



Photo: Largo School Pueblito Ruin, New Mexico. By Lawrence R. Baca.

# The Next Century of Federal Indian Law: A Moderator's Reflections

By Kaighn Smith Jr.

The Federal Bar Association's Annual Indian Law Conference is a place for big thinking. So 10 years into the new millennium, why not ask: "How will federal Indian law look over the course of the next century?" A better question might be: "How *should* federal Indian law look in the next century?" At this year's conference, a panel of prominent Indian law scholars—Wenona Singel, Eugene Fidell, and Stacy Leeds—will discuss this theme. They will grapple with potential institutional changes—heady ideas, like the formation of a national tribal supreme court, a court of last resort that tribes could opt to use or not, and an Intertribal Convention on Human Rights, which could serve to protect human rights in Indian country. These scholars will discuss how the untold stories of tribal justice—like the one leading to the Supreme Court's 1896 decision in *Talton v. Mayes*<sup>1</sup>—can be told in a way that will bolster tribal sovereignty against continued diminishment.

I have been asked to moderate the discussion and to provide a few initial reflections. The best I might hope to do is perhaps provide a little food for thought. I'll leave the tall thinking to our panelists.

## Owning History

In his keynote address to the National Congress of American Indians' Annual Convention, Kevin Gover recently remarked that the accepted history of the American Indian finally is the one written by American Indians.<sup>2</sup> The historical narrative is now accurate. The distorted, makeover history that endured for the first 200 years of the United States is discredited.

This was confirmed, Gover said, when President Barack Obama signed the Native American Apology Resolution on Dec. 19, 2009. Section 8113, H.R. 3326, Public Law No. 111-18 (2010 Defense Appropriations Act). Senator Sam Brownback (R-Kan.) introduced the measure "to officially apologize for the past ill-conceived policies by the U.S. Government toward the Native Peoples of this land and re-affirm our commitment toward healing our nation's wounds and working toward establishing better relationships rooted in reconciliation."<sup>3</sup> The resolution "apologizes on behalf of the people of the United States to all Native

Peoples for the many instances of violence, maltreatment, and neglect inflicted on Native Peoples by citizens of the United States." Section 8113, H.R. 3326, Public Law No. 111-118.

Another watershed moment came at the end of last year, when, on Dec. 16, 2010, a day after the White House Tribal Nations Conference, President Obama signed the United Nations Declaration of Human Rights for Indigenous Peoples, ending the United States' dubious distinction as the only member of the United Nations not to have endorsed the declaration. The declaration requires governments to obtain the "free, prior, and informed consent" of native peoples before embarking on development projects or other actions that would affect their territories or the integrity of their cultures.<sup>4</sup>

This is all good news. The Apology Resolution and the Declaration of Human Rights are positive developments for our times. And one might hope that history is progressive in the sense that, as time passes, the wrongs of the past will continue to be made right. But the history of the United States' treatment of its native peoples, ever-shifting from destruction to preservation, is a sobering one. And history is said to repeat itself. We cannot be sure that yet another cycle of mistreatment is not on the horizon. The Apology Resolution and the U.N. declaration are not enforceable. Indeed, they lack even the force of treaties, and the history of treaties is a sorry one. Red Cloud famously said, "They made us many promises, more than I can remember, but they never kept but one; they promised to take our land, and they took it."<sup>5</sup>

A lot can change in 100 years, but much can remain the same in the absence of vigilance and foresight.

## Reflecting Back

History is always a good teacher. Perhaps the "trends" listed below and presented in 50-year increments can provide some perspective.

### 1811

- Estimated population of Native Americans: 600,000.<sup>6</sup>
- Federal Indian policy: There was none, other than the notion that the federal government would be

responsible for Indian affairs and the protection of tribes against states: Article 1, section 8 of the U.S. Constitution (1787); Indian Non-Intercourse Act (1790).

- Significant Supreme Court Indian law cases: There were none.

#### 1861

- Estimated population of Native Americans: 310,000.<sup>7</sup>
- Federal Indian policy/events: Andrew Jackson, President (1828); Removal Act (1830); removal era (1817–1848); reservation era (1848–1886); gold rush and Civil War.
- Significant Indian law cases:
  - *Johnson v. McIntosh* (1823): In this controversy between non-Indians over title to Indian lands, the Court held that “however extravagant the pretention” of the “discovery doctrine,” it is the “law of the land,” and therefore the exclusive right to extinguish Indian title is vested in federal government.
  - *Cherokee Nation v. Georgia* (1831): Tribes are not states or foreign nations, but rather “domestic dependent nations.”
  - *Worcester v. Georgia* (1832): The “dependence” of Indian nations upon the federal government does not mean that they surrendered their statehood; the law of Georgia could have “no force” within the territory of the Cherokee Nation.

#### 1911

- Estimated population of Native Americans: 260,000.<sup>8</sup>
- Federal Indian policy/events: End of treaty-making (1871); Battle of Little Big Horn (1876); Major Crimes Act (1885); allotment and assimilation (1887–1928) Wounded Knee Massacre (1890).
- Significant Supreme Court Indian law cases:
  - *Ex Parte Crow Dog* (1883): There was no federal jurisdiction over Crow Dog’s murder of Spotted Tail, a crime that had been resolved under tribal law and custom. Ambiguities in federal treaties and statutes should be construed to prevent the infringement of tribal law. Congress reacted by enacting the Major Crimes Act.
  - *U.S. v. Kagama* (1886): Upholding the constitutionality of the Major Crimes Act for the prosecution for murder of one tribal member by another. The source of Congress’ power to enact the Major Crimes Act is not found in the Commerce Clause but in Congress’ plenary authority over Indian people as “weak and helpless wards.”
  - *Talton v. Mayes* (1896): The Cherokee Nation pre-existed the U.S. Constitution and is therefore not subject to the Fifth Amendment of the U.S. Constitution.
  - *Lone Wolf v. Hitchcock* (1903): The U.S. Supreme Court would not stop Congress from abrogating treaty obligations in furtherance of the General Allotment Act, because Congress’ plenary power

prevails, leaving the Court to “presume that [it] acted with perfect good faith.”

#### 1961

- Estimated population of Native Americans: 525,000.<sup>9</sup>
- Federal Indian policy/events: Native Americans granted citizenship (1924); Indian Reorganization Act (1934); Termination Acts/Era (1947–1961); Indian Claims Commission (1946); Felix Cohen’s *Handbook on Federal Indian Law* (1942); Public Law 280 (1953).
- Significant Supreme Court Indian law cases:
  - *Seminole Nation v. U.S.* (1943): The Seminole and Creek Nations were not entitled to compensation from the United States for damages to land from encroachments by railroads.
  - *Tee-Hit-Ton Indians v. U.S.* (1955): Alaska natives considered “nomadic” and therefore not entitled to compensation for United States’ taking of timber.
  - *Williams v. Lee* (1959): “The basic policy of *Worcester* has remained.” The Arizona state court lacked jurisdiction over collection action by non-Indian grocery store owner against Navajo tribal members arising on the Navajo reservation. This is because the exercise of state authority “would infringe on the right of the Indians to govern themselves.”

#### 2011

- Estimated population of Native Americans: 1.5–2 million.<sup>10</sup>
- Federal Indian policy/events: Indian self-determination era (1961–present); Nixon’s renunciation of termination policies (1970); Indian Education and Self-Determination Act (1975); Indian Child Welfare Act (1978); Indian Gaming Regulatory Act (1988); “Duro Fix”—1990 Amendment to Indian Civil Rights Act (confirming “inherent power of Indian tribes ... to exercise criminal jurisdiction over all Indians”); Tribal Law and Order Act (2010); *Cobell* Settlement (2010).
- Significant Supreme Court Indian law cases:
  - *Santa Clara Pueblo v. Martinez* (1978): With the exception of petitions for habeas corpus relief, tribal forums are the exclusive forums for the enforcement of the Indian Civil Rights Act and such rights must be defined by tribes.
  - *Oliphant v. Suquamish Indian Tribe* (1978): Under the implicit divestiture doctrine, tribal courts lack jurisdiction to prosecute non-Indians for crimes committed within tribal territory.
  - *Montana v. U.S.* (1981): Tribal authority over non-member activity on nonmember fee land is limited to the regulation of (1) consensual relationships between a nonmember and a tribe or a nonmember and tribal members or (2) activities that pose direct threats to the political integrity or the health and welfare of the tribe.

- *California v. Cabazon Band of Mission Indians* (1987): Tribes have inherent authority to raise governmental revenues from gaming within their territories. California lacks authority to regulate a tribe's gaming when the state does not prohibit such gaming as a matter of criminal law and public policy.
- *Duro v. Reina* (1990): The tribe lacks criminal jurisdiction over nonmember Indian. Congress reacts by amending the Indian Civil Rights Act with the "Duro Fix," as described above.
- *Strate v. A-1 Contractors* (1997): The Court described *Montana* as a "pathmarking case" on the question of tribal authority over nonmembers.
- *Kiowa Tribe v. Manufacturing Technologies* (1998): Tribal sovereign immunity extends to commercial activities of Indian tribes. Any change to the doctrine of sovereign immunity is the prerogative of Congress.
- *Nevada v. Hicks* (2001): A fractured Court grapples with the rule governing tribal court authority over a tribal member's civil rights suit against state law enforcement officers, who enforced criminal subpoenas against the tribal member's property to investigate a state law crime. A majority of justices concluded that such authority was lacking.
- *U.S. v. Lara* (2004): Congress has power to relax the restrictions the Supreme Court places upon the inherent authority of Indian tribes, which is the nature of the *Duro* Fix.
- *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.* (2005): The Oneida Nation's reacquired aboriginal lands are not free from state taxation; "the doctrine of laches, acquiescence, and impossibility ... render inequitable the piecemeal shift in government this suit seeks unilaterally to initiate."

The population figures are no doubt flawed in the early years because of the ignorance (or laziness) of officials collecting data in Indian country. The sharp decline in the population of Native Americans between 1811 and 1911, however, cannot be doubted. The drop reflects the destructive policies (and wars) against Indians during that century. It is likely that the restoration of the Native American population in the last 50 years reflects the modern restoration of tribes and their membership rolls as well as more accurate data collection.

The descriptions of federal Indian policies are, of course, oversimplified, but they reveal the ever-shifting, even schizophrenic history of federal Indian policy. See *U.S. v. Lara*, 541 U.S. 193, 219 (2004) ("Federal Indian policy is, to say the least, schizophrenic.").

Finally, the inclusion or exclusion of decisions listed as "significant Indian law cases" within the designated time frames surely is subject to debate. What cannot be debated, however, is the increased pace of decisions involving Indian tribes or tribal enterprises and their impact over the course of the last 50 years.

What about the next 50 years or the next *century* (the subject of our panel)? There is massive potential for significant change in the law.

### Reflecting Forward

The discussion of federal Indian law typically has focused on developments within the three branches of the "dominant" power, the United States—decisions made by its judiciary, the enactments of its Congress, and the policies of its executive branch—in top-down or outside-in fashion. But the dialogue is now focusing as much from the inside out as it is from the other way around, because Indian tribes are developing their own jurisprudence and enacting their own laws to govern their members and territories (including the economic activities of nonmembers therein).

There is an important dynamic at play between the two realms. The more tribes exercise their sovereign authority in fair and reasonable ways (on the inside), the less interference they may face from external federal or even state authorities (from the outside). The regulation of labor and employment relations is a good example of this dynamic. As tribes develop their own labor and employment laws, not only may they enhance the fairness of their workplaces in accordance with their own cultural norms and values, but they may also stave off the efforts of federal agencies to interfere in such matters.<sup>11</sup> Where tribal law establishes rights and remedies to ensure fair employment practices, why should federal agencies like the Department of Labor bother to get involved?

### Building Pressure from the Outside In

#### *A Wild Card for the Future of Federal Indian Law*

The Apology Resolution and the Declaration of Rights of Indigenous People reflect the work of the political branches. Federal Indian law, however, is likely to be more profoundly shaped in years to come by the judiciary. The political branches appear firmly committed to tribal sovereignty and independence—at least for the time being. The judiciary, however, is a wild card.

Even though it is often deferential to Congress in charting new ground that could undermine established principles of tribal sovereignty, the federal judicial branch has reserved to itself the power to declare that certain tribal powers have been "lost" by virtue of the "dependent status" of Indian tribes. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). From time to time, the Court has resorted to this rarely used, but readily available, "implicit divestiture" doctrine to announce that certain attributes of tribal sovereignty can no longer exist because they are inconsistent with "the overriding sovereignty of the United States." See *Olipphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209–10 (1978); *Wheeler*, 435 U.S. at 326. The Court has made such announcements with respect to the powers of tribes to (1) engage in "direct commercial or governmental relations with foreign nations;" (2) try non-Indian citizens of the United States for crimes committed on the reservation; and (3) alienate tribal lands to non-Indians without federal

oversight. *Wheeler*, 435 U.S. at 326 (internal citations and quotations omitted); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980). Inasmuch as federal Indian common law derives from the Court's determination that the "actual state of things" requires a particular rule,<sup>12</sup> the field is vulnerable to unanticipated developments in the federal courts.<sup>13</sup>

*Montana v. U.S.* is a case in point. 450 U.S. 544 (1981). The "narrow" issue presented in that case was the scope of tribal regulatory authority over nonmembers who hunted and fished on nonmember-owned fee land within the exterior boundaries of the Crow reservation. *Montana v. U.S.*, 450 U.S. at 557 (describing the "narrow" issue presented). Invoking the implicit divestiture rule, however, the Court announced a "general proposition" about tribal authority over nonmembers, without limiting it to the location of nonmembers' activity (that is, on their own fee land or within an Indian tribe's trust or reservation lands). The Court stated that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."<sup>14</sup>

The Court quickly qualified its proposition by announcing the now well-known "exceptions" to it, vaguely linking one of them back to some consideration of the location of the nonmember's activity.<sup>15</sup> *Montana's* "general proposition" could well be considered dictum, but the Court subsequently deemed *Montana* "the pathmarking case concerning tribal civil authority over nonmembers,"<sup>16</sup> and it has subsequently left uncertainty about the actual state of the law.<sup>17</sup>

In short, the uncertainty of the judiciary for the future of federal Indian law is a given. Much will turn on the kinds of cases that are brought before the Court.

#### "Bad" Facts Will Make "Bad" Law

One of the more lively FBA Indian Law Conferences took place in 2002, shortly after the Supreme Court's decision in two Indian law cases: *Nevada v. Hicks* and *C & L Enterprises Inc. v. Citizen Band Potawatomi Tribe of Oklahoma*, 533 U.S. 353 (2001) and 532 U.S. 411 (2001). *C & L Enterprises* was decided in April 2001 and *Hicks* was decided in June of that year.

Even though the central issue presented in *Hicks* was a narrow one and had to do with tribal court jurisdiction over state officers accused of violating the civil rights of a tribal member when they allegedly botched a search warrant, the case raised a host of flash point considerations for the Court: the scope of state authority within Indian territory, tribal authority over nonmembers, and common law principles of tribal sovereignty in general.

The facts of the case were as follows: Floyd Hicks, a member of the Fallon Paiute-Shoshone Tribes, allegedly killed a California bighorn sheep off the reservation, in violation of Nevada criminal law. On a tip from tribal police officers that Hicks had two mounted sheep heads at his residence on the reservation, Nevada game wardens obtained a search warrant, approved by both the state court and the tribal court, to search Hicks' residence, and they executed that warrant with the cooperation of tribal

police. In doing so, the tribal and state officers found heads of different sheep, but not the head of the California bighorn protected by Nevada law. Claiming that the officers had acted beyond the scope of their warrant and damaged his sheep heads, Hicks sued the state wardens, the tribal police officers, and the tribal court judge who had approved the warrant in tribal court. Eventually the tribal court dismissed all his claims, with the exception of certain tort and civil rights claims against individual state officers. After the tribal court ruled that it had jurisdiction to proceed with those claims, the state officers sued Hicks in federal court, seeking a declaration that the tribal court lacked jurisdiction. Hicks prevailed in the Ninth Circuit, but the Supreme Court reversed the lower court's decision.<sup>18</sup>

Attendees at that FBA conference in 2002 asked, "How could such a controversy about a couple of damaged sheep heads be 'allowed' to reach the Supreme Court and place critical issues of tribal sovereignty in jeopardy?" Perhaps hindsight is 20/20, but the "bad" outcome might have been anticipated. (Notably, 18 states filed amici briefs to support Nevada.)

*C & L Enterprises* also garnered almost as much attention. In that case, the Supreme Court seemed to lower the standard for a waiver of tribal sovereign immunity to something less than "unequivocal." The following are the facts of *C & L Enterprises*: The Citizen Band Potawatomi Tribe contracted with C & L Enterprises to construct a roof on an off-reservation bank in Oklahoma that was owned by the tribe. The parties executed a standard form agreement, which provided that all claims would be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association; further, that the arbitrator's decision "shall be final and judgment may be entered upon it ... in any court having jurisdiction thereof"; and further, that the contract "shall be governed by the law of the place where the Project is located." *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. at 415. After executing the contract, the tribe decided it wanted different roofing material; then it solicited new bids and retained another contractor. C & L proceeded to arbitration to enforce its contract, but the tribe refused to participate. The arbitrator awarded C & L \$25,400 plus attorneys' fees. C & L then filed suit in Oklahoma state court to enforce the award. The tribe claimed that it had not unequivocally waived its sovereign immunity and prevailed.<sup>19</sup>

A unanimous Supreme Court reversed the decision, holding that the contract exemplified a "clear" waiver. The Court pointed out that the tribe had proposed the contract, including the clause stating that it was "governed by the law of the place where the Project is located" and that an Oklahoma statute provided that "the making of an agreement ... providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder." This, the Court said, was enough to satisfy the requisite clarity for a waiver under the law of tribal sovereign immunity.<sup>20</sup>

As they did when discussing *Hicks*, the FBA conference

participants wondered, “How on earth could a controversy about a \$25,000 roofing job reach the Supreme Court to generate a significant challenge to the law of tribal sovereign immunity?” (Seven states supported the Supreme Court’s grant of certiorari in *C & L Enterprises*.)

No doubt this year’s FBA Conference might have been dominated by concerns about another Supreme Court case, *Madison County and Oneida County, N.Y. v. Oneida Indian Nation of New York*.<sup>21</sup> The Court initially granted certiorari to review the decision handed down by the U.S. Court of Appeals for the Second Circuit but later vacated it and ordered remand in light of facts suggesting that the case was moot.<sup>22</sup>

The facts of *Madison County* are as follows: After the Court decided, in *City of Sherrill*, that land owned by the Oneida Indian Nation was not free from state and local taxes, Madison County levied taxes against the land, which resulted in a state foreclosure action.<sup>23</sup> The Oneida Nation sought declaratory and injunctive relief against the county in federal court, claiming, among other things, that, under the rule of *Oklahoma Tax Commission v. Citizen Band of Potawatomi*, it had sovereign immunity from the county’s foreclosure action. “In *Potawatomi* ... [the Court] reaffirmed that while Oklahoma may tax cigarette sales by a Tribe’s store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. ... There is a difference between the right to demand compliance with state laws and the means available to enforce them.” *Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc.*, 523 U.S. 751, 755 (1998). The Second Circuit reluctantly affirmed the federal district court’s judgment in favor of the tribe, following *Potawatomi* and *Kiowa*. In a stinging concurring opinion, Judge Cabranes called upon the Supreme Court to reconsider *Kiowa* and *Potawatomi* or for Congress to change the law. *Oneida Indian Nation of New York v. Madison County, Oneida County, N.Y.*, 605 F.3d 149 at 164 (Cabranes, J., concurring). The county, supported by 15 states, petitioned to the Supreme Court, which granted review.

A Supreme Court decision on the merits was avoided when counsel for the Oneida Nation alerted the clerk of the Court that the tribe had, by ordinance, waived its sovereign immunity from the county’s foreclosure action. This led the Court to vacate the Second Circuit’s decision and order the case remanded for consideration of whether such developments rendered the controversy moot. See *Madison County, N.Y. v. Oneida Indian Nation of New York*, 131 S. Ct. 704 (2011). Perhaps a disaster was averted.

Apart from the rare invocation of the notion of implied divestiture, the Supreme Court has long held that Congress is the proper branch of government to make policy judgments about any retrenchment from the established contours of tribal sovereignty, including sovereign immunity.<sup>24</sup> But by granting certiorari in *Madison County*, at least four members of the Court (the requisite number for issuing the writ) apparently signaled some willingness to reconsider that view or perhaps to invoke implicit divestiture as a basis for a judicial revision to the doctrine of tribal sovereign immunity.

The Supreme Court Project, jointly launched by the Native American Rights Fund and the National Congress of American Indians in 2001—the year *Hicks* and *C & L Enterprises* were decided—monitors cases that could be bound for the U.S. Supreme Court in an effort to stave off the ones with “bad facts.” This is a significant step for checking the judicial wild card. The project’s efforts may well have contributed to the avoidance of a merits decision by the Court in *Madison County*; the project at least provides a place for holding a dialogue about views beyond the particulars of a single case.

### **Relieving Pressure from the Inside Out**

As noted above, external forces that exert pressure to diminish tribal self-government may well be offset by the affirmative exercise of tribal sovereignty. The considerations are many, and this subject is best left to the panelists who will be taking part in this year’s FBA conference to formally address federal Indian law in the next century. Suffice it to say, by way of introduction, as tribes continue to exercise their authority to protect “civil rights,” to develop principled rules for the conduct of counsel and judges in their courts, and to make their laws accessible, they will shore up their sovereignty and protect it in the long run.

### **Federal Indian Law as a Movement?**

The United Nations Declaration of Rights for Indigenous Peoples appeared as a draft in the course materials for the 2002 FBA Indian Law Conference. It is now a reality. (A lot can change in nine years.) The declaration states the following:

Indigenous peoples have *the right to self-determination*. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Indigenous peoples, in exercising their right to self-determination, have *the right to autonomy or self-government* in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

The so-called modern era of federal Indian policy, marked by a commitment to tribal self-government, stands foursquare with the spirit of this declaration. At this point in history, perhaps it is time to call such a commitment “self-evident.” Is it not self-evident that tribal self-government and the established attributes of tribal sovereignty are good things, worthy of preservation and enhancement for the next century and beyond?<sup>25</sup> No doubt a majority of participants at the FBA’s Annual Federal Indian Law Conference will think so.

But there is much uncertainty outside of Indian country, stemming from perceived “abuses” of tribal sovereign power or the “special treatment” afforded to tribal enterprises.<sup>26</sup> Ironically, the very success of Indian gaming—which Congress endorsed for the purpose of promoting tribal self-government<sup>27</sup>—has had the effect of generating

a fair amount of hostility toward the values of tribal self-determination.<sup>28</sup>

If the values of tribal sovereignty are as self-evident as the U.N. declaration proclaims them to be, advocates of those values should work hard to make them as much a part of the American legal fabric as civil rights are today. It took a highly coordinated movement to solidify civil rights in this country. Perhaps the same kind of effort—carefully focused on the interplay between external pressures that can diminish tribal sovereignty and internal developments that may support it—is now needed to preserve the values of tribal self-determination for the next century. **TFL**

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## Endnotes

<sup>1</sup>163 U.S. 376 (1896) (holding the Fifth Amendment's grand jury requirement inapplicable to prosecution under laws of the Cherokee Nation; the powers of the Cherokee Nation "existed prior to the Constitution" and are, therefore, not constrained by it).

<sup>2</sup>Kevin Gover, J.D., director, Smithsonian Institution's National Museum of the American Indian, *Essential Conversations about the Future of Indian Country*, Keynote Address to the National Congress of American Indians' 67th Annual Convention, Plenary Session (Nov. 16, 2010), available at [www.ncai.org/fileadmin/ncai\\_events/2010annual/2010\\_Kein\\_Gover\\_Keynote\\_NCAI\\_Annual\\_Convention.pdf](http://www.ncai.org/fileadmin/ncai_events/2010annual/2010_Kein_Gover_Keynote_NCAI_Annual_Convention.pdf); <http://vimeo.com/17096874>.

<sup>3</sup>Remarks of Sen. Sam Brownback, quoted at [nativevotewa.wordpress.com/2009/12/31/president-obama-signs-native-american-apology-resolution/](http://nativevotewa.wordpress.com/2009/12/31/president-obama-signs-native-american-apology-resolution/). See also Press Release, *Brownback, Dorgan Applaud Senate Passage of Native American Apology Resolution* (Oct. 7, 2009); available at [indian.senate.gov/news/pressreleases/pr-10-07-09.cfm](http://indian.senate.gov/news/pressreleases/pr-10-07-09.cfm).

<sup>4</sup>See United Nations Declaration on the Rights of Indigenous Peoples Adopted by General Assembly Resolution 61/295 (Sept. 13, 2007), available at [www.un.org/](http://www.un.org/)

[esa/socdev/unpfii/en/drip.html](http://esa/socdev/unpfii/en/drip.html). The declaration provides, inter alia, that:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. ...

States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

<sup>5</sup>Red Cloud (Ogala Teton), quoted in Dee Brown, *BURY MY HEART AT WOUNDED KNEE* 448 (Henry Holt & Co., First Owl Edition, 1991).

<sup>6</sup>Extrapolated from figures provided in Michael R. Haines and Richard H. Steckel, *A POPULATION HISTORY OF NORTH AMERICA* 23–24 (2000). This figure does not account for Native populations in Alaska or Hawai'i.

<sup>7</sup>*Id.* Extrapolated from figures provided in Haines and Steckel, *supra* note 8 at 23–24. This figure does not account for Native American populations in Alaska or Hawai'i.

<sup>8</sup>Extrapolated from figures in 1 Department of Commerce, Bureau of Census, *Thirteenth Census of the United States Taken in the Year 1910, Population 1910: General Report and Analysis* Table 1 (Population Enumerated at the Census of 1910) 125 (Washington, D.C.: GPO, 1913). This figure does not include Native populations in Alaska or Hawai'i. The census indicates the population of Alaskan "Indians" at 25,000. See *id.* It provides no figures for the Native population in Hawai'i.

<sup>9</sup>Extrapolated from figures in 1 Department of Commerce, Bureau of Census, *Eighteenth Decennial Census of the United States, Census of Population: 1960*, Part 1 United States Summary, Table 56 (Race of the Population, By Regions, Divisions, and States: 1960) 1–164 (1961). This includes figures for Alaska (15,000) and Hawai'i (500).

<sup>10</sup>This would be closer to 3.5 million if extrapolated from the U.S. Census Bureau, *The American Indian and Alaska Native Population in the United States*, available at [www.census.gov/population/www/socdemo/race/AIAN-US.pdf](http://www.census.gov/population/www/socdemo/race/AIAN-US.pdf) (last viewed on 1/25/11). However, the Census Bureau relies on self-identification of Native Americans, not enrolled members of tribes, resulting in inflated figures. See Frederick E. Hoxie ed., *ENCYCLOPEDIA OF NORTH AMERICAN INDIANS* (Houghlin Mifflin Co. 1996).

<sup>11</sup>See generally, Kaighn Smith Jr., *LABOR AND EMPLOYMENT LAW IN INDIAN COUNTRY* 78, 175–76 (2011).

<sup>12</sup>*Johnson v. M'Intosh*, 21 U.S. 543, 574, 590 (1823) (fashioning conception of Indian title and Indian tribes' loss of right to alienate lands without federal oversight from "the actual state of things").

<sup>13</sup>See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191,

209 (1978) (“We have already described some of the inherent limitations on tribal powers that stem from their incorporation into the United States. In *Johnson v. McIntosh*, we noted that the Indian tribes’ ‘power to dispose of the soil at their own will to whomsoever they pleased,’ was inherently lost to the overriding sovereignty of the United States.”). See also *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 219 (2005) (“[T]his Court has recognized the impracticability of returning to Indian control land that generations earlier passed into numerous private hands.”).

<sup>14</sup>See *Montana v. U.S.*, 450 U.S. at 564–66 (reviewing the Court’s application of “implicit divesture” and concluding that “the principles on which [*Oliphant*] relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”). But see *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (“Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. ... Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.”) (citations omitted); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (“Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.”).

<sup>15</sup>The Court said:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations, even on non-Indian fee lands*. 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, contracts, leases, or other arrangements. ... A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands *within its reservation* when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

*Montana*, 450 U.S. at 565–66 (emphasis added).

<sup>16</sup>*Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). *Strate* presented a narrow issue much like the one presented in *Montana*: the scope of a tribe’s adjudicatory authority over a nonmember on a state-owned right of way within exterior boundaries of the reservation. See *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997).

<sup>17</sup>See generally, Kaighn Smith Jr., LABOR AND EMPLOYMENT LAW IN INDIAN COUNTRY 33–34 (2011) (discussing lack of clarity about the controlling rule after *Montana*).

<sup>18</sup>For the foregoing facts and procedural history, see generally *Nevada v. Hicks*, 533 U.S. 353, 355–56 (2001).

<sup>19</sup>For the foregoing facts and procedural history see generally *id.* at 416–17.

<sup>20</sup>*Id.* at 416–22. The Court noted that the tribe’s argu-

ment that it only contracted to arbitrate, not to waive its sovereign immunity, was disingenuous on two counts: (1) the tribe refused to arbitrate and (2) arbitration would be meaningless if an arbitration award were left unenforceable. See *id.* at 422.

<sup>21</sup>131 S. Ct. 459 (2010), granting writ of certiorari.

<sup>22</sup>See *id.*; *Madison County, N.Y. v. Oneida Indian Nation of New York*, 131 S.Ct. 704 (2011), *vacating and remanding Oneida Indian Nation of New York v. Madison County, Oneida County, N.Y.*, 605 F.3d 149 (2d Cir. 2010).

<sup>23</sup>See generally *Oneida Indian Nation of New York v. Madison County, Oneida County, N.Y.*, 605 F.3d 149–57 (2d Cir. 2010).

<sup>24</sup>See *Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc.*, 523 U.S. 751, 758 (1998) (“we defer to the role Congress may wish to exercise in this important judgment”); *Oklahoma Tax Com’n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991); *Williams v. Lee*, 358 U.S. 217, 223 (1959).

<sup>25</sup>By “established attributes of tribal sovereignty” is meant the authority of Indian tribes over their territory, including the activities of nonmembers, confirmed by the standing decisions of the Supreme Court and endorsed by Congress (through its enactments like the IESDA, NAHASDA and IGRA) and the President (through his consultation order), but also reflected in the Apology Resolution and the U.N. Declaration.

<sup>26</sup>See, e.g., *Granite Valley Hotel Limited Partnership v. Jackpot Junction Bingo and Casino*, 559 N.W.2d 135, 138–91 (Min. Ct. App. 1997) (Randall, J., concurring) (“Sovereignty, as now used, is causing the disintegration of tribal government credibility”; attacking tribal sovereignty for, inter alia, enabling tribes to escape scrutiny under state and federal constitutions, enabling tribal courts to appoint judges without legal credentials, exempting tribes from civil rights laws, like sexual harassment, and preventing full disclosure of gaming revenues). See also Donna Leinwand, *Seminole Fight Sexual Harassment Suit*, MIAMI HERALD, at A1 (Feb. 12, 1996).

<sup>27</sup>See 25 U.S.C. § 2702 (IGRA enacted “to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development self-sufficiency and strong tribal governments”).

<sup>28</sup>See Cover Story, *Indian Casinos*, TIME MAGAZINE (Dec. 16, 2002); Joel Millman, *House Advantage: Indian Casinos Win by Partly Avoiding Costly Labor Rules, Sovereignty Helps Shield Them from Unions and Lawsuits, Can Limit Worker Benefits*, WALL ST. J. at A1 (May 7, 2002). For an example of organizations campaigning against tribal sovereignty see Citizens Equal Rights Alliance, available at [www.citizensalliance.org](http://www.citizensalliance.org), stating “Federal Indian Policy is unaccountable, destructive, racist and unconstitutional,” and One Nation United, available at [www.onenationunited.org](http://www.onenationunited.org), stating as one of its missions “to legally or legislatively overturn ‘Treatment Similar to States’ policy for Indian tribes” under laws administered by the Environmental Protection Agency and “getting tribal sovereign immunity from lawsuits waived or abrogated.”