THE MORE THINGS STAY THE SAME: WAITING ON INDIAN LAW'S *BROWN V. BOARD OF EDUCATION*

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"Not everything that is faced can be changed, but nothing can be changed until it is faced."

James Baldwin

I. INTRODUCTION

Lone Wolf v. Hitchcock[1] has been referred to as "the Indians' Dred Scott[2] decision."[3] Although Dred Scott was a "negro[ ] of the African race,"[4] and Lone Wolf was a Kiowa of "the Indian race,"[5] the similarities within these decisions are chilling. Both relied on prevailing contemporaneous views of white racial superiority to disregard constitutional claims by people of color. Both assigned blame for the lack of enforceable rights to the people of color themselves.[6] Consider the following quotations as a challenge, and identify whether they are excerpted from *Dred Scott* or *Lone Wolf*:

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1. 187 U.S. 553 (1903).

2. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

3. "The day *Lone Wolf* was handed down, January 5, 1903, might be called one of the blackest days in the history of the American Indian, the Indians' *Dred Scott* decision." *Sioux Nation of Indians v. U.S.*, 601 F.2d 1157, 1173 (Ct. Cl. 1979) (Nichols, J., concurring), *aff'd, sub nom. U.S. v. Sioux Nation of Indians*, 448 U.S. 371 (1980). Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L.J. 113, 182 (2002); Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 Ga. L. Rev. 481, 484 (1994); Sharon L. O'Brien, *Freedom of Religion in Indian Country*, 56 Mont. L. Rev. 451, 480 n. 190 (1995).

4. *Dred Scott*, 60 U.S. at 403.

5. *Id.* The *Dred Scott* decision distinguishes Africans from Indians for purposes of possible inclusion into the political process. *Id.* at 403-04.

6. In *Lone Wolf*, Congress would not have the power to change the status of landholdings were it not for the Indians' dependant status. *See* 187 U.S. at 567. Likewise, slaves were under the subjugation of white society because they were inferior and subordinate beings. *Dred Scott*, 60 U.S. at 404-05.

> "[T]hey were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race . . . ."[7]

> "[T]he course of events has brought [them] . . . under subjection to the white race . . . ."[8]

> "It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependant race."[9]

The quotations cumulatively classify the white Christian inhabitants of the United States as a race that rightfully dominates the ignorant, inferior, subordinate, and dependant African and Indian races. This hierarchical structure led to the ultimate similarity between *Dred Scott* and *Lone Wolf*. In both instances, the Supreme Court refused to address the substantive legal claims of the litigants on the basis of the political question doctrine.[10] On this point, the *Dred Scott* and *Lone Wolf* language is virtually interchangeable:

> "[T]he propriety or justice of [Congress'] action towards the Indians . . . is a question of governmental policy . . . ."[11] (*Lone Wolf*)

> "It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power . . . ."[12] (*Dred Scott*)

> "We must presume that Congress acted in perfect good faith . . . and that the legislative branch of the government exercised its best judgment in the premises."[13] (*Lone Wolf*)

Despite these similarities, the two cases depart in their longevity as precedent and their present day applicability. *Dred Scott* was superceded by constitutional amendments. *Dred Scott*'s legacy decision, *Plessy v. Ferguson*,[14] was eventually overruled by *Brown v. Board of Education*.[15] *Lone Wolf*, however, is controlling authority routinely cited by the current United States Supreme Court.[16]

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7. *Dred Scott*, 60 U.S. at 404-05 (discussing why Africans did not fall within the words "people of the United States" at the time the Constitution was drafted).

8. *Id.* at 404 (distinguishing between the legal rights of Indians and Africans on the issue of potential inclusion within the United States political process as full citizens).

9. *Lone Wolf*, 187 U.S. at 565 (quoting *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877)); *Id.* at 567 (describing Indians as merely "wards" to whom federal governmental policy unquestionably applies).

10. The political question doctrine places certain issues outside the realm of judicial inquiry for resolution by the legislative branch or otherwise through the political processes. For a more complete description of the political question doctrine, *see generally Baker v. Carr*, 369 U.S. 186 (1962).

11. 187 U.S. at 565.

12. 60 U.S. at 405.

13. 187 U.S. at 568.

14. 163 U.S. 537 (1896). I refer to *Plessy* as a legacy decision of *Dred Scott* because it imposes the same power structure of supremacy and inferiority. *See* D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 Geo. L.J. 437, 454 (1993).

15. 347 U.S. 483 (1954).

16. *See Hagen v. Utah*, 510 U.S. 399, 404 (1994), for an example of current reliance on *Lone Wolf*. Professor Clinton sets up this paradox in his most recent law review article. Clinton demonstrates the absurdity of the Supreme Court's present reliance on cases such as *Kagama* and *Lone Wolf* and their

In today's decisions, it is no longer acceptable for the United States Supreme Court to refer to a racial group as "a subordinate and inferior class of beings."[17] We will likely never read another Supreme Court decision that blatantly rationalizes disenfranchisement on the basis that a group is "so far inferior, that they [have] no rights which the white man [is] bound to respect."[18] Unless, perhaps, the United States Supreme Court is deciding an Indian law case.[19]

Section two of this essay will explore the rationalizations of Indian racial inferiority found in *Lone Wolf*. Section three will demonstrate how, after one hundred years, the Court continues to rely on *Lone Wolf*'s rationales to uphold congressional plenary power and the unilateral abrogation of treaties. Section four will reveal how the Court not only relies on decisions founded on racist premises, but also continues to employ racist rationales for judicially divesting tribes of power. This analysis will demonstrate how racism, at times shockingly blatant, remains pervasive in decisions from *Lone Wolf* through the 2001 Term of the United States Supreme Court. Finally, this essay will conclude by suggesting why federal Indian law has not seen its *Brown v. Board of Education*.[20]

II. *LONE WOLF* FOR THE SOCRATIC, THE HISTORIAN AND THE CYNIC

The facts of *Lone Wolf* do not speak well of the United States' treatment of Indians. At the center of the case was a treaty establishing a reservation for permanent settlement of the Kiowa and Comanche tribes.[21] The treaty guaranteed that no subsequent land transactions would be valid unless approved by three-fourths of the adult Indian male residents of the reservation.[22] Congress, however, passed a statute taking the lands owned by the tribal government and

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racial superiority arguments, and draws an excellent analogy: What if the current Supreme Court cited *Dred Scott* or *Plessy* to control the outcome of a modern affirmative action claim? Clinton, *supra* n. 3, at 199. Where this essay departs from Professor Clinton's piece is in its focus. This essay focuses less on the continued use of *Lone Wolf* as precedent and emphasizes instead the Supreme Court's continued use of racial superiority arguments to divest tribal authority.

17. *Dred Scott*, 60 U.S. at 404-05.

18. *Id.* at 407.

19. *See infra* notes 55-56 for examples of historical, racist case language appearing in modern court opinions.

20. 347 U.S. 483. *Brown* rejected the notion that one class of society is inferior and therefore entitled to inferior access. *Id.* I am not suggesting that Indian people seek integration into the American political process, but that an Indian law *Brown v. Board of Education* would put an end to the Court's reliance on race-based rationales for the divestiture of tribal autonomy and self-determination rights.

21. 187 U.S. at 553.

22. *Treaty with the Kiowa and Comanche* (*The Treaty of Medicine Lodge*), art. XII (Oct. 21, 1867), 15 Stat. 581, 585:

> No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians occupying the same, and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article III [VI] of this treaty.

redistributing the lands to various individuals, Indian and non-Indian alike.[23] The requisite three-fourths assent was never obtained.[24] Principal Chief Lone Wolf of the Kiowa Nation, along with other tribal governmental officials, sought to invalidate the statute under the Fifth Amendment, arguing that the redistribution was an inappropriate taking of property interests without compensation.[25]

In a manner reminiscent of its *Dred Scott* decision, the Supreme Court sidestepped all substantive judicial inquiry into the presumption that Congress acted in "perfect good faith" in passing the legislation.[26] The judiciary would not "question or inquire into the motives"[27] of Congress in this matter. Such congressional action was deemed a constitutionally appropriate exercise of "[p]lenary authority over the tribal relations of the Indians."[28] This "plenary authority" included the power to unilaterally abrogate provisions of Indian treaties.[29]

Each time I cover *Lone Wolf* while teaching a federal Indian law class, my outrage, as an Indian person subject to plenary power, intensifies.

"Where does this plenary power come from?" I ask my law students. Scanning the classroom for responses, while in turn seeing blank stares and wrinkled brows, I, the Socratic professor, respond to my own question with a further question: "What legal authority or precedent does the Court cite in reference to this plenary power?"

The historian in me then asks: "Have we ever discussed a previous case where the word 'plenary' is used?" The historian-me follows up, "Perhaps someone should do a search of old case law tonight to find out when the word 'plenary' was first used with respect to congressional authority in Indian relations."

The cynical-me sarcastically questions, "Did they just make it up?"

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23. *Lone Wolf*, 187 U.S. at 555-57, 560 (Lands were redistributed from the tribal government to tribal citizens. Other lands were labeled "surplus" lands for which the tribes were compensated at prices below what the tribe requested. These surplus lands were then patented to non-Indian settlers.).

24. *Id.* at 557. The Secretary of the Interior confessed to the Senate that the three-fourths required signatures were not obtained:

> If eighteen years and over be held to be the legal age of those who were authorized to sign the agreement, the number of persons who actually signed was 87 less than three fourths of the adult male membership of the tribes; and if twenty-one years be held to be the minimum age, then 23 less than three fourths signed the agreement. In either event, less than three fourths of the male adults appear to have so signed.

Id.

25. *Id.* at 564. The property interest allegedly taken was the tribes interest in lands held in common within the reservation, an interest guaranteed by Article 12 of the treaty. *Id.* It can be argued that the tribe received just compensation for the surplus lands discussed. *See supra* n. 23. However, the tribes did not receive compensation for lands taken from the tribal government and redistributed to tribal members. *Id.*

26. *Lone Wolf*, 187 U.S. at 568.

27. *Id.*

28. *Id.* at 565.

29. *Id.* at 566.

A. *Answering the Socratics*

To support plenary power, the *Lone Wolf* Court concluded it "has been exercised by Congress from the beginning."[30] Then, on the question of whether legislation that directly violated treaty provisions should be upheld, the Court concluded that when "treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress . . . ."[31] In coming to this conclusion, the Court relied heavily upon *United States v. Kagama*,[32] a case decided less than twenty years before *Lone Wolf*. The Court quoted *Kagama* to assert that Congress had the power "from the beginning" to unilaterally abrogate treaties.[33] However, there was no treaty at issue in *Kagama* and the word "plenary" is absent altogether.[34] *Kagama*'s language did, nevertheless, substantiate *Lone Wolf*'s premise that Indians are dependent:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. . . . From their very weakness and helplessness . . . arises the duty of protection, and with it the power. . . .[35]

> The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell.[36]

The *Kagama* quotes employed by Justice White speak predominately to the dependency, weakness, and inferiority of the Indian race as justification for congressional plenary authority that was not in conflict with Indians' interest but used for the Indians' own good.

B. *Researching for the Historians*

And what of the word "plenary?" Although mysteriously absent from *Kagama*, is it used in any prior Indian cases?

The term "plenary" does emerge in a few, less publicized cases prior to *Lone Wolf*. In 1899, the Supreme Court addressed four appeals regarding individual applications of citizenship enrollment to the Cherokee Nation.[37] The appeals came from the United States District Court that was established in the Indian territories, and most of those cases came to that court on appeal from the "Dawes Commission, though some were [appeals from the] tribunal courts."[38] Ruling on

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30. *Id.* at 565.
31. *Lone Wolf*, 187 U.S. at 566 (emphasis in original).
32. 118 U.S. 375 (1886).
33. *Id.* at 565.
34. Professor Clinton discusses the *Kagama* decision at length, Clinton, *supra* n. 3, at 170-79, and cites *Kagama* as the "intellectual origin" of plenary power. *Id.* at 195.
35. *Lone Wolf*, 187 U.S. at 567 (quoting *Kagama*, 118 U.S. at 383-84).
36. *Id.*
37. *Stephens v. Cherokee Nation*, 174 U.S. 445, 476 (1899).
38. *Id.*

the contention that the Indian Apportionment Act of July 1, 1898,[39] which extended remedial appeal to the Supreme Court, was invalid because of its retrospective application, the Court stated that:

> [A]ssuming that congress [sic] possesses plenary power of legislation in regard to [Indian tribes], subject only to the constitution of the United States, it follows that the validity of remedial legislation of this sort cannot be questioned unless in violation of some prohibition of that instrument.[40]

The Court held that the tribes were subject to the power and authority of the United States, specifically when Congress may choose, and that because of "the power of congress in the premises having the plenitude thus indicated," the Act was not unconstitutional.[41]

Plenary power was also used outside the field of federal Indian law, where the Supreme Court invoked it in immigration cases.[42] When the Court invoked plenary power in immigration cases, they used it to deny Chinese and other "non-white" immigrants entry into the United States.[43]

C. *Review for the Cynics*

Did the United States Supreme Court simply invent congressional plenary power? Was it anything more than justification for colonial acquisition of yet more Indian land? It is notably curious that *Lone Wolf*'s predecessor, *Kagama*, squarely denies any constitutional authority to regulate internal tribal matters, yet upholds legislation allowing federal prosecution of crimes committed by Indians on tribal land.[44] It is equally curious that *Lone Wolf* permits Congress to take and redistribute land without tribal consent, against treaty guarantees, and without citation to any constitutional source of legislative authority. What, then, can the cynic conclude is the ultimate source of congressional plenary authority? It seems to have emerged from thin air against a backdrop of Indian wardship and racial inferiority.

III. *LONE WOLF*'S LEGACY: RACE-BASED JUSTIFICATIONS IN MODERN SUPREME COURT DECISIONS

The race-based rationales used in *Lone Wolf* still persist in modern-day Supreme Court opinions issued in Indian law cases. Indeed, Justice Reed's

39. *Indian Appropriation Act*, 30 Stat. 571 (1898).

40. *Stephens*, 174 U.S at 477-78.

41. *Id.* at 486.

42. *See Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889); *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893); Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 Cal. L. Rev. 1923, 1944-47 (2000).

43. *See* Harris, *supra* n. 42, at 1944-47.

44. *Kagama*, 118 U.S. at 379-80 ("While we are not able to see in either of these clauses of the constitution and its amendments any delegation of power to enact a code of criminal law for the punishment of [Indians]. . . . But this power of congress to organize territorial governments, and make laws for their inhabitants, arises, not so much from the clause in the constitution . . . as from the ownership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else.") (citations omitted).

opinion in *Tee-Hi-Ton Indians v. United States*,[45] Justice Rehnquist's opinion in *Oliphant v. Suquamish Indian Tribe*,[46] and Justice Souter's concurring opinion in *Nevada v. Hicks*[47] are all tainted with racial undertones, suggesting race played a part in the opinions. These three opinions are chosen for a number of reasons. First, *Tee-Hi-Ton* is selected as a case from the era of *Brown v. Board of Education* as a comparison of countervailing views on the Court. In chronological progression, *Oliphant* follows *Tee-Hit-Ton* by twenty-three years, and *Hicks* follows *Oliphant* by twenty-three years. These three cases demonstrate the Court's prolific reliance on race-based rationales over a time period that is otherwise marked by cyclical shifts in federal Indian policy.

For example, *Tee-Hi-Ton* was decided in the federal Indian policy era known as "Termination."[48] This era was marked by legislative enactments designed to end federal recognition of numerous tribal governments. *Oliphant* and *Hicks*, on the other hand, were decided during the federal government's policy of "self-determination,"[49] which purported to respect and promote tribal autonomy. Yet despite the shifts in federal policy dictated by the executive and legislative branches, the Court continued not only to rely on precedent from the *Lone Wolf* era, but also to perpetuate racist rationales by employing new versions of racial justifications.

The three cases were also selected for their detrimental effect on the rights of tribes. As a matter of federal Indian law, *Tee-Hi-Ton* held that Alaska native villages were not entitled to compensation for the extinguishment of aboriginal title.[50] As a matter of federal Indian law, *Oliphant* held that tribes were implicitly divested of criminal jurisdiction over non-Indians.[51] As a matter of federal Indian law, *Hicks* held that tribal courts lacked adjudicatory authority over the conduct of state law enforcement officers on tribal land.[52]

When these cases are considered from the Indian perspective, in light of both *Lone Wolf's* premises and the race-based justifications for the divestiture of tribal rights they all employ, the holdings translate to me as:

> "The doctrine of conquest is alive and well." (*Tee-Hi-Ton*)
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> "Brown people don't put white people in jail."[53] (*Oliphant*)
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> "If brown people want to sue police officers for violating their civil rights, they'll have to do it in a white court." (*Hicks*)

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45. 348 U.S. 272 (1955).
46. 435 U.S. 191 (1978).
47. 533 U.S. 353, 375-86 (2001).
48. *See* Vine Deloria, Jr. & Clifford M. Lytle, *American Indians, American Justice* 15-21 (U. Tex. Press 1983).
49. *See id.* at 21-24.
50. 348 U.S. 272.
51. 435 U.S. 191.
52. 533 U.S. 353.
53. Credit for this perspective is warmly extended to Professor G. William Rice of the University of Tulsa College of Law who employed it with great effect during my days under his pupilage.

A. *Tee-Hit-Ton Indians v. United States*

The year following *Brown v. Board of Education*, the United States Supreme Court decided *Tee-Hit-Ton*.[54] In *Tee-Hit-Ton*, the Court rejected the tribe's Fifth Amendment Takings claim, employing the same principles set forth in *Lone Wolf*, citing identical passages to render the taking of tribal land nonjusticiable:

> The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race.[55]

The *Tee-Hit-Ton* Court did not, however, stop at reliance on a racially-charged historic case. Instead, the Court continued by employing its own, equally racist language. Justice Reed expounded his rationale for continuing the application of discovery and conquest principles as:

> Every American schoolboy knows that the *savage* tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.[56]

Justice Reed was not quoting a case from the late 1800s or the early 1900s. His explanation represented the contemporaneous attitude of the Supreme Court toward Indians as inferior peoples subject to the dominion of the United States. Although a dissenting opinion followed,[57] it disagreed with the majority over the legal interpretation of the Alaska Organic Act[58] rather than the Court's continuing reliance on the doctrine of discovery and conquest. Nor did the dissent criticize the majority opinion's description of Indians as savages with poor negotiation skills. The nature of the dissent is telling when compared to those from *Plessy v. Ferguson* and *Korematsu v. United States*,[59] a decision which upheld Japanese internment during World War II. The dissenting opinions from each of these cases criticized the majority for its race-based rationalizations and foreshadowed the possibility of social change. *Tee-Hit-Ton*'s dissent made no reference to racial stereotyping and no criticism of the reliance on racially charged precedent.

Given the racial climate of the 1950s, Justice Reed's statements would be somewhat understandable if *Tee-Hit-Ton* marked the near end of reliance on race-based justifications. After all, it was not for a number of years after *Brown* that

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54. 348 U.S. 272.

55. *Id.* at 281 (citing *Beecher*, 95 U.S. at 525). This passage is also cited in *Lone Wolf*, 187 U.S. at 565.

56. *Tee-Hit-Ton*, 348 U.S. at 289-90 (emphasis added). Professor Clinton refers to this notion as one of the greatest myths, noting that the military defeat, at the hands of the United States military, was the exception rather than the rule in Indian country. *See* Clinton, *supra* n. 3, at 165. In fact, in *Tee-Hit-Ton*, the United States had no claim of actual conquest.

57. *Tee-Hit-Ton*, 348 U.S. at 291-95 (Douglas, J., dissenting).

58. *Alaska Organic Act*, 23 Stat. 24 (1884).

59. 323 U.S. 214 (1944).

mainstream society was willing to accept desegregation.[60] But statements similar to Justice Reed's did not stop in the 1950s. More recent Supreme Court decisions continue to use race-based rationalizations for the divesture of tribal authority.[61]

B. *Oliphant v. Suquamish Indian Tribe*

Twenty-three years after *Tee-Hit-Ton*, the Supreme Court decided *Oliphant*, holding that Indian tribes were divested of criminal jurisdiction over non-Indians.[62] Congress, despite its plenary power articulated in *Lone Wolf*, had passed no statute that would divest tribes of criminal jurisdiction in this scenario.[63] The Suquamish Indian Tribe had never relinquished criminal jurisdiction to the United States by treaty. Nonetheless, the Court deemed the tribe, and consequentially *all* Indian tribes, to be divested of criminal jurisdiction over non-Indians. What was the Court's rationale? That it would be "'inconsistent with [the tribe's] status.'"[64] And what does the opinion say of the tribe's status? It says that Indians are dependent, and their tribal courts are biased.

With respect to tribal courts, the Court noted that the principle that non-Indians should not be subject to tribal criminal jurisdiction would have been "obvious" a century ago, because "Indian tribes were characterized by a 'want of fixed laws [and] of competent tribunals of justice.'"[65] But even though today's tribal courts "embody dramatic advances over their historical antecedents,"[66] the Court deems the principle "no less obvious today."[67]

The Court's disrespect for and fear of Indian tribal courts is manifest throughout the opinion. First, the case references an 1883 Supreme Court case, *Ex parte Crow Dog*,[68] to caution against subjecting non-Indians to Indian courts.[69] A quotation is used to note that, if subjected to Indian courts, non-Indians would be tried "not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception."[70] *Crow Dog* dealt with whether an Indian could be prosecuted in federal court for killing another Indian within Indian country following adjudication at the tribal level.[71] *Crow Dog* was

60. In fact, given the recent remarks of former Senate Majority Leader Trent Lott, it may be argued that acceptance of desegregation is still forthcoming.

61. *See supra* notes 55-56 for examples of historical, racist case language appearing in modern court opinions.

62. 435 U.S. 191.

63. 187 U.S. 553. In fact, even with the passage of the Major Crimes Act, 23 Stat. 385 (1885), the legislation at issue in *Kagama*, Congress did not divest tribes of criminal jurisdiction. The Major Crimes Act merely established jurisdiction without reference to, or divestiture of, tribal jurisdiction.

64. *Oliphant*, 435 U.S. at 208 (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976) (emphasis added)).

65. *Id.* at 210 (quoting H.R. Rpt. 23-474, at 18 (May 20, 1834)).

66. *Id.*

67. *Id.*

68. 109 U.S. 556 (1883).

69. *Oliphant*, 435 U.S. at 210-11.

70. *Id.* at 210-11 (quoting *Crow Dog*, 109 U.S. at 571).

71. *Crow Dog*, 109 U.S. 556.

immediately followed by the passage of the Major Crimes Act,[72] which subjected Indians to federal court prosecution, usually with non-Indian juries.

Following the *Crow Dog* discussion, the *Oliphant* Court next turned to the issue of whether non-Indians were afforded basic due process rights in tribal courts. The Court noted that "some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts"[73] and that after the passage of the Indian Civil Rights Act of 1968,[74] "many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared."[75]

The concerns of the *Oliphant* Court, although more subtle than *Tee-Hit-Ton*'s "savage" imagery, suggest a number of racists concepts. First, that tribal courts are inferior to non-Indian courts. Second, that non-Indian judiciaries provide a superior form of justice, which tribal court systems should strive to emulate. Finally, that tribal courts and Indian judges are unfair, and will fail to extend basic rights to non-Indians. What else could be meant by "the many dangers" of tribal court jurisdiction over non-Indians?

C. *Nevada v. Hicks*

Twenty-three years later, the Court decided *Hicks*, which incorporates many of *Oliphant*'s rationales into the context of civil jursdiction.[76] *Hicks* continued the Supreme Court's implicit divesture of tribal authority absent congressional enactment or treaty provision. The Court held that tribal courts lack civil adjudicatory jurisdiction for claims involving state officers, even when the alleged conduct occurs on tribally-owned lands.[77]

The case is heavily criticized and questioned by scholars and commentators as an intellectually dishonest application of federal Indian law principles.[78] Justice Souter's concurring opinion employs veiled rationales of tribal inferiority. Specifically, he suggests that tribal courts are inferior to state, federal, or non-Indian forums.[79] This discussion begins, like *Oliphant*, on the notion that non-Indians need to be protected from tribal courts. "The ability of nonmembers to

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72. 23 Stat. 385.

73. *Oliphant*, 435 U.S. at 211-12.

74. *Indian Civil Rights Act of 1968*, Pub. L. No. 90-284, 82 Stat. 77 (1968).

75. *Oliphant*, 435 U.S. at 212.

76. Richard E. James, Student Author, *Sanctuaries No More: The United States Supreme Court Deals Another Blow to Indian Tribal Court Jurisdiction*, 41 Washburn L.J. 347, 356 (2002) (*Hicks* built on *Oliphant*, which had already severed the tie between the situs of the crime and the jurisdiction when non-members are involved); 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, 333 (2001).

77. *Hicks*, 533 U.S. 353.

78. Melanie Reed, Student Author, *Native American Sovereignty Meets a Bend in the Road: Difficulties in* Nevada v. Hicks, 2002 BYU L. Rev. 137, 169 (2002) (discussing how the ruling is contrary to well-established precedent); N. Bruce Duthu & Dean B. Suagee, *Supreme Court Strikes Two More Blows against Tribal Self-Determination*, 16 Nat. Resources & Envtl. 118, 119 (Fall 2001) (the Court manipulates its recent precedents to reach its results while ignoring precedents that support tribal authority).

79. *Hicks*, 533 U.S. at 376 (Souter, J., concurring).

know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given '[t]he special nature of [Indian] tribunals.'"[80] What exactly is the "special nature" of tribal courts?

Justice Souter's attention then focuses on how tribal courts are different, and impliedly inferior, to non-Indian courts. He reiterates *Oliphant*'s policy considerations of "an overriding concern that citizens who are not tribal members 'be protected . . . from unwarranted intrusions on their personal liberty.'"[81] He also notes that tribal courts "differ from traditional American courts in a number of significant respects," including the inapplicability of the United States Bill of Rights and the Fourteenth Amendment.[82] The opinion briefly mentions the Indian Civil Rights Act to note its guarantees are not identical to the Constitution.[83] Souter's opinion conveys a fear that tribal courts will disregard the rights of non-Indians and that the United States cannot step in to ensure constitutional rights.[84] Ignored in both *Hicks* and *Oliphant* is that the Indian Civil Rights Act ensures that federal law affords all defendants (especially non-Indians) greater rights in tribal criminal courts than in state courts.

The fear factor would be dampened if the opinions revealed that defendants in tribal courts, unlike those in state courts, have guaranteed habeas review in a federal district court,[85] and that tribal courts are prohibited from imposing a sentence in excess of one year or fines in excess of five thousand dollars.[86] And finally, all defendants in tribal court, unlike state court, have the right to a jury trial, even in misdemeanor cases.[87]

The comparison of tribal courts to "other American courts" continues beyond the need to protect the rights of non-Indians into an implied inferiority of tribal judiciaries:

> Tribal courts also differ from other American courts (and often from one other) in their structure, in the substantive law they apply, and in the independence of their judges. Although some modern tribal courts "mirror American 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," which would be unusually difficult for an outsider to sort out.[88]

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80. *Id.* at 383 (quoting *Duro v. Reina*, 495 U.S. 676, 693 (1990)).
81. *Id.* at 384 (quoting *Oliphant*, 435 U.S. at 210).
82. *Id.* at 383.
83. *Id.* at 384.
84. *Hicks*, 533 U.S. at 384-85.
85. *Indian Civil Rights Act*, 25 U.S.C. § 1303 (2000).
86. *Id.* § 1302(7).
87. *Id.* § 1302(10).
88. *Hicks*, 533 U.S. at 384 (quoting Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 Judicature 126, 130-31 (1995) and Natl. Am. Indian Ct. Judges Assn. et al., *Indian Courts and the Future: Report of the NAICJA Long Range Planning Project* 43 (Natl. Am. Indian Ct. Judges Assn. 1978) (citations omitted)).

At least two aspects of the foregoing quotes beg discussion. The first reference to judicial independence suggests that tribal judges are influenced by politics to a larger extent than judges of "other American courts." This implies that tribal judges are incapable of the same objectivity and professionalism exercised by non-Indian judges, and at a deeper level of inquiry ponders whether tribal judges possess comparable intellectual capacity to their non-Indian counterparts.

Second, the reference to unwritten law and reliance on tradition and custom suggests that tribal legal precedent and tribal common law are less substantiated and lack credibility in comparison to "real" laws applied by "other American courts." Each of these references contains not-so-underlying messages of Indian inferiority, if not as a race of people, then as inferior governments of second-rate laws.

Justice Souter offers one final commentary on tribal courts in his parade of horribles. Should tribal courts be recognized as an appropriate forum to adjudicate tort claims against state officers for civil rights abuses occurring on tribal land? "The result, of course, is a risk of substantial disuniformity in the interpretation of state and federal law, a risk underscored by the fact that '[t]ribal courts are often subordinate to the political branches of tribal governments.'"[89] He ends, as he began, with a reference to judicial independence and inferior governmental structure.

IV. CONCLUSION

Why does race continue to be a pivotal justification for divestiture of tribal authority? Or, why has Indian law yet to see a comparable *Brown v. Board of Education*? I offer three interrelated reasons. First is the fact that subtlety is an art form well crafted by the United States Government. Second, United States colonization of Indian country has been largely successful and continues to be pervasive. And finally, the effects of colonization and the perfection of subtle racism has created an American public that suffers from a lack of outrage when it comes to American Indian issues.

The Supreme Court, and our society as a whole, has become increasingly well-versed in the art of subtlety to mask racism.[90] An offspring of our society's "political correctness" industry is the art of masking one's beliefs in words and phrases that are acceptable to the mainstream society. Words change, attitudes do not.

Compare the language used in *Tee-Hit-Ton* to the words employed in *Oliphant* or *Hicks* in light of political correctness and contemporary legal issues. The Court can no longer write "every American schoolboy knows" the court systems of the "savage" tribes are too inferior to hear certain claims.[91] But the

89. *Id.* at 385 (quoting *Duro*, 495 U.S. at 693) (quotation marks omitted).

90. *See* Margaret E. Montoya, *Of "Subtle Prejudices," White Supremacy, and Affirmative Action: A Reply to Paul Butler*, 68 U. Colo. L. Rev. 891 (1997).

91. *Tee-Hit-Ton*, 348 U.S. at 289.

Court can and does write that it is "obvious" the tribes cannot hear certain claims because of "the special nature" of their tribal judiciaries.[92] Words have been altered, but their underlying meaning has not.

Why is it that a few Indian law scholars and a handful of Indian people are the only people seemingly outraged by the Supreme Court's continued use of racist rationales to divest tribes of authority, even when these subtleties are revealed to others? The ongoing colonization process has desensitized the American public, including many tribal leaders. As kids in public school, we were all one of those "American schoolboys" that Justice Reed referenced in *Tee-Hit-Ton.* We learned of "Happy Pilgrims. Happy Indians."[93] Today, our children's knowledge of Indian people derives from Walt Disney's *Pocahontas* or from their local sports team: "the Redskins" or "the Fighting Sioux." To the majority of Americans, Indians are not real people, except for the ones with casinos or the ones that "choose" to live in poverty on a reservation. Each of these perceptions is perpetuated, consciously or unconsciously, as a part of the ongoing colonization process.

The latest census data reports American Indians constitute approximately one percent[94] of the United States population. It has always been difficult to generate support from the majority for the benefit of minority issues, particularly in a time of political apathy or contempt toward a particular minority group. This is a truth that Japanese-Americans felt in the 1940s.[95] This is a truth many Arab-Americans are undoubtedly facing today. It is the ongoing reality of Indian people.

Brown v. Board of Education happened at the beginning of a period in our history when the American people were forced to face the realities of race-based injustice. The images of armed national guardsmen, water hoses, and bombings are now engrained in our national psyche. These images served as catalysts for social change. But change did not occur until the American people were forced to consciously face the issues. The American public has no visual image of the

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92. *Hicks*, 533 U.S. at 383.

93. Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 Mich. L. Rev. 2280, 2296 (1989).

94. *See* U.S. Census Bureau, *Quick Tables* <http://factfinder.census.gov/servlet/QTTable?_ts=50442067882> (accessed Sept. 18, 2002).

95. For a primer of majority attitudes towards Japanese internees, *see* Alison Dundes Renteln, *A Psychohistorical Analysis of the Japanese American Internment*, 17 Human Rights Q. 618 (1995):

> A common stereotype was that Japanese Americans were un-American. They were not and could never be properly assimilated into the American way of life. An example of this perception is found in the testimony of V.S. McClatchy, a powerful figure in the Japanese Exclusion League who lobbied for an immigration law to exclude "Orientals:"
>
> > The Japanese are less assimilable and more dangerous as residents in this country than any other of the peoples ineligible under our laws . . . with great pride of race, they have no idea of assimilating in the sense of amalgamation. They do not come here with any desire or any intent to lose their racial or national identity. They come here specifically and professedly for the purpose of colonizing and establishing here permanently the proud Yamato race. They never cease being Japanese.
>
> *Id.* at 632-34.

Cherokee death march[96] or the slaughter of women and children in the Northern Plains. One of the most pervasive images of Indian dehumanization in contemporary American society is the smiling Chief Wahoo of Major League Baseball's Cleveland Indians. This suggests, as comparative imagery, that the American Indians are respected today as African-Americans were respected during a time period where Sambos and minstrel shows were commonly acceptable. Perhaps the major conceptual difference is in the rhetoric of the respective imagery. Unlike the present Indian mascot debate, it was likely seldom argued that the Aunt Jamima and Sambo images were perpetuated to "honor" African-Americans.

This essay began with a James Baldwin quote that inspired my thoughts: "*Not everything that is faced can be changed, but nothing can be changed until it is faced.*" As students of Indian law, we cut our teeth on the distinctions between Indian law and "everything else." As Indian people, we are told that we are treated differently, not because of a racial distinction, but because of our political classification.[97] While each of these propositions possess elements of legal truth, more attention must be placed on that which has not been adequately revealed: the majority of Indian law decisions from Chief Justice Marshall's trilogy[98] to *Lone Wolf* to the Rehnquist Court are premised on notions of racial supremacy of the United States over the perceived inferiority and dependency of Indian people. Until we can discuss this openly in the Indian law circles, in the mainstream legal community, and in our classrooms, an Indian law *Brown v. Board of Education* decision will not be possible.

96. The Cherokee death march I refer to has otherwise been romanticized as the "Trail of Tears," which gets cursory mention in most history text.

97. *Morton v. Mancari*, 417 U.S. 535, 554 n. 24 (1974).

98. *Worcester v. Ga.*, 31 U.S. 515 (1832); *Cherokee Nation v. Ga.*, 30 U.S. 1 (1831); *Johnson v. McIntosh*, 21 U.S. 543 (1823).