably successful. Today, tribal sovereignty is better protected, and Indian tribal governments are stronger, than they have been in many, many decades. And, considering Native American rights

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* Harry D. Sunderland Distinguished Professor of Law, University of California, Hastings College of the Law. This essay is a modestly edited version of remarks delivered at the University of Colorado Law School symposium *A Life of Contributions for All Time: Symposium in Honor of David H. Getches* on April 27, 2012. The author appreciates the able research assistance of Anthony Verdugo, U.C. Hastings Class of 2013.

as a part of a broader movement, the depth of change is profound. An African-American President, unfathomable in the sixties, is only the most obvious indicator. Today, most of America's major institutions not only tolerate, but welcome—indeed, celebrate—racial, ethnic, cultural, religious, and many other forms of diversity in America.

There is more to do, of course, but the victories in the struggles for civil rights, tolerance, and respect for human dignity might rightly be called the greatest moral achievement of the last hundred years.

Gains are also apparent in managing natural resources and protecting the environment—the other major focus of David's professional career. The legal system governing these resources once served a relatively narrow range of interests, neglecting broader concerns. Today, by contrast, the idea that impacts on the natural environment must be taken into account is deeply embedded in our legal system.

In short, in a myriad of ways, the law now routinely incorporates considerations of Indian sovereignty and environmental protection in ways that could barely be imagined in, say, 1967—the year David graduated from law school.

As a nation, we can, and should, take great pride in this. It is a credit not only to reform advocates like David, but more generally, to the capacity of our politics and our legal system to accommodate broad currents of change, to meet new challenges, and to translate legitimate concerns into effective policies and rules.

What can we learn from these experiences as we turn toward the future? One lesson is that reforms sometimes veer off in unanticipated ways, with unexpected benefits and costs. Who could have predicted that promotion of tribal sovereignty would help create an enterprise—gaming—that would grow into the most important economic engine ever devised for Indian country (generating some twenty-five billion dollars in revenue annually)? And who could have foreseen how, along the way, the politics of national Indian policy-making would be transformed in profound ways? The effects were not totally positive; gaming has weakened national political support for tribal aspirations, especially for that substantial proportion of tribes who do not reap its financial benefits. But on balance, gaming has been beneficial. Most tribes, most of the time, have handled their economic success well, using it to reinvigorate

tribal culture and traditions and, smartly, to reduce economic dependence on gaming.

Another lesson is that successful reform strategies and tactics can sow the seeds of counter-reformation. For example, the efforts of David and his colleagues on behalf of Native Americans initially depended heavily on litigation, on persuading judges to apply old, or invent new legal concepts to advance their cause. In this way, they were emulating the classic strategy adopted by the NAACP, whose long campaign to end "separate but equal" culminated in *Brown v. Board of Education*.[1]

Defenders of the established order responded to these successes by launching efforts to recapture the courts (through the appointments process) and by establishing organizations like the Mountain States and Pacific Legal Foundations to counter groups like the Native American Rights Fund and Earthjustice.

Our political system has been plastic enough to allow these counter-efforts to work. In recent decades, they have made considerable headway on issues like affirmative action, protection of property rights, limiting government's regulatory reach, and restricting legal standing to sue.

American courts today are more sympathetic to conservative arguments than progressive arguments. This posture reflects a return by the courts to their more traditional, and more comfortable, position, for they—and indeed the law itself—have a cultural conservative bias. Grounded in rules, orderliness, and stability, they inevitably tilt toward the status quo. The courts' relatively brief role in the vanguard of reform efforts a few decades ago was, in other words, more of a historical aberration than a secure path. This means that a reform strategy based primarily on litigation may not be easy to sustain, at least unless political support for its objectives is engendered along the way.

To be sure, David's generation of activists fostered, and tapped into, political support for their causes. Just as *Brown v. Board of Education* led to the civil rights legislation of the 1960s, court decisions promoting tribal sovereignty helped pave the way for a spate of legislation in support of tribal self-determination. In the same way, early environmental litigation

1. 347 U.S. 483 (1954). The saga is well told in RICHARD KLUGER, SIMPLE JUSTICE (1976).

helped pave the way for an outpouring of environmental legislation.

The wheels of political change continue to turn. Organizations are created to counter the counter-reformers, proving once again that imitation is the most sincere form of flattery. The Federalist Society's success in moving judicial selection and legal scholarship to the right gave rise to the American Constitution Society, which seeks to move them back to the left. On social and economic issues, the success of right-leaning advocacy think tanks like the American Enterprise and Cato Institutes gave rise to the Center for American Progress on the left.

Regardless of where one stands on the political spectrum, all this back and forth activity is hardly a bad thing. It illustrates the genius of America's complex, pluralistic political system, where power is diffused and many levers can be pulled to affect the course of events. That our society not only tolerates, but also encourages the clash of ideas and perspectives is one of its great strengths, helping make it the envy of the world.

In recent years, however, a new, grave challenge to our political system has emerged—the increasingly dominant role of money in politics, particularly electoral politics. For a variety of reasons, the cost of campaigning for people and causes has become astronomical. The money to pay for it is increasingly coming from a relatively small group of people. This infusion of large sums of money from a comparative handful is overwhelming the public policy-making process. Its effects are visible every day, not only in campaigns, but in the gridlock that paralyzes our government, making compromise next to impossible.

Perhaps most pernicious is how just about everyone aspiring to, or running for, significant public office is required to spend the great bulk of his or her time and energy in an unseemly effort to raise ever-larger sums of money. The magnitude would shock the average American. The way things stand now, if you are elected to the United States Senate in a populous state in November and aspire to more than a single term, you must, in order to mount a credible re-election campaign, raise on the order of twenty-five to fifty thousand dollars *every single day for the next six years*.

This endless chase for campaign money leads politicians to develop, as Harvard Law School Professor Larry Lessig has put

it, a "sixth sense, a constant awareness of how what they do will affect their ability to raise money."[2] The need to fundraise overwhelms the time lawmakers have to discharge their basic responsibilities—learning issues, listening to reasoned advocacy, pondering the public good, getting to know constituents and colleagues, looking for common ground among competing interests, and building bridges across partisan divides.

These are not original observations. A number of recent books have made this case effectively, like Lessig's *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It.*[3] Lessig points out that the problem is not Tammany Hall-style graft and corruption. It is that the money-dependent political system does not allow politicians—who, whatever their ideology, are mostly good people—to do the public's business. In short, the tsunami of money, and politicians' need to get it, are corrupting our nation's capacity to govern itself effectively. They are making the political system more rigid, more protective of established interests, and less accommodating to emerging needs.

This rise in the role of money, ironically, owes a considerable debt to the activism of the sixties. That era strengthened our society's commitment to free speech, primarily to protect advocates for change in the civil rights and anti-Vietnam War movements. This helped open the door for a slim majority of the current Supreme Court to take the simple—and to my way of thinking, simplistic—view that money equals speech. It would be wrong to place the entire blame for our current problem on decisions like *Citizens*

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2. Lawrence Lessig, Professor, Harv. Law Sch., Speech at Harvard University (Mar. 19, 2012), *quoted in* Katie Koch, *A Cleanup Plan for D.C.*, HARV. GAZETTE, Mar. 21, 2012, http://news.harvard.edu/gazette/story/2012/03/a-cleanup-plan-for-d-c/.

3. LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2012). Lessig is a former libertarian and law clerk to Richard Posner and Antonin Scalia. Several other books developing this and related themes have recently been published. *E.g.*, LARRY BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE (2010); ROBERT KAISER, SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT (2009); JEFF MADRICK, AGE OF GREED: THE TRIUMPH OF FINANCE AND THE DECLINE OF AMERICA, 1970 TO THE PRESENT (2011); TIMOTHY NOAH, THE GREAT DIVERGENCE: AMERICA'S GROWING INEQUALITY CRISIS AND WHAT WE CAN DO ABOUT IT (2012); JOSEPH STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE (2012).

United[4] and its kin. But in these decisions, five Supreme Court Justices have sharply limited the power of government (at every level across the country) to control or neutralize the role of money in electoral politics.

Equating money with speech could not have come at a worse time. In the last thirty years, the gap between the very rich and everyone else in our country has steadily widened. It is now a chasm, bigger than it has been in many decades—bigger, indeed, than in almost every other developed nation on earth.

Many statistics tell that tale. Here are just two: Over the last three decades, out of every dollar of increased national income, twenty cents went to the *top 1/10 of 1 percent* of Americans. Only 13.5 cents went to the *bottom 60 percent* of Americans. In that same period, the compensation of the CEOs of America's largest companies rose from thirty to three hundred times the salary of the average worker in that company.

Meanwhile, as I have noted, the cost of running for office has vastly inflated. The result: campaigns are increasing dependent on the wealthy. A mere 1 percent of Americans contribute two-thirds of all federal campaign money. The top 1/100th of 1 percent contributes one-quarter. Put a little differently, for *every one hundred dollars* that the wealthiest 1/100th of 1 percent of Americans give to political campaigns, the bottom 99 percent gives *one penny*. This amazing imbalance does not reflect altruism at the top. Every study I know of shows that lower-income Americans give a higher percentage of their income to charity than the wealthy do.

In the 2012 presidential election cycle, of the many millions of dollars spent by groups technically not affiliated with any candidate—I am referring to the so-called "super PACs" and similar organizations—something like 80 percent came from *fewer than two hundred individuals* out of a country of some 310 million souls. As one wag suggested, if you are looking for a handy slogan, that would be the "63 millionth of [1] percent."[5] The late conservative commentator William F. Buckley once famously said he would rather be governed by the first two hundred individuals listed in the Boston telephone

4. Citizens United v. FEC, 130 S. Ct. 876 (2010). Our system was "already broken" by prior events and decisions; that is, *Citizens United* "may have shot the body, but it was already cold." LESSIG, *supra* note 3.

5. Koch, *supra* note 2.

directory than by the faculty of Harvard University. Maybe he was right about the Harvard faculty (he was a Yalie, after all), but is it any better to have two hundred wealthy individuals wield such influence, especially when most of this money is being raised through devices that shield the identity of the donors?

The problem will not be easy to fix. The first step is to agree that there is a problem, and we are not there, yet.

Another current challenge to our governing system was also unwittingly fostered by sixties reformers—the low esteem in which government is held by the citizenry. Like all reform movements, sixties reformers tended to paint government as an enemy of change. This is natural. Reformers want to change government policy, and government, like any large institution, has built-in resistance to change.

The crisis of confidence in government in America today is, of course, related to the first problem. The chase for campaign funds feeds the popular notion that politicians are "bought" by moneyed interests, which in turn feeds disillusionment with the government. Recall what Ronald Reagan said in 1977: "Politics is supposed to be the second oldest profession. I have come to realize that it bears a very close resemblance to the first."

Is it any wonder Congress's approval rating is in single digits and 80 percent of Americans say they have lost trust in government? On this point, I would nominate as one of the most wrong-headed statements ever to appear in a Supreme Court opinion, this statement by Justice Kennedy for the five-justice majority in *Citizens United*: "The appearance of influence or access [when persons and corporations give money to organizations not technically affiliated with political candidates] . . . will not cause the electorate to lose faith in our democracy."[6]

This breathtaking lack of vision brings to mind Federal Reserve Board Chair Alan Greenspan's stubborn belief that the self-interest of the financial wizards on Wall Street, and elsewhere, would prevent them from using their freedom from government regulation to lead the world economy off a cliff. After the financial sector seized up in the fall of 2008, Greenspan famously confessed the error of his ways in testimony to the Congress. Justice Kennedy and his allies on

6. *Citizens United*, 130 S. Ct. at 910.

the Court have yet to follow suit; indeed, there is no sign that they have any second thoughts.

Attacking government is a staple of reform advocacy—indeed, of American culture. But there is, to my way of thinking, a profound difference between saying that governmental policies need to be changed so that government can help solve problems and saying that government cannot do anything to solve problems but can only make them worse.

As sixties reformers were attacking government from the left for being unresponsive, another group of reformers was doing the same from the right. They were promoting free markets and private property, and their objective was to unleash the private sector from as much government control as possible.[7] The sentiment was neatly captured by President Reagan in his first inaugural address: "Government is not the solution to our problem," he said. "Government is the problem." The promise was that if the government simply got out of the way, the private sector would lead the country to ever-greater prosperity.

As Greenspan, Richard Posner, and many others have noted, we now understand that this policy paved the way for the financial meltdown of 2008 and the most severe economic distress in three-quarters of a century.

Even before that meltdown, loss of confidence in government had set up a kind of vicious cycle. Large tax cuts destroyed the budget surplus the country briefly enjoyed at the turn of the millennium. "We ought to hand people's money back to them," said President Bush in the 2000 campaign—a far cry from Holmes' "taxes are what we pay for civilized society." The ensuing deficits, compounded by two wars carried "off the books" at the Treasury, further impaired the capacity of government to govern.

One reason "government is the enemy" rhetoric succeeds is because of ignorance—"keep the government's hands off my Medicare" was a refrain sometimes heard during the health care reform debate. In 2008, more than half of the Americans surveyed in a Cornell study said they had never used a government social program. It turned out 94 percent had, with the average respondent having used four different ones. The problem of ignorance is made worse by the atomization of the

7. Except, of course, for vigorously enforcing laws that establish and protect private corporations and private property and enforce private contracts.

media. There are no widely trusted, avuncular figures like Walter Cronkite around to provide relatively unbiased information.

Bashing the government is easy. We have all seen its shortcomings up close. Witness the recent antics of General Services Administration personnel in Las Vegas or the Secret Service in Colombia. But we need to keep governmental failings in perspective. The United States remains one of the freest countries on the planet. Our government is, moreover, more protective of private property rights than almost any other nation on earth. And, even though the political process is awash in money, our government is remarkably free from old-style graft and corruption.

Capitalism and free markets can do wondrous things, bringing us wealth, consumer products, and a standard of living practically unimaginable to our forebears. But they alone cannot solve our problems any more than prayer, meditation, drugs, or diet and exercise can.

History shows that government must play a critical role. At some level, most Americans seem to agree, as only a tiny fraction support libertarian candidates. Yet too many Americans take government achievements for granted. Consider the vast decline in water-borne diseases after the government built public water supply and sanitation systems. Or the vast improvement in the economic status of senior citizens since the government implemented Social Security. Indeed, one of the government's biggest successes was its use of educational, social, labor, and health policies to facilitate a vast expansion in America's middle class in the half century leading up to 1980. It is ironic that this was followed, in the last thirty years, by a seemingly ever-expanding disparity in the distribution of wealth.

Because the government does and will continue to do essential things, it needs to have not only resources but also people capable of doing the job. Unfortunately, the loss of faith in government has led to disparagement and devaluation of public service. Working in government (and not just in the military) ought to be honored, not scorned. Rebuilding faith in government and in the value of public service is one of the biggest challenges before us.

Nowhere is the need for effective governmental engagement more apparent than in the biggest problem the earth faces today. I refer, of course, to greenhouse gas

emissions and climate disruption. This is the problem that our grandchildren, and maybe even our children, will be least likely to forgive us for insufficiently addressing.

As I noted earlier, on the environmental and natural resources issues that David devoted attention to, there is much that can be called a success. Compared to when he graduated from law school in 1967, natural resources are, generally speaking, much better managed. Not only is the air and water cleaner, but we no longer log, drill, and mine with scant regard for their effects on other interests and values. We pay a good deal of protective attention to species besides our own.

But if the climate "crisis" Cassandras—and many credible earth scientists fall into this category—turn out to be correct, all these achievements might be looked back upon, in just a generation or two, as accomplishing little more than rearranging the deck chairs on the Titanic.[8]

A destabilizing climate could change everything in very significant, and mostly deleterious, ways—all within the life span of many people living today and certainly within the life span of my new granddaughter, born earlier this year. Noted climate scientist James Hansen said, "It would be immoral to leave . . . young people with a climate system spiraling out of control."[9] But that is exactly what we are on a path to do.

This challenge could dwarf all the others that mankind faces. It requires action by governments at all levels, around the globe. If we do not act soon to remake our infrastructure to minimize greenhouse gas emissions, we will find ourselves, in the words of one climate scientist, "back in the [late] Cretaceous, except this time *we* will be the dinosaurs."[10]

But our government is paralyzed, and our political system is severely incapacitated, in large part because of the problems I have mentioned—the corrupting effects of money, the loss of

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8. The Titanic analogy also works for the income disparity I mentioned earlier. On that doomed ship, first-class men survived at a higher rate than third-class children.

9. James Hansen, TED Talk, Why I Must Speak Out About Climate Change, Feb. 29, 2012, *available at* http://www.ted.com/talks/james_hansen_why_i_must_speak_out_about_climate_change.html.

10. Joe Romm, *Ken Caldeira: Natural Gas Is 'A Bridge To A World With High CO2 Levels', Deployment Is To R&D As Elephant To Mouse*, THINKPROGRESS (Mar. 12, 2012), http://thinkprogress.org/climate/2012/03/12/442484/ken-caldeira-natural-gas-is-bridge-to-a-world-with-high-co2-levels-deployment-is-to-rampd-as-elephant-to-mouse/ (emphasis added). The Cretaceous was from 140 million to 65 million years ago, characterized by the emergence and then extinction of the dinosaurs.

confidence in government, and the devaluation of public service.

Among other things, a small number of wealthy people and institutions have worked to create a false, but effective, impression that no scientific consensus exists on the perils of greenhouse gas emissions. By some polls, the number of Americans who believe in anthropogenic climate change has substantially diminished in the last few years, despite steadily mounting evidence to the contrary. Practically all the significant figures in one of our two major national political parties now seem, lamentably, to subscribe to this view.

The "lamestream media," to borrow Sarah Palin's phrase, too often fail to report the existence of that overwhelming worldwide scientific consensus. Commercial media companies shrink from the obvious. Not long ago, the New York Times reported that the Discovery Channel had aired a documentary on the melting polar ice caps without once mentioning greenhouse gas emissions because, the producers said, they did not want to create controversy and alienate those who simply refuse to believe humans have anything to do with it. The result was, as Bill McKibben said, like "doing a powerful documentary about lung cancer and leaving out the part about the cigarettes."[11]

Young people obviously have the most at stake in this struggle. There are some hopeful signs they are beginning to engage, for there is no time to lose.

Let me close by suggesting that—instead of all joining hands and jumping off the nearest cliff (or, remembering that this is Boulder, the nearest Flatiron)—we ponder three of David's notable strengths. They can help guide us out of this corner in which we find ourselves—if we have the wisdom to follow his example.

One is that he was engaged—he did not simply sit in his office and write. He knew that it is rare for a law review article or a book to contain ideas powerful enough to change the course of events. That usually happens only as a result of active, committed, indeed strenuous, engagement.

David's form of engagement is also instructive. He did not toil away on problems where success is measured only in dollars. He represented underserved interests. A good portion

11. Brian Stelter, *No Place for Heated Opinions*, N.Y. TIMES, Apr. 20, 2012, at B1.

of his talents and energy were devoted to helping to craft constructive solutions to broad policy problems. He did a turn in government, running the Colorado Department of Natural Resources. He helped build and guide nonprofit institutions doing good works.

Second, for much of his career, David was an educator as well as public servant. Education is essential for a well-functioning economy and a good society. It remains an important responsibility of government at practically all levels. David helped educate younger generations about how our legal and political systems operate, and he equipped many with the zeal, advocacy skills, and other tools to go out and make a difference.

Finally, David was an optimist. He believed that people are mostly of good will, that they can be persuaded to work together to fashion a better world, and that the political system can be made to work to lift us all to higher ground.

Although our system seems to be doing its best to avoid confronting the challenges we face, history shows us that dramatic turnarounds are possible in a relatively short period of time. The Progressive Movement, which crafted many innovations we now take for granted, followed quite abruptly on the heels of what Mark Twain dubbed the "Gilded Age"—when American politics and society were corrupted by narrow moneyed interests.

We are all deeply privileged to have known David and to have shared his fellowship through times of great change. He maintained his spirit of engagement; his commitment to education, learning, and improvement; and his irrepressible optimism to the end. We should let his example sustain and guide us as we confront the challenges ahead.

REMARKS OF THE HONORABLE TIMOTHY E. WIRTH: SYMPOSIUM IN HONOR OF DAVID H. GETCHES

TIMOTHY E. WIRTH*

Good morning and thank you all for coming. I feel privileged to be here today to join you in reflecting on the life and work of David Getches, one of the real treasures of the legal profession, of environmental history, of this University, and [of] our broader community.

David was my friend—we ran rivers together, talked a lot of politics, and he flattered me by inviting me many times to meet with his faculty and students. He recruited my son, Christopher—one of his students—to be his assistant on the little book, *Water Law in a Nutshell*, which has a proud spot in our library.

We all feel cheated by David's early departure—I think of punctual David; he was always on time. It is still a jolt to think of the late David Getches. I would have valued his counsel—as [always], we would have sat on river banks trying to puzzle through what had gone wrong in our country and what we could do about it. David and I—and many of you here today—were of a generation keenly aware of the opportunities we had been given and our responsibilities to [ensure] that future generations [have] [those] opportunities as well.

Like John Leshy,[1] I would like to frame my remarks in a generational context. Many [of my] thoughts echo John's good talk. We were products of a previous generation that made huge investments in our public spaces:

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* Former U.S. Senator (1987–1992) and U.S. Representative (1975–1986) from Colorado. He is President of the United Nations Foundation, founded by R. E. "Ted" Turner. The Foundation connects people, ideas, and resources with the United Nations to address key global problems. The Foundation has major campaigns in the areas of energy and climate change, population and women's empowerment, and children's health. This talk was delivered at the University of Colorado Law School symposium *A Life of Contributions for All Time: Symposium in Honor of David H. Getches* on April 27, 2012.

1. John D. Leshy, *Reflections on Social Change and Law Reform*, 84 U. COLO. L. REV. 221 (2012).

- our great public universities;
- remarkable advances in the public health;
- public parks and public libraries;
- a vast public transportation system, open to everyone; and
- public electrification, public broadcasting, and a public interest standard to govern the public's airwaves.

The public invested in the Marshall Plan, rebuilt our international financial institutions, and built the United Nations. For our lucky generation, these investments were governed by a broadly shared sense of public responsibility and the public interest. An unprecedented number of Americans benefited [from the] deep sense of possibility and optimism.

David, and much of his generation, built another American structure on this public legacy and developed a new layer of common, public institutions:

- the Civil Rights Movement, in all of its ramifications;
- women's access and equality;
- the voice of the consumer; and
- the environmental awakening (perhaps most profound right here).

David was dedicated to making our country more economically, socially, and environmentally just. He believed that it was important to break down barriers to equal opportunity in the United States. He worked throughout his life to help ensure that all Americans had access to the educational experiences that underlie individual and societal progress. He valued wilderness and the natural world and wanted to make sure that future generations could enjoy the same experiences he had climbing the mountains of Colorado and running the rivers of the west.

Based on these values, David fought and won the Boldt[2] decision that gave Native Americans in Washington access to salmon fisheries. He founded and ran the Native American Rights Fund. His knowledge and work ethic made him a preeminent resource in the creation of wilderness areas and the establishment of water rights within them. He helped

2. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975).

broker the agreement that recognized the water rights of the Southern Ute and Mountain Ute Tribes in southwest Colorado. He created the Natural Resources Law Center here. And, as Dean, he rebuilt this law school—as is reflected not only in this building but also in the diverse and dynamic scholars he recruited.

His life's work demonstrated that the law, the legislature, and the courts can be made to work for the disadvantaged, the disenfranchised, and the environment. But, as David—ever the cheerful optimist—often pointed out, this work was getting harder all the time. [For example]:

- our environment is more threatened than ever, with accurate measurements that tell this important and depressing story;
- battles for equal opportunity have had mixed results at best, with income indices for minorities, immigration law, and even the rights of women now under broad assault; and
- the gap between rich and poor has grown dramatically; while our historic investments in public institutions have frayed for one America, the other America lives within a gated community, with access to quality schools, good health care, and real economic opportunity.

David would be wrapping his head around these huge challenges, urging his faculty to join, and leading his students in a set of new commitments for what is right for America. [David would ask the following questions]:

- What is the role of corporations in governance? Is there an antidote to their enormous concentration of economic and political power?; and
- How should financial institutions be regulated? They were once considered akin to public utilities, and now seem to have become vehicles for private gain. Is this right, and if not, what is the solution?

As John Leshy described so well, the Executive [branch] and Congress are under attack, so too are the courts.[3] Who else

3. Leshy, *supra* note 1.

can adjudicate questions of the common good, and will they maintain their more progressive role?

Work used to be defined in pretty much the same way, and so were incomes. But modern specialization has led to great disparities. Is capitalism too efficient?

Under what condition might our country, and the world, accept a climate treaty? What building blocks must first be in place, and what new legal regimes will be required?

Finally, and perhaps most important[ly], how might we deal with the tangled and destructive campaign finance system? From the earliest days of the Republic, special interests have attempted to purchase politicians and political outcomes. What is different today is the size and pervasiveness of the money involved, the growing veil of secrecy surrounding political money, and the apparent naiveté or indifference of our highest court to this powerful, corrupting, and stultifying political cancer. As Justice Stevens wrote in his dissent to *Citizens United*, "A democracy cannot function effectively when its constituent members believe laws are being bought and sold."[4]

These are some of the major issues of today and tomorrow. As [Professor Sarah Krakoff] wrote in her invitation to this symposium, David lived several lives in one. His scholarship was as far reaching as his curiosity and grew to assume new issues and to try to understand new challenges. As he opened up Indian law, forged some order from the chaos of water law, codified new approaches to natural resource law, and even tried to streamline and reform the Department of the Interior, David demonstrated his enormous capacity, his ethical standards for how we should operate, and his moral code for right and wrong.

He had built his school, grown his faculty, and pointed the enterprise in the direction he had calibrated. I am certain that [now] he would [turn] his attention to the great emerging challenges of today and to ways in which the law could contribute. His cheerful leadership would have helped to sketch new definitions of the public good.

We are left behind to do that work without him. I suspect that we all know what he would [urge] us to do. So let us get with it before the country slips away. Time is short and there is so much to do. Thank you.

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4. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).