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Who Is an Indian? The Story of *United States v. Sandoval*

> Picture now that vast arena stretching westward from the pine-forested great bend of the Red River to the red desert mesas of the Colorado Plateau and southward from the Arkansas River to the Rio Grande . . . Spain's intrusion into the Pueblo world was born of a great misunderstanding, only the first of many that claimed a frightful toll of lives and property over the next two centuries.[1]

Introduction

On a grand scale, the history of Indian law in the United States can be understood as the collision between the tectonic plates of political ideology slowly grinding out disputes over tangible resources such as land, water, or minerals through abstract, almost denatured legal categories that have their origins in the messier precincts of politics or empire. These disputes have historically reflected struggles between centers of power, but have almost always occurred far from the metropolis. Sometimes seemingly petty (though occasionally bloody) battles have also reconciled our constitutive documents, racial ideology, colonial ambition, and international relations in the broken bodies of the combatants. Yet the conflicts that ultimately must be reduced to their legal forms often seem prosaic, merely technical and sometimes simply trivial. Thus a case in which all of these forces collide, *United States v. Sandoval*,[2] appears as a question of who has the authority to regulate the sale of whiskey in a relatively newly acquired territory.

As in many cases involving Indian tribes or Indian people, including cases that are now viewed as foundational in the field, this dispute ultimately pivoted around an argument of federalism. The non-Indian elites of New Mexico territory attempted to erect the shield of "state's rights" in order to protect their historic and continued depredations on Indian land and resources. Characteristically, what the parties argued

[1] Elizabeth A.H. John, *Storms Brewed in Other Men's Worlds: The Confrontation of Indians, Spanish, and French in the Southwest, 1540–1795* at 3–4 (1975).

[2] United States v. Sandoval, 231 U.S. 28 (1913).

and what they believed were often some distance apart. Thus as we shall see, the Pueblos of New Mexico could be Indian socially and culturally just so long as they were not Indian legally—though they were that, too, according to the non-Indians in the territory, at least until inconvenient for them to be continued in that status. And certainly it was most inconvenient after New Mexico became a state.

Social and Legal Background

It is difficult to separate the conflict that ultimately resulted in the *Sandoval* litigation from the circumstances that brought New Mexico into the union and from the long and difficult relationship the Pueblo Indians had first with the Spanish and then with the Mexicans and ultimately with the Americans (whether Anglo or Mexican). Although this case arose about a year after New Mexico had obtained statehood, New Mexico had come into the possession of the United States over fifty years earlier at the conclusion of the Mexican–American War. At that time it comprised a territory larger than Texas or California and, in fact, larger than Texas and California combined. Its population was larger and in many ways more civilized than any other in the Mexican cession.

The history of European engagement in the New Mexican territory, of course, predates the events leading up to the conflict between New Mexico and the United States over Felipe Sandoval's sale of wine on the Santa Clara Pueblo; but understanding that history is in many ways crucial if one is to appreciate the claims made by both sides, especially the argument of the state that the Pueblo Indians were not, in fact, Indians. The Spanish first ventured into what would become New Mexico in 1539, although there is some evidence that Cabeza de Vaca was in the region at least four years earlier.[3] In 1539, Fray Marcos de Niza set out to explore country of the upper Rio Grande and what is now western New Mexico and it was there that he first encountered Pueblo Indians. While it seems clear from the fragmentary history that Father Niza did not actually enter the Pueblo of Zuni, the moor, Esteban, who served as a scout for the priests and preceded them into Indian country, did.[4] According to several accounts, the Zuni initially greeted Esteban cordially leading to the often-repeated oxymoron: "The first *white* man our people saw was a *black* man."[5] Yet this opening friendliness was misinterpreted by Esteban as accommodation, and his demands grew more insistent and threatening.[6] For Esteban this escalation turned out

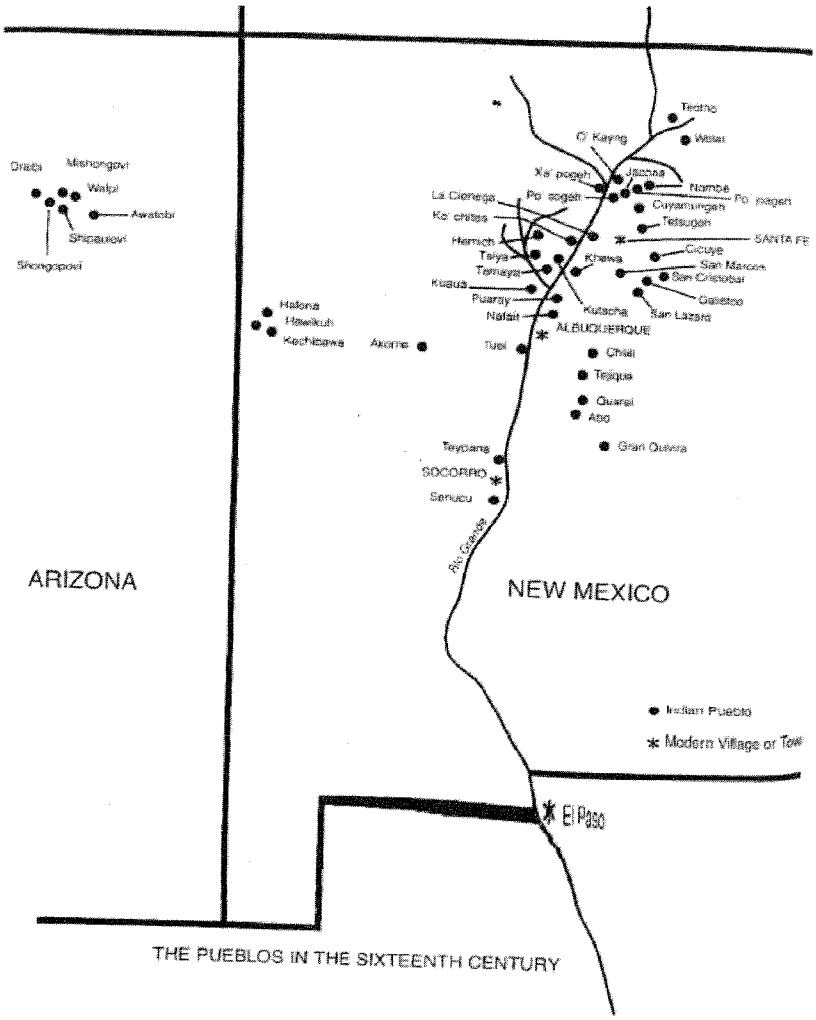
[3] Although virtually every account of the Spanish exploration of the American Southwest begins with the story of Cabeza de Vaca, his exact role (other than his survival of the ill-fated expedition to northern Florida that began his epic journey across what is now the gulf coast and southwest) is difficult to ascertain with complete confidence. *See* Andrés Reséndez, *A Land So Strange: The Epic Journey of Cabeza de Vaca* (2007).

[4] This story is recounted in virtually every history of the Spanish colonization of New Mexico. *See, e.g.* Edward P. Dozier, *The Pueblo Indians of North America* (1970); Joe S. Sando, *The Pueblo Indians* (1976); Laura E. Gómez, *Manifest Destinies: The Making of the Mexican American Race* (2007).

[5] Joe Sando, *Pueblo Nations: Eight Centuries of Pueblo Indian History* 50 (1992); Gómez, *supra* note 4, at 48.

[6] David Roberts, *The Pueblo Revolt* 50–59 (2004).

to be a fatal mistake. The Zuni killed him both for his impudence and because he claimed to be leading others more powerful than himself. The news of Esteban's death caused Father Niza to retreat back to Mexico proper.



Map from Joe S. Sando, *The Pueblo Indians* 16 (1976).

This debacle was just the beginning of Spain's entrance into the North. Barely a year later Francisco Vázquez de Coronado set out from interior Mexico to establish a settlement where Fray Niza had failed. In 1540, Coronado assembled a large party of over 1,500 people and 2,000 animals (including horses and livestock) for the journey north. Their expedition was driven by dreams of wealth—Cabeza de Vaca had spun and the retreating Niza had reinforced legends of seven "golden cities" of Cíbola in the southwest—as well as the imperative to save souls. Although Coronado's entry into New Mexico began with a contingent that promised permanence, his entry was to be short lived. He managed to explore Northern New Mexico and chased stories of the cities of gold into the plains of what is now Oklahoma before giving up and returning to the settlements along the Rio Grande. By 1542, he ended his expedition exhausted and perhaps disgusted by the perfidy of those who promised wealth from the desert and grasslands of the southwest.

Coronado brought back no stories of cities of great wealth or stories of civilizations to rival those found in the valley of Mexico. The reports generated no immediate interest in returning to the territory; yet the desire to explore for mines, save souls, and secure lands and Indians in *encomienda*[7] ultimately overcame tales of hardship that accompanied Coronado. In 1581, Francisco Chamuscado and Fray Rodriguez launched an expedition back into Pueblo territory, encountering the northern Pueblos and leaving the priests among the Indians. The expedition did not establish a permanent settlement, but it did attempt to create a spiritual beachhead. It failed. The priests were killed and a subsequent expedition was launched to search for them.[8]

That expedition, led by Antonio de Espejo, was undertaken the next year, in 1582, in an effort to discover what had become of the priests left behind by the previous effort at colonization. Though Espejo soon discovered that the friars had been killed, or in any event, had died, he nonetheless continued exploring Pueblo country, and the evidence points to him having visited the western Pueblos as well as the Pueblos along the Rio Grande and some of the eastern Pueblos as well.[9] His ostensible interest in discovering the fate of the priests had apparently given way to his interest in finding minable ore. Like the other Spanish before him, he and his party depended on the Pueblos for supplies to get them through the winter; and when provisions were not forthcoming, they were not loathe to extract tribute by force or to resort to brutal punishment.[10] Espejo returned to Mexico in order to secure authorization to establish a permanent settlement but failed to immediately persuade his superiors. While he was awaiting a decision, there were several unauthorized attempts to settle the Pueblo territory, but these, all around 1590, failed.

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[7] See discussion and definition *infra* notes 19–21.

[8] Dozier, *supra* note 4; Sando, *supra* note 4.

[9] Dozier, *supra* note 4.

[10] Dozier, *supra* note 4; Sando, *supra* note 4; Roberts, *supra* note 6.

The real colonization of the New Mexico territory began with the arrival of Don Juan Oñate 1598. Apart from the Indian servants, whose number remains undocumented, there were well over 500 soldiers and settlers who accompanied Oñate north. It was a major investment of men and material, the magnitude of which was captured in the following inventory:

> Like Coronado, Oñate drove a herd of livestock north to provide food for his pilgrims, mounts to ride, and beasts of burden to carry supplies—all told, some 7,000 cattle, sheep, goats, oxen, donkeys, mules, and horses. Unlike Coronado, Oñate was burdened with a veritable warehouse of tools and goods with which the settlers might craft their future homesteads: from plowshares to saws, hammers to hoes, cottons bolts to medicine chests, and the tidy sum of 13,500 nails. There were enough harquebuses among the soldiers to require eighteen barrels of gunpowder, and for good measure, the party dragged along three bronze cannons. At the same time, bent on peaceful trading, Oñate hoarded 80,000 glass beads, as well as innumerable other trinkets.[11]

The sight of this entering company must have been impressive and intimidating. As was the case in the other expedition, the Indians abandoned the Pueblos upon the approach of the colonists. Yet, gradually the Indians returned and engaged Oñate, who delivered the Spanish version of the sovereignty speech.[12] The Indians were ordered to bow down to accept the secular authority of the Spanish crown and the spiritual authority of the Catholic Church. Resistance was not tolerated, yet it should have been expected. The Indians were to be converted and recruited into labor. After Oñate's men secured the basics for settlement, suppression of Pueblo religions and erection of churches became the next orders of business.

Oñate's program led to conflict with the people of Acoma Pueblo, and the response was brutal. In response to the killing of a few Spanish soldiers, Oñate burned the Pueblo and killed most of the inhabitants. When the survivors surrendered they were ordered to be punished as a lesson to the other Pueblos on the wages of resistance. Surviving men

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[11] Roberts, *supra* note 6, at 72–73.

[12] On their expedition west Meriwether Lewis and William Clark read a sovereignty proclamation to all of the Indians his party encountered declaring them subject to protection and jurisdiction of the United States. As Clark recounted in his Journal:

> Journal of William Clark Council Bluffs, August 3, 1804: "after Brackfast we Collected those Indians under an orning of our Main Sail, in presence of our Party paraded & Delivered a long Speech to them expressive of our journey the wirkes of our Government, Some advice to them and Directions how They were to Conduct themselves.... Those Chiefs all Delivered a Speech acknowledgeing Their approbation to the Speech and promissing to prosue the advice & Derictions given them that they wer happy to find that they had fathers which might be depended on & c...."

The Journals of the Lewis and Clark Expedition, August 3, 1804, available at http://lewisandclarkjournals.unl.edu/read/?_xmlsrc=1804-08-03.xml&_xslsrc=LCstyles.xsl (last visited March 17, 2010).

over age twenty-five were to have one foot amputated. Younger men and women and girls were pressed into service for twenty-five years.[13]

The attack on Acoma had its effect, and overt Puebloan resistance waned in its shadow. The colonization continued and most of the Pueblos adopted Catholicism overtly while continuing to practice Native religions in secret. The kivas remained even as the churches were being built and were becoming the central buildings in most Pueblos. Oñate imposed the *encomienda* system on the Indians, and the coming of the Spanish exacted a terrible toll on the Pueblo population. While there are no accurate numbers, the magnitude of the loss is undoubtedly accurate. At the time of Oñate's entrance there was a Pueblo population in excess of 80,000. By 1680, a mere ninety years later, there were barely 17,000 and by 1800, 9,732.[14]

The year 1680 was a signal year in the history of New Mexico and in the relationship between Europeans and Indians in New Spain, Mexico, and later the United States. It revealed how the later legal treatment of the Pueblos continued the colonization that Oñate enforced with the gun and the blade. Although the Pueblos were widely dispersed and linguistically distinct, by 1680 they had determined to force the Spanish out of their territory. Led by a charismatic medicine man Popé from the San Juan Pueblo, the combined Pueblos organized a concerted revolt to rid the Pueblo land of Spanish for good.[15] Spanish reluctance to believe stories of the impending revolt contributed to the success of the uprising. Even though renegades revealed the Indians' plans to the Spanish governors, the Spaniards could not conceive that their loyal Indian subjects were planning a military operation. The Spanish delayed preparing for an attack, a decision that had fatal consequences. Under Popé's guidance the tribes carefully planned the attack so that it would catch the Spanish by surprise. After the Indians discovered that their plan had been disclosed, they triggered the assault slightly ahead of schedule. Even so, synchronicity was retained. Though the battles were fierce at the northern and southern Pueblos, the Spanish were routed.

The defeat of the Spanish led to a long, slow, and arduous retreat south. A question that has always puzzled historians is why, given the military victory the Indians had just won, did they permit the Spanish to retreat? At that point the defeated Spanish were vulnerable to attack and could have been wiped out before reaching the safe haven of El Paso. Instead, the Pueblo Indians merely watched from the bluffs overlooking the escape route without unduly harassing or menacing the escaping colonists. Indian and non-Indian historians give different reasons for this response, but it will suffice to say that Governor Otermín and his remaining party and loyal Indian servants were able to get back to

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[13] Roberts, *supra* note 6; Dozier, *supra* note 4.

[14] Roberts, *supra* note 6; Dozier, *supra* note 4.

[15] Roberts, *supra* note 6, at 59. As Dozier points out, the description of Popé as a medicine man is ambiguous and could have placed him in any of a number of socio-ceremonial positions.

Mexico proper where they carried with them the tale of the Pueblo treachery and butchery. This tale surely left out the narrative of conquest that the Pueblo Indians themselves might have told.

The revolt of 1680 ushered in a dozen years free of Spanish rule. As the Spanish told of Puebloan savagery, a Puebloan anthropologist, Joe Sando tells of the oral tradition that has been handed down concerning the reaction in Santa Fe following the expulsion of the Spanish. As Sando remarks, the first American Revolution had succeeded. Though many spoke, Popé was the final one to address the assembled:

> According to tradition, he said: "Within and around the world, within and around the hills and mountains, within and around the valleys, your authority returns to you. Therefore, return to your people and travel the corn pollen trail again. A trail with no pebbles, no boulders, and no obstructions. Go home and enjoy your families, the birds, the clouds, the mist, the rain, the lightning, the wind, the rivers, the mountains, the trees, and the sky.... Lastly, don't forget, each morning before our father, the sun, makes his appearance, to take feathers in one hand and corn pollen in the other hand and offer them to the deities in the mountains, in the clouds, in the valleys, to the north, to the west, to the south, to the east, to Sipofinae and to Waynema. *Sengi di ho*![16]

The accounts differ, but the impulse seems to be plain. The revolt was long in building, coming not just from the physical ill-treatment of the Indians by the Spanish and the near slavery that extracted their labor and goods, but principally from the religious persecution imposed by the forced conversion to Catholicism and the destruction of the Puebloan religious life. One of Spanish Governor Otermín's first acts had been to round up and execute the shamans or religious leaders of the Pueblo, and it was only threat of mass resistance at that point that reduced the total planned executions to brutal flogging and limited the executions to three. There is little wonder that long simmering resentments ultimately boiled over into full-bodied revolt with an aim to remove everything Spanish from the territory.[17]

Yet the freedom from Spanish rule did not last. The interregnum was brief and marked by friction among the various Pueblos as well internal divisions within individual Pueblos. The confederation that had been constructed to so successfully expel the Spanish was coming apart under the centripetal pressures of independence and linguistic diversity. Moreover, records seem to indicate that this was also a period of sustained drought leading to famine and a temporary drying up of the Rio Grande. In addition to these local and natural challenges, the Pueblos were also beset by raids from nomadic tribes from the north.

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[16] Joe Sando, *Pueblo Profiles* 23 (1998).

[17] John, *supra* note 1. "Obvious similarities among Pueblos led Spaniards to miscalculate the complexity and difficulty of Hispanizing them. Apparent simplicity, even frivolity, of Pueblo rites caused laymen and priest alike to underestimate the power and importance of native beliefs and the dangers of attacking them." *Id.* at 7.

These tribes were adept at horse and armed warfare, and posed a continual threat to the Pueblos. It was against this background that the Spanish re-entered New Mexico in 1693.

The so-called reconquest was being planned from the moment of Otermín's retreat. Yet it took nearly a dozen years to accomplish. Although it is often referred to as a "bloodless" reconquest, no war is really bloodless. In fact, there were many violent conflicts, though none as bloody as the revolution that led to the expulsion of the Spanish.[18] For purposes of the legal story, however, the military aspects of the campaign are not as important as what the Spanish learned about administering their relationship with the Pueblos. Throughout Spanish-dominated America, the initial system of administration was the semi-feudal *encomienda*, in which the King granted a tract of land or town to an individual "with all its lords and caciques and nobles, and all the divisions and subject villages of the said town, so that you may use and profit by them in your estates and commerce, provided that you indoctrinate them and teach them in the things of our Holy Catholic Faith, and treat them according to the Royal Ordinances which have been issued, or which may be issued, for the good and increase of the said Indians; . . ."[19] Although the Spanish eventually abandoned this *encomienda* system, they maintained it longer in the northern territory. Yet even as early as 1652 the system was in decline in the northern territory, and following the reconquest of 1693 it was eliminated as a formal matter.[20] It was the elimination of this institution that formed the basis for the relationship between the Pueblos and the Spanish after the reconquest. Although the land belonged to the Pueblos before the Spanish arrived and remained so, the elimination of the *encomienda* system laid the groundwork for the granting of lands to the Pueblos consistent with crown law and the law of New Spain and its territorial administrators. Nonetheless, the centuries of life under the *encomienda* regime structured the fundamental relationships between the Indians and the Spanish. An *encomienda* was the grant from the crown to a colonist giving him a specified number of Indians for whom he was to have responsibility. This entailed protection as well as instruction in Spanish and the Catholic faith. In theory, the *encomendero* had a kind of trust duty in relationship to the Indians in his care. In return for these graces, the Indians were obligated to pay tribute to their protector in the form of the labor necessary to produce what the *encomendero* required or in the form of the material goods themselves. It would not be stretching a point to suggest that it is never a good idea to have the trustee be the measurer of the trust duty.[21]

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[18] *Id.* at 98–154.

[19] Title to an encomienda granted by Francisco de Montejo, Governor of Yucatan, to Antonio de Vergara, May 7, 1544, reproduced in Lesley Byrd Simpson, *The Encomienda in New Spain: The Beginning of Spanish Mexico*, app. at 203 (1950).

[20] It was legally prohibited in 1721.

[21] *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (see Chapter 6, this volume).

The *encomienda* system functioned both as an economic and social institution. It was, in many ways, an outgrowth of a feudal understanding that was fading in Spain but nonetheless drove the personal and almost chattel relationships between the indigenous people of New Spain and the Spanish colonists. Because the enslavement of the Indians was not permitted by the crown, a different system of securing their labor while also securing their souls was needed, and the traces of a feudal system no doubt held some appeal.[22] The priests also demanded, by way of justification, a technique to organize the economic system in order to serve the spiritual needs of empire. As they saw it, they were saving the souls of savages from eternal damnation; the labor was part of the deal, but not the main part.[23] The Indians might have looked at it differently, but as the revolt and the speech by Popé indicated, it was the violent substitution of a strange and savage god that was perhaps as repugnant as the forced labor.

One additional factor was undoubtedly important in the Spanish conquest and reconquest, and that was the predominance of the corn culture in Pueblo life. Just as Cortés discovered in the valley of Mexico, an economy based on corn cultivation required a social life that was committed in some important ways to the cycle of agricultural production. The calendar was immutable, and required social order and peace rather than war as a principal social organizing imperative. This fact of social life in a corn culture shaped the different relationship that the Spanish had with the Pueblos than with the other tribes they encountered. It was this distinct relationship and the ways in which the Pueblos organized their own land holding, husbandry, and internal political and social order that would later lead to the controversies that were resolved in the *Sandoval* case.

The period of Mexican jurisdiction over the New Mexican territory was remarkably brief compared to the centuries of Spanish jurisdiction and the aboriginal claims of the Indians in the territory. In 1821 the Mexican nation declared its independence from Spain. Before its independence was confirmed it issued the Plan of Iguala, in many ways like our own Declaration of Independence. The plan was rejected by Spain but later confirmed in the Treaty of Cordoba. Two critical elements of

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[22] Simpson, *supra* note 19, at xvi, notes the following correspondence from Viceroy Luis de Velasco II to his successor, the Count of Monterrey, in 1595:.

> The two Republics, of Spaniards and Indians, of which this Kingdom consists are so repugnant to each other ... that it seems that the conservation of the former always means the oppression and destruction of the latter. The estates, buildings, plantations, mines, and herds, the monasteries and religious orders,—I do not know whether it would be possible to maintain them or improve them without the service and aid of the Indians.

[23] "It was laid down as a sacred formula that the governor's chief duty was the indoctrination of the Indians in the Holy Catholic Faith.... The Indians were to pay tribute, like other subjects, according to the value of their land, and its amount was to be established after consultation with the caciques, who were to be given to understand that it was not unjust." *Id.* at 9.

the plan that would later come back to be used against the Pueblo Indians were the following:

> ART. 3. They [inhabitants of Mexico] shall be all united, without any distinction between Americans and Europeans.
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> ART. 11. The distinction of castes is abolished, which was made by the Spanish law, excluding them from the rights of citizenship. All the inhabitants of the country are citizens, and equal, and the door of advancement is open to virtue and merit.[24]

Despite some attempts by Spain to reclaim its colony, Mexico maintained its independence under the conditions outlined in the Plan of Iguala. New Mexico and its inhabitants were now under the jurisdiction of the Mexican government. Of course, the juridical position of Indians under these articles applied to all Indians, not just the Pueblos and not just to Indians who were subject to *encomiendas*. The rights of the Indians to their lands under Mexican law should have been protected. Even the formal claims embodied in the obligations of the trustee in the grants of *encomienda* would have provided a basis for protecting Indian lands in addition to the specific grants that were made by the Spanish crown and the colonial government. Instead, concerned with organizing their revolutionary government, the central authorities paid scant attention to what was happening in the distant territories. And the lands held by the Indians were thus put in ever greater jeopardy.

Increased competition for land augmented by fraudulent land transfers, other forms of illegal title transfers, and just plain squatting led to a rapid diminution of Indian land ownership.[25] This land loss was compounded by a rapid opening of the territory to trade with the United States. As early as 1822 the first wagon trains from the United States entered New Mexico, and the problems with Texas were already beginning. Between 1825 and 1836, when Texas declared its independence, the non-Mexican population there soared. The conflicts that would later come to be adjudicated in the Territorial Courts, the lower federal courts, and finally the Supreme Court of the United States all had their roots in the relationships that were established during the Spanish period, but especially during the increasingly direct competition for resources that began to emerge in the Mexican period. It was during this period that legal fictions as well as plain lawlessness were deployed to take land from the Pueblos.

Texas surrendered its independence and joined the Union on December 29, 1845, and it was this action that was perhaps the principal precipitating factor in the run up to the war between the United States

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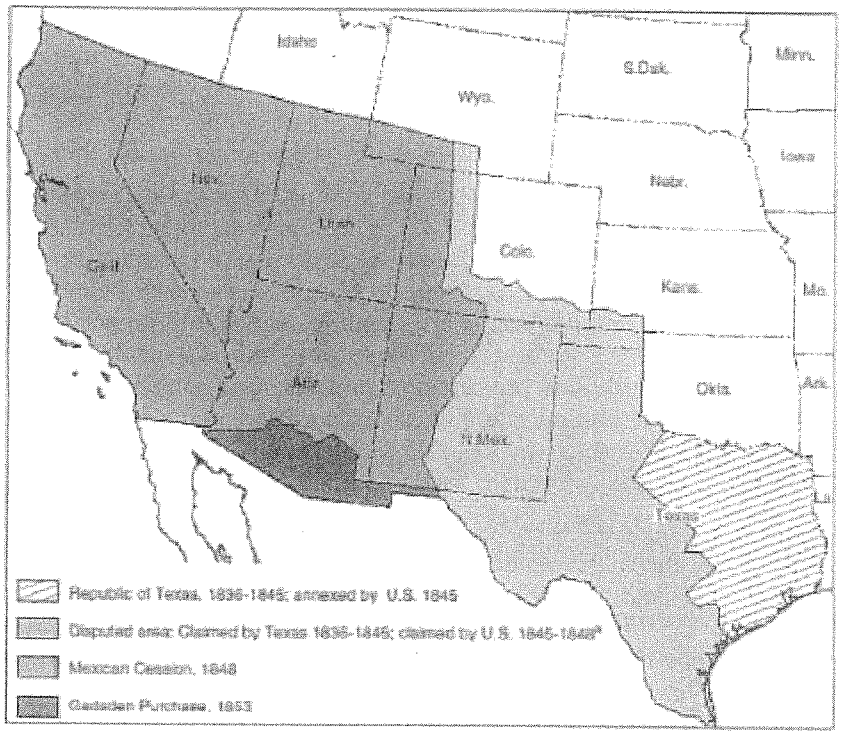
[24] Agustin de Iturbide, *Memoirs of Agustin de Iturbide*, at app. I at 99–100 (1971). The district court in *United States v. Sandoval*, 198 F. 539, 542 (D.N.M. 1912) quoted the Plan of Iguala as follows: "That all the inhabitants of New Spain, without distinction, whether Europeans, Africans, or Indians, are citizens of this monarchy, with a right to be employed in any post according to their merit and virtues."

[25] Herbert O. Brayer, *Pueblo Indian Land Grants of the "Rio Abajo," New Mexico* (1939).

and Mexico, since the Texas Republic claimed all of the land east of the Rio Grande. This territory included a substantial portion of the land within what we now think of as New Mexico. The conflict between the United States and Mexico over Texas led eventually to the war between the two countries on May 13, 1846. It was the first war the United States conducted on foreign soil, and despite some strong domestic opposition the war proceeded. On August 18, 1846, through the action of General Stephen Watts Kearny, the United States annexed the territory of New Mexico and just a month later appointed Charles Bent the first American civilian governor of the territory during the military occupation. His reign was brief since he was killed five months later in the Taos revolt. The war finally came to an end on February 2, 1848 with the negotiation of the Treaty of Guadalupe Hidalgo.



*When Texas was officially recognized as a state in 1845, it included the light-gray area, which was also claimed by Mexico. The Treaty of Guadalupe Hidalgo resolved this dispute, with Texas claiming the disputed land. In 1850, Texas transferred part of this land to the federal government, which became the eastern portion of the territory of New Mexico.

The treaty transferred almost two thirds of the national territory of Mexico to the United States, including, of course, all of the people residing within that territory.[26] What the treaty says about those people

[26] The map above showing the Mexican cession is available at the following website: Thomas' Legion, *The Treaty of Guadalupe Hidalgo*, http://thomaslegion.net/thetreatyofguadalupehidalgo.html (last visited Jan. 4, 2010).

is worth quoting at length, because the distinctions the treaty draws are both interesting and, for the later cases that were finally resolved in *Sandoval*, somewhat perplexing:

Article VIII

Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.

Those who shall prefer to remain in the said territories may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States.

Article IX

The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution; and in the mean time, shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

Article XI

Considering that a great part of the territories, which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes, who will hereafter be under the exclusive control of the Government of the United States, and whose incursions within the territory of Mexico would be prejudicial in the extreme, it is solemnly agreed that all such incursions shall be forcibly restrained by the Govern-

ment of the United States whensoever this may be necessary; and that when they cannot be prevented, they shall be punished by the said Government, and satisfaction for the same shall be exacted all in the same way, and with equal diligence and energy, as if the same incursions were meditated or committed within its own territory, against its own citizens.

It shall not be lawful, under any pretext whatever, for any inhabitant of the United States to purchase or acquire any Mexican, or any foreigner residing in Mexico, who may have been captured by Indians inhabiting the territory of either of the two republics; nor to purchase or acquire horses, mules, cattle, or property of any kind, stolen within Mexican territory by such Indians.

And in the event of any person or persons, captured within Mexican territory by Indians, being carried into the territory of the United States, the Government of the latter engages and binds itself, in the most solemn manner, so soon as it shall know of such captives being within its territory, and shall be able so to do, through the faithful exercise of its influence and power, to rescue them and return them to their country or deliver them to the agent or representative of the Mexican Government. The Mexican authorities will, as far as practicable, give to the Government of the United States notice of such captures; and its agents shall pay the expenses incurred in the maintenance and transmission of the rescued captives; who, in the mean time, shall be treated with the utmost hospitality by the American authorities at the place where they may be. But if the Government of the United States, before receiving such notice from Mexico, should obtain intelligence, through any other channel, of the existence of Mexican captives within its territory, it will proceed forthwith to effect their release and delivery to the Mexican agent, as above stipulated.

For the purpose of giving to these stipulations the fullest possible efficacy, thereby affording the security and redress demanded by their true spirit and intent, the Government of the United States will now and hereafter pass, without unnecessary delay, and always vigilantly enforce, such laws as the nature of the subject may require. And, finally, the sacredness of this obligation shall never be lost sight of by the said Government, when providing for the removal of the Indians from any portion of the said territories, or for its being settled by citizens of the United States; but, on the contrary, special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain.[27]

This treaty, it should be noted, must be read together with the Indian Trade and Intercourse Act of 1834, also known as the Nonintercourse

[27] Treaty of Peace, Friendship, Limits, and Settlement Between the United States of America and the United Mexican States, U.S.–Mex., Feb. 2, 1848, 9. Stat. 922.

Act,[28] which prohibited, among other things, settling on or surveying Indian lands. That Statute, which was not specifically limited by the treaty, would govern the primary property relations between Indians and non-Indians in the ceded territory. The treaty also incorporated the trust duty that the Mexican and Spanish governments undertook with respect to the Indians under their jurisdiction, regardless of their juridical status in relation to the state. Moreover, in the process of integrating the vast new territory into the United States, the sole jurisdiction was in the federal government, as there was yet no state. Article IV of the Constitution specifically gives to Congress "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; . . ."[29] Through the Treaty of Guadalupe Hidalgo, the United States ostensibly directed and constrained this power in relation to all of the residents of the territory, Indians included. The duty the federal government had to Indians in the rest of the United States as well as the power they exercised over them were the same in these territories subject only, perhaps, to the treaty limitations the United States agreed to in ending the war. It is also noteworthy that the Spanish grants that confirmed the land holdings of the Pueblos were ratified by the Mexican government as the successor to the Spanish crown, and by the same token were binding on the United States by virtue of the treaty ending the war.

Two parts of the Mexican cession, Texas and California, were hived off almost immediately to become states during and after the conclusion of the Mexican–American War. Those states figured more prominently in the sectional struggle over the expansion of slavery, and with the conclusion of the war the non-Mexican population greatly exceeded the Mexican and Indian population. The discovery of gold in California led to a flood of Americans into that new state. The loss of Indian land followed the pattern there that it did everywhere, and the promises made by the Spanish and Mexican governments to the Indians were ignored in the rush to claim the riches the land would produce. The New Mexico territory was different. The bulk of the population was Mexican and Indian rather than northern European and the successful administration of the territory would depend on the Mexican elite for some time.[30] This demographic fact perhaps contributed to the odd elongated period during which the New Mexican territory remained in that legal status and did not ascend to statehood;[31] but in all events it produced a struggle between the local administrators of federal power and the more distant sources of that power. This dynamic was not unknown to the province given its historic distance first from Madrid and then from Mexico. "Obedezco mas no cumplo."[32]

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[28] 25 U.S.C. § 180.

[29] U.S. Const. art. IV § 3, cl. 2.

[30] *See* Gómez, *supra* note 4.

[31] Professor Gómez develops this point at length.

[32] According to my friend Nick Shumway, the Tomas Rivera Regents Professor in Spanish Language and Literature at the University of Texas, the phrase "comes from the

The struggle over land and resources did not end with the recognition of land grants to the Pueblos by the Spanish crown and ultimately confirmed by the colonial governors and the subsequent Mexican successors. The continual influx of non-Indians into the territory created tensions over land uses. These tensions were exacerbated by the change in administrations brought on by the conclusion of the Mexican–American War. By the late 19th century the non-Indian population was close to 150,000 while the Pueblo population had fallen to about 9,000.[33] According to Edward Dozier, an anthropologist and a Pueblo Indian himself, friction developed between Pueblos and Hispanos following the American occupation, a product of competition for land and Hispano concern over specialized treatment of the Pueblos as Indian communities. The Spanish crown had offered land grants to the Pueblo Indians and protected them against alienation of that land. So long as the *encomienda* system prevailed, Pueblo lands "remained in the possession of the Indians, simply because the Spaniards were not tillers of the soil." With reconquest and the end of the *encomienda* system, "the Hispanicized population itself began to settle down to farm." As this population of Hispano farmers increased Mexican farmers "encroachment upon the lands of the Pueblo became a problem and loomed into critical proportions after the first half of the nineteenth century." Most of the squatters on Pueblo lands were Hispanos, but Anglos began to join them after the mid-nineteenth century.[34]

The end of the war was not the end of territorial acquisition. The United States wanted land to extend a transcontinental railroad and disputed the southern border. To achieve this goal and to settle some claims of border raids by Indians from Mexico, the United States offered to buy a 29,670 square mile portion of Mexico for $10 million. That territory later became part of Arizona and New Mexico. The Gadsden Purchase as this agreement was called was finalized as a Treaty between the United States and Mexico in 1854. This addition of land and ambition only increased the movement of outsiders into the territory.

The continued influx of Americans from the east and the competition from Hispanos led to controversy over Indian land claims and spawned disputes over the validity of the claims.[35] Sometimes permission

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colonial period: which literally translates as 'I obey but I do not comply,' which of course is a contradiction. The sense behind the phrase was that one could recognize the authority of the monarch but choose to do whatever he wanted on a particular matter."

[33] Dozier, *supra* note 4, at 104.

[34] *Id.* at 100–01.

[35] It is understandable on one level that the newcomers would want to continue the process of dispossessing the Indians. See Richard Wells Bradfute, *The Court of Private Land Claims: The Adjudication of Spanish and Mexican Land Grant Titles, 1891–1904* (1975):

> The significance of the land grant titles to the economy of the region can be most clearly recognized by taking cognizance of the fact that the alleged grants embraced millions of acres in a frontier region at a time when land constituted the primary

for temporary grazing privileges morphed into beliefs that the Pueblo had transferred a permanent right to possess the pasture. Clashes ensued. But the controversies did not just arise out of informal arrangements between tribal members and non-Indians or neighbors trying to be helpful in a generally inhospitable environment. There were also attempts to disclaim the legitimate land rights of the Pueblos. Recall that the Spanish crown land grants were not grants *to* the Pueblos; they were ratification of unceded claims *from* the Pueblo. The grants from 1689 to 1763 confirmed the lands held by the Pueblos.[36] The Pueblos were the legitimate owners of the land from before the arrival of the Spanish and certainly before the transfer to the United States. That both the United States and the Spanish (and through them the Mexican) governments claimed the sovereign power to determine ownership does not mean that the power to determine ownership (even if that claim is itself legitimate) devolves to individual members of the non-Indian polity.[37] Thus, an individual attempt to take land from the Indians, even if it were permitted under federal law, would qualify as theft, squatting, or trespassing where there was no consensual exchange. For land-hungry non-Indians, the path out of this thicket was clear: show that the land did not belong to the Indians or show that the federal law did not prohibit non-Indians from taking Indian land. The first tack was to demonstrate that the Pueblo land grants were illegitimate in some way,[38] and the second was to argue that the Pueblo Indians were not the kinds of Indians meant to be protected by the federal government, and even if they were, the federal government could not exercise that kind of authority in New Mexico.

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source of wealth. The claims were not only large in size, but usually embraced the best and most arable lands in the region.

Id. at 4.

[36] Sando, *supra* note 5, at 110.

[37] *See* Stuart Banner, *How The Indians Lost Their Land: Law and Power on the Frontier* (2005):

> In the end, the story of the colonization of the United States is still a story of power, but it was a more subtle and complex kind of power than we conventionally recognize. It was the power to establish the legal institutions and the rules by which land transactions would be enforced. The threat of physical force would always be present, but most of the time it could be kept out of view because it was not needed.

Id. at 6.

But see a review by Eric Foner, Book Review, London Review of Books, Feb. 9. 2006:

> Ultimately, *How the Indians Lost Their Land* illustrates the weaknesses of a history focused on laws and ideas divorced from their social, political and military context. To be sure, Banner is fully aware that 'formal law and actual practice could diverge.' But this radical understatement is typical of an account that seems oddly antiseptic given the violence that always infused Indian-white relations. Banner unnecessarily plays down the role of outright military subjugation in land acquisition.

Id. at 18.

[38] See Sando, *supra* note 5, at 110 for a discussion of the investigation, where Sando describes the contention that the Pueblo land claims were "spurious." *See also* Bradfute, *supra* note 34.

In America, political problems often get reduced to a legal form. In that process, the underlying social reality that animates the dispute can get wildly distorted. Thus the Territorial Supreme Court of New Mexico in *United States v. Varela*[39] decided that the Trade and Intercourse Act, which prohibited transfers of Indian land without consent of the United States, did not apply to land transactions with the Pueblo Indians because of their status as citizens, a status conferred upon them by the Mexican government and ratified by the United States through the Treaty of Guadalupe Hidalgo. The concurrence went further to suggest that the federal government was incompetent to make any land held by the Pueblos into Indian country, because of both the nature of the Pueblos and the nature of the territory. What emerges from that opinion is the seed of an "equal footing" argument—that is, an argument that rests on the rights of the original thirteen states at the time they entered the Union, coupled with an equal rights argument for later-admitted states. According to the Territorial Supreme Court, the Trade and Intercourse Act applied only to the class of lands designated "Indian country;" and only "territory which, though sometimes located within, is completely set apart from, and forms no part of any of the states or organized territories" could be properly characterized as Indian country, absent a treaty setting aside land for the exclusive occupation of the Indians. In the words of the Territorial Supreme Court, for tribes without treaties, their lands could be considered Indian country only if they were located within "those wild and unreclaimed regions west of the Mississippi river, which at the time of the passage of the act of the thirtieth of June, 1834, were and had been from time immemorial, in the occupation of various nomadic Indian tribes." Since the Pueblo lands were now within an organized territory, they could not be Indian country.[40]

The idea that the Treaty of Guadalupe Hidalgo could have confirmed the Pueblo land as Indian country *as a treaty* and that the Pueblo Indians could have been Indians and citizens under the treaty were ideas that seem never to have occurred to the judges of the territorial courts.[41] Of course, to have reached that conclusion would have meant that the federal government in the form of Congress, rather than in the form of the territorial government, had primary jurisdiction over activities in Indian country. More than that, accepting such a view of the treaty would have preserved to the Pueblos themselves the right and power to govern themselves, supported by the legislative jurisdiction of the federal government outside of Santa Fe.

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[39] United States v. Varela, 1 N.M. 593 (N.M. Terr. 1874).

[40] *Id.* at 6.

[41] Of course, the argument could be made that the treaty would not have affected the status of the Pueblo Indians (or any other Indians for that matter) since they were not parties to it, but the dependent status of tribal Indians would have made them subject to federal law in any event whether exercised through treaty or statute. Their citizenship status would have complicated the analysis, but as the Supreme Court later indicated, not by much.

The United States Supreme Court was faced with the same question two years later in *United States v. Joseph*.[42] There a federal statute prohibited non-Indians from settling on Indian land. The question the Court considered was whether the Trade and Intercourse Act applied to Pueblo Indians. A non-Indian had settled on the land of the Pueblo of Taos. The land had been secured to the Pueblo by, among other things, a patent from the federal government. Under the statute, a person settling on Indian land was liable for a fine of $1,000. By way of defense, defendant Joseph demurred, arguing that the Taos were not Indians within the meaning of the statute, and also that the way they held title to their land took them outside of the statute.

While not directly challenging the competence of the federal government to enact the statute as the Territorial Court had in *Varela*, the Supreme Court took a different tack. If the Taos were not Indians, then the statute would not apply and the question of congressional power could be avoided altogether. In order to reach this happy conclusion and to make the territory safer for non-Indian settlement under the control of the territorial government, all the Court had to do was engage in some casual history augmented by some arm-chair anthropology.

In the Court's extremely brief opinion, the virtually non-existent historical discussion merely suggests that the Pueblo had lived as self-governing villages under the Spanish and then the Mexican governments and they had later obtained a measure of civil status. When this civil status was laid against the Court's thin understanding of the meaning of the Pueblo's adoption of Catholicism (ignoring, for example, the continued practice of indigenous religions), the majority concluded that the Pueblos were not Indians in a sense that would subject them to the federal statute, and thus the demurrer should be sustained. The decision had immediate and devastating consequences for the Pueblos. By excluding Pueblo lands from protection of the federal statute, license was given for over "3,000 white families, with about 12,000 people, [to] settle on Indian land."[43]

As if these decisions were not enough, despite the confirmation of the Pueblo land grants there were repeated claims that the rights of the Pueblos to the land were invalid and, in any case, the opinions were binding on the federal agencies normally charged with the trust responsibility. Of course, these arguments fly in the face of the treaty obligations the United States undertook and which protected Pueblo land and resources. The depredations on Pueblo land continued, whether through trickery, fraud, or outright theft. Left to the tender mercies of the colonial powers, the Pueblos were as naked before that power as they had been before the Spanish. Although the only power the colonial (territorial) government was exercising was delegated power from the federal government, it acted as though it were the sovereign in the

[42] United States v. Joseph, 94 U.S. 614 (1876).

[43] Sando, *supra* note 5, at 256.

territory, and the acquiescence of the departments of the central government merely reinforced that conceit. As Professor Sando puts it:

> In 1891, the United States attorney general ruled that federal statutes authorizing the commissioner of Indian affairs to regulate Indian traders had no application to the Pueblos. In 1894, the Department of the Interior ruled that laws relating to the approval of leases of Indian tribal land had no application to the Pueblos. In 1900, the Territorial Court, in a suit to suppress title brought by one who claimed to have legally acquired some Pueblo land, issued a decree against Nambe Pueblo, stating that the pueblo had actually granted away the land.[44]

Although the government in Washington may have acquiesced initially because it was distracted by the aftermath of the Civil War and reconstruction, that conflict also had implications for the territorial government in New Mexico. The Civil War unleashed a centralizing force that could not allow the colonial leadership to continue to pretend it was free to go its own way, independent of all western policies. The struggle was now turning to one not just between the local elites and the Indians in the territory; it was becoming a conflict between the local elites and the powers in Washington. As has often been the case, Indian interests may have been a precipitating cause of the conflict, but they were not the only thing at stake.

New Mexico was a territory until January 6, 1912, when it became a state. Arizona, which was part of the territory of New Mexico, was severed and became a state a month later on Valentine's Day, 1912. The New Mexico and Arizona statehood enabling acts contain the following language: each state would "forever disclaim all right and title to . . . all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."[45]

The interregnum between the end of the Mexican–American War and the granting of statehood was a period in which the United States itself was undergoing dramatic changes both legally and socially. Its own sense of empire was stoked by the war against Mexico and then Spain. The Civil War created a national citizenship and prompted a debate over its meaning that the country is engaged in to this day.[46] In 1871, three years before the *Varela* decision and five years before *Joseph,* Congress took the treaty-making power away from the president in a move of

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[44] *Id.* at 114.

[45] N.M. Const., Art. XXI, sec. 2. *See* New Mexico Enabling Act, 36 Stat. 558–559.

[46] See Charles L. Black, Jr., *A New Birth of Freedom: Human Rights Named and Unnamed* (1999).

dubious constitutionality. Not long thereafter, the Supreme Court declared in *United States v. Kagama*[47] that Congress has plenary authority over Indian affairs. Of course, in the aftermath of the Civil War and in the backwash of the struggles over power in the New Mexico territory, it is no wonder that citizenship would figure as a central trope in the debate over the priority of local control as against distant federal supervision. "Obedezco mas no cumplo." Indeed.

This local non-Indian recalcitrance in New Mexico ought to be understood as a form of lawlessness. It was justifiable in the eyes of the locals, but except for the morally insane, lawlessness is almost always justifiable to the lawbreaker. However, the locals were also acting with the apparent authority of the national government, insofar as officials in Washington were not applying federal law. Thus the potential lawlessness was twofold: disregard of the Treaty of Guadalupe Hidalgo, and disregard of federal statutes such as the Trade and Intercourse Act. These forms of lawlessness were the rule from the appointment of the first American governor of the territory. Yet, once New Mexico became a state, the issues were complicated by denser questions of federalism. Although officials in the territory asserted a species of equal footing claim in *Varela,* there was no real basis for their assertion since the powers they were exercising were all derivative. The ascendance of New Mexico to statehood made that equal footing claim more robust, if no more availing. It was against this roiling background that Felipe Sandoval rode into Santa Clara Pueblo to sell his wine. He could not have known that he was triggering a confrontation that would reverberate through federal Indian law to this day.

Factual Background and Prior Proceedings

The desert air in March in Santa Clara Pueblo still has the remnants of winter. Though it climbs into the sixties during the day it typically dips below freezing at night. It is not one of the wettest months, but it gets about a half an inch of rain and an inch and a half of snow on average. March 1912 was not a record setting month for weather one way or the other. Where Felipe Sandoval was coming from when he entered the Santa Clara Pueblo was not disclosed, but Santa Fe is about twenty-eight miles away, and the town of Española is just down the road less than two miles as the crow flies. Nonetheless, when he left those towns and came onto Santa Claran lands he was doing more than entering the village of neighbors, he was in many ways entering a world apart. The history presented above suggests just how hard the Pueblos struggled to maintain their separate world even as they pragmatically understood that it was, in ways that they could not completely control, interwoven with the emerging powers and conflicts beyond their borders. The effort to keep the Spanish and the Mexicans and now the Americans out of their land was a problem that seemed never to end. It was different from the defensive struggles or commercial engagements the

[47] United States v. Kagama, 118 U.S. 375, 384–85 (1886) (see Chapter 5, this volume).

Pueblos had with the Utes, Apaches, Comanches, or Navajos. With the Europeans and their heirs it was always a military, commercial, *and* legal fight.

Felipe Sandoval may not have known he was crossing into this contested territory, but when he was indicted by the United States for selling wine on the Santa Clara Pueblo he surely had a clue. In any event, his cause was taken up by a colorful lawyer, Alois B. Renehan, who was an interesting character and apparently a relatively important player in territorial life in New Mexico. It seems fairly clear that his class, more that the class of wine peddlers like Felipe Sandoval, would benefit from a victory in this case. Alois B. Renehan was born in Alexandria, Va., January 6, 1869. His father was an associate editor at a series of newspapers including the New York Tribune, the Irish American, and the New Jersey News. The Renehan family moved to Washington, D.C., during Alois's childhood. There Renehan attended the St. John's Institute and then St. Charles College, Maryland, where he was prepared for the priesthood. Renehan eventually left divinity school and he worked as a bookkeeper and stenographer in Georgetown. Then he worked as a French translator in the Department of Agriculture and later as general manager in charge of construction of Glen Echo Chautauqua. From that his interests turned to real estate and insurance. In the 1890's Renehan moved to New Mexico.[48]

In New Mexico, Renehan was first employed by Edward L. Bartlett, a member of the Santa Fe bar and the solicitor general of the territory. Renehan was admitted to practice in 1894. At the time he also held the position of official stenographer for the first judicial court, a position which he continued to hold until 1896. He also served two terms as city attorney of Santa Fe.[49] Early during his tenure in Santa Fe, Renehan ran into legal problems in connection with fraudulent land dealings.[50] The New Mexico State Bar recommended his disbarment, but charges were dismissed.[51] There is no indication that this held him back in his career. Renehan was a partner in the firm Renehan & Gilbert, which was listed in the Lawyer's List of 1922.[52] Renehan was eventually elected head of the Bar Association for New Mexico territory.[53]

Although early in his career Renehan was affiliated with the Democratic Party and he served as delegate of the Territory in two national conventions, in 1896, he changed political parties.[54] He served as a

[48] Ralph Emerson Twitchell, *Old Santa Fe: The Story of New Mexico's Ancient Capital* (Sunstone Press 2007) (1925), *available at* http://books.google.com/.

[49] *Id.* at 475–76.

[50] Retsch v. Renehan, 16 N.M. 541 (N.M. 1911), *reversed* 235 U.S. 711 (1914).

[51] *In re* Renehan, 19 N.M. 640 (N.M. 1914).

[52] *The Lawyer's List* 213 (1922).

[53] Twitchell, *supra* note 48, at 476.

[54] *Id.*

member of the Santa Fe City Council for two terms as its president. In 1914 he was elected to the lower house of the state legislature, and in 1924, he was elected to the state senate.[55]

Interestingly, on June 9, 1923, ten years after the *Sandoval* case, Renehan gave a speech at the conference of the League of the Southwest at Santa Barbara, California, which has been published as "The Pueblo Indians and Their Land Grants." This speech is apparently "A plea for patient and humanitarian consideration as opposed to excited and uninformed abuse and contumely."[56] Although the entire speech is currently unavailable it is described generally as a conciliatory appeal, which would have to be understood as being delivered on the eve of the Pueblo Land Act. Be that as it may, his exact views of the Pueblo at the time of the *Sandoval* case remain unknown.

With this important lawyer at his side, Felipe Sandoval demurred, claiming to have violated no laws of the United States. The regulation of alcohol sales is normally a state matter, so whether he was right depended on whether the federal government had any authority to regulate the behavior of state citizens on the Santa Clara Pueblo. The United States may once have had the power to do so; but now New Mexico was a state, and if the federal government lacked power to regulate activity of citizens when New Mexico was a territory, even less did it have the power to do so now.[57] How quickly the interests of the Pueblos seem to have faded into the background as the lawyers tried to make this into a case about the powers of Congress and the dignity of the states.[58]

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[55] *Id.* Although Renehan had a busy legal career, and a Westlaw search of Renehan returns almost 200 cases where he individually or his law firm is listed as attorney of record, he was also a poet. *See* Alois B. Renehan, *Songs from the Black Mesa* (1900). This book received enough attention to merit mention in a government report. *See* John Peabody Harrington, *Ethnogeography of the Tewa Indians, in* W.H. Holmes, *Twenty-Ninth Annual Report of the Bureau of Ethnology to the Secretary of the Smithsonian Institute 1907-1908* (1916). Renehan also is cited in at least one case for his excellent Latin translation of a passage of 2 *Hale's Pleas of the Crown* which discusses the role of the judge. *See* State v. Chance, 29 N.M. 34 (N.M. 1923) (Botts, J., dissenting).

Charles A. Siringo dedicated his autobiographical book *A Cowboy Detective: A True Story of Twenty-Two Years with a World-Famous Detective Agency* to Alois B. Renehan. *See* Charles A. Siringo, *A Cowboy Detective: A True Story of Twenty-Two Years with a World-Famous Detective Agency* 4 (1912) (dedication). Renehan also features very briefly in the story itself as a prominent attorney with a pretty young wife. *Id.* at 294. Renehan also appeared to enjoy a friendship with folklorist and translator Jeremiah Curtin. See the inscription to Jeremiah Curtin in Curtin's edition of *Songs from the Black Mesa*, donated to Harvard College Library Sept. 3, 1913; copy available from http://books.google.com/. Renehan died in a hospital at Dayton, Montgomery County, Ohio, on April 20, 1928. He is interred at Fairview Cemetery, Santa Fe, N.M. http://politicalgraveyard.com/bio/renaud-republican.html.

[56] Alois B. Renehan, *The Pueblo Indians and Their Land Grants* (1923).

[57] United States. v. Varela, 1 N.M. 593 (N.M. Terr. 1874); United States. v. Joseph, 94 U.S. 614 (1876).

[58] *See* Brief for the United States, United States v. Sandoval, 231 U.S. 28 (1913) (No. 32); Brief of Defendant in Error, *Sandoval*, 231 U.S. 763 (No. 32).

Once again, Indians and their lands provided a stage to work out problems they did not create. In addition to the language in the enabling act requiring New Mexico to disclaim any pretensions to ownership of Pueblo or other Indian lands, Congress also included the following provisions in the enabling act for admission of New Mexico to the Union, provisions that were incorporated into the constitution of the state:

> A. that ... the sale, barter, or giving of intoxicating liquors to Indians and the introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico, are forever prohibited....
>
> H. that whenever hereafter any of the lands contained within Indian reservations or allotments in said proposed state shall be allotted, sold, reserved or otherwise disposed of, they shall be subject for a period of twenty-five years after such allotment, sale, reservation or other disposal to all the laws of the United States prohibiting the introduction of liquor into Indian country, and the term 'Indian country' shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them.[59]

This language, combined with the earlier provisions, suggests that the question of federal authority to regulate liquor sales on Indian lands, specifically on Pueblo lands, was not a close question, *Varela* and *Joseph* (among other cases) to the contrary notwithstanding. Felipe Sandoval may have thought himself just another citizen of New Mexico trying to make a living among fellow citizens, and the jurists and other elites in New Mexico may have thought that the Pueblo people could not be Indian and citizens, too. But why they thought so and why they thought that other Indians could not also be in the category of Indian and citizen seemed never to be clear except when viewed through the same lens that caused the Spanish to construct a caste system that the Plan of Iguala threw out. Nonetheless, the Judge William H. Pope of the Federal District Court laboriously explained why Felipe Sandoval was right.

Judge Pope's conclusion came as no surprise. Just a few months before Felipe Sandoval made his fateful entry into Santa Clara Pueblo, President Taft had moved Pope from his position as Chief Justice of the Territorial Supreme Court to an appointment as the first federal judge in New Mexico following statehood. Five years earlier, as a Justice of the Territorial Supreme Court, Judge Pope had authored the opinion in the *Varela* case denying Indian country status to the Pueblos. This time, however, he seemed determined to lay out the reasoning behind his conclusion at greater length.

At the outset, Judge Pope correctly noted, "There is no doubt that those several provisions [in the New Mexico Constitution, adopted in response to the Enabling Act] are broad enough to constitute lands now owned or occupied by the Pueblo Indians Indian country. If, therefore, the terms of the Enabling Act are to be given the effect resulting from its

[59] Act of June 20, 1910, 36 Stat. 557, Chapter 310; N.M. Const., Art. XXI, sec. 8.

language, the indictment is good; otherwise not."[60] The rest of his opinion is concerned with whether the restrictions put on the state through the enabling act, and included in the state's constitution, are valid. Yet in conducting this analysis, Judge Pope took the same two tacks that he had taken earlier in the territorial court: first, these restrictions cannot apply to the Pueblos, because they are not the kinds of Indians contemplated to be under the jurisdiction of the United States; and second, the restrictions are an unconscionable intrusion on the prerogatives of a sovereign state in violation of the equal footing doctrine.

Judge Pope's opinion adopts the role of armchair anthropologist, and in doing so exposes the ways in which race is insinuated into judgments about the legal status of peoples. Yet it does so in a way that is dripping with faux charity even as it would result in the loss of Pueblo lands at the hands of people alien to them. The New Mexico Territory, for example, had attempted to tax the Pueblo lands, doubtless in hopes of forcing sale or foreclosure, and Congress had intervened and prohibited them from doing so.[61]

The fundamental error in the opinion, one that is repeated to this day, is to think of Indians as a race and not a nation. It is easy to do if you just pluck one Indian out at a time. As Judge Pope wrote:

> We have, therefore, left, as the sole basis upon which federal jurisdiction may be retained over these people, the fact that they are of Indian lineage. Is this enough? There is, from a governmental standpoint, no magic in the word "Indian." It has through the course of our legislation indicated a condition no less than a race. With the condition gone by the assimilation of the person into the body politic, and the release of his lands from governmental control by the issuance of unconditional patents, his race loses significance. If the mere fact that he be an Indian is of itself sufficient to justify his being held always subject to a species of federal police power, that power would seem, likewise, logically to extend to his remote posterity; for they, like him, have Indian blood in their veins calling for the national guardianship.[62]

The racialist thinking that percolates through this opinion (and through the Supreme Court's later opinion as well) is that the racial condition of the Pueblos is what determines their legal status. If they are just as good as Mexicans then they should have the same status as Mexicans.[63] "[Y]ou may pick out 1,000 of the best Americans in New Mexico, and 1,000 of

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[60] United States v. Sandoval, 198 F. 539, 541 (D.N.M. 1912).

[61] *Id.* at 550–51 ("Congress, after the decision in the Pueblo Indian Tax Case, above mentioned, relieved them from the payment of any taxes to the territory of New Mexico.").

[62] *Id.* at 551.

[63] This kind of analysis is compellingly documented in other areas by Professor Neil Foley, *The White Scourge: Mexicans, Blacks, and Poor Whites in Texas Cotton Culture* (1997).

the best Mexicans in New Mexico, and 1,000 of the worst Pueblo Indians, and there will be found less, vastly less, murder, robbery, theft, or other crimes among the 1,000 of the worst Pueblo Indians than among the 1,000 of the best Mexicans or Americans in New Mexico."[64] Because the Pueblo Indians are law abiding, hold their land in fee (though in common) in grants from the Spanish that have been ratified by the Mexican and American governments (though the territorial government had tried to invalidate them and they were under constant pressure from outsiders), they should not be treated like Indians, because there are other classes of Indians from whom they differ. The other Indians are *wild* Indians. Because the Pueblos are good Indians they should be treated not as Indians at all, but should be subject to all of the laws of the state of New Mexico and freed from any threat of the strangling embrace of the federal government. Merely because the federal government has insulated them from the obligation to pay local taxes, or because they have provided them with tools and supplies to farm or with a federally funded survey to definitively identify the current boundaries of Pueblo land should not suggest that the federal government has undertaken any special obligation in regards to the Pueblos as Indians.[65] These appropriations are such that Congress could have taken for any citizen or group of citizens. Or so Judge Pope would maintain.

Such a conception, of course, ignores the prior political existence of Indian nations while claiming to free them from federal pupilage. What is clear in Judge Pope's opinion, however, is that the political existence of the Pueblos and the effect of treaties on the nature of that status were of no concern. For Judge Pope's purposes, the idea of Indian-ness being a condition and a racial status combined was already strained because of the degree of civilization exhibited by the Pueblos; but even if that were not the case, the Plan of Iguala and the Treaty of Guadalupe Hidalgo, which conferred citizenship on the Pueblo Indians, made them into something that did not exist in American law, a sub-class of citizens subject to a separate body of federal law that insulated them from state jurisdiction.

Judge Pope was working with three sets of facts about the Pueblo people that he felt were dispositive. First, the Pueblos were not Indians in any constitutional sense, and Congress could not arrogate to itself the power to regulate the affairs of people of the Indian race who did not also correspond to the conditions of Indian life that justified federal supervision. Second, the federal government was bound by the treaty ending the war with Mexico, and that treaty made citizens of the Pueblo Indians, not the other Indians. Since Congress is without power to pass laws singling out for special treatment a sub-class of citizens, the statute cannot constitutionally apply to the Pueblos. Just as an enabling act

[64] *Sandoval*, 198 F. at 543 (Remember, the earlier claim that the Treaty of Guadalupe–Hidalgo made citizens of all inhabitants regardless of race or caste; thus who the "Mexicans" would be is only self-evident to the court.)

[65] *Id.* at 550.

could not reserve federal power over larceny committed on lands owned by individuals of German or Italian descent, so Congress could not reserve such power over lands owned by the Pueblo Indian citizens.[66] Third, because the United States does not have jurisdiction over the Pueblo Indians, to enforce the statute would not only violate the equal footing doctrine, it would offend the principles of representative government by suggesting that the state would not protect the interests of the Pueblos as well as the federal government.

Of course, what Judge Pope took to be facts were really conclusions based on his notions of the characteristics that make one an Indian and the absence of such characteristics among Pueblo people. These contrasts then provided the legal content for his understanding of the meaning of the category "Indian." It also provided a bright line rule. If you were Pueblo, you were subject to state jurisdiction, and the Trade and Intercourse Act and the laws prohibiting the sale of liquor in your territory and other federal obligations could not be applied to you. Congress might still provide largess, but it need not do so to satisfy any trust obligation. The Pueblos were not in a state of tutelage. If you were not Pueblo but were still Indian, the analysis in the opinion might ultimately result in your exclusion from federal jurisdiction, but it did not require it. In many ways Judge Pope did not need to resort to the claims of Pueblo citizenship once he made the determination that the Pueblos were not Indian in the legal sense. That they could have been citizens would have followed naturally regardless of any treaty commands. (If they were not eligible for citizenship, then Judge Pope would have had to recognize their pre-territorial political existence and would have been forced to confront the question of what happened to it. Politics, like nature, abhors a vacuum.)

Judge Pope opined at length about the quality of civilization the Pueblo had achieved. Their organization into villages and local governments marked them out as different from "tribal Indians." Central to their civilization were their land holdings, which were in fee and long recognized to be derived from grants originally from the Spanish crown. The subsequent ratification of these grants merely confirmed the Pueblos' land tenure in a way that was radically different from the way other tribes held their land.[67] The more they were distinct from other tribes, the less Indian they seemed, according to Judge Pope. Moreover, their accommodation to Spanish, Mexican, and now American authority (the 1680 revolution and the 1848 Taos revolt apparently overlooked) demonstrated their integration into the broader culture. Of course, nothing could have been farther from the truth. The entire history of the Pueblos in relationship to Europeans had been resistance and accommodation in

[66] *Id.* at 549.

[67] Of course, as the United States pointed out in its brief, other tribes had long held their land in fee derived from patents from the federal government. *See* Brief for the United States, *supra* note 47, at 24.

order to preserve Puebloan autonomy.[68] Even the adoption of Catholicism had resulted in both devout belief and syncretism. Yet interpreted from the perspective of the outsider, the building of the church at the center of the Pueblo does no more than indicate the centrality of the faith. That the kivas were transformed from their traditional round shape to rectangles to save them from destruction by the Spanish seems to have escaped Judge Pope's notice.

Judge Pope tried to address controversies surrounding the effects of the Treaty of Guadalupe Hidalgo, which had offered United States citizenship to all Mexican citizens in the ceded territory, presumably including the Indians who had been granted citizenship under the Plan of Iguala. Did that provision mean there was no longer any Indian country at all in New Mexico, or in other parts of the southwest acquired from Mexico? Judge Pope sidestepped this potential mine field by reading the treaty as applying only to the Pueblos and not to the "wild Indians." The convenience of this reading, of course, meant that the statutes did not apply to the Indians with the most coveted land in the new state. The Athabascan tribes, distinct from the Pueblo, had far less land that the non-Indian elite wanted for agriculture or other purposes. This distinction also conveniently fit with the idea that the categories of Indian and citizen were mutually exclusive. But, of course, they were not.[69] Adopting the pose of being loyal followers of treaty obligations, the state political actors and their legal sycophants distorted the meaning of the treaties and their amendments. The Solicitor General who argued the case, William Marshall Bullitt, was described as a slight man who could "talk faster than any man in Kentucky" and was also known for being such a loyal Republican that he would have election officers arrested is they weren't performing up to his standards.[70] According to their reading, the treaty, which incorporated the inhabitants of the territory and granted them the juridical status they would have had under Mexican law, applied to Mexicans (meaning presumably Genizaros, Hispanos, Mestizos, and others), Africans (including moors), and Indians, which they took to be limited to Pueblos. Under the Plan of Iguala and the Treaty of Guadalupe Hidalgo, all Indians, Pueblo or not, would have had the option of being citizens.

There is no warrant for the treaty construction that New Mexico had long espoused and that Judge Pope adopted. Even if there were, it would not follow that the Pueblos could not remain Indian in any legal sense. Just twelve years after Judge Pope rendered his decision, Con-

[68] The trope of accommodation in order to preserve independence and its misinterpretation is depressingly common in federal Indian law. *See, e.g.* Gerald Torres and Kathryn Milun, *Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case*, 1990 Duke L.J. 625 (1990).

[69] *See* Brief for the United States, *supra* note 58, at 23.

[70] www.justice.gov/osg/aboutosg/bullittbio.htm (last visited July 21, 2010).

gress conferred United States citizenship on all Indians, while expressly preserving their status and rights as Indians.[71] But for Judge Pope to have decided the issues of treaty interpretation and Indian status otherwise would have stood in the way of local political and territorial ambition. The squatters' claims could be normalized under local law if the federal government could be pushed out of the way. After the *Joseph* decision, a veritable flood of non-Indians had rushed in to acquire Pueblo land. If their claims to land ownership could be tossed over by a meddling federal government, the political landscape would suffer an upheaval as well. The Pueblo Indians, Judge Pope pointed out, could vote; they just chose not to.

According to Judge Pope's reasoning, if one accepts his characterization of the Pueblo Indians and the implications of that characterization for Pueblo treaty rights, then any effort by the federal government to impose additional duties on the state regarding the Pueblos would violate federal obligations to the territory to treat it with the respect due any sister state. In a repeat of the arguments he made in his *Varela* opinion, Judge Pope declared Congress out of bounds. The type of restriction Congress was attempting to impose on the state in the enabling act trenched directly on the local police powers of the state. To have permitted the federal government to control the sale of alcohol from one citizen to another would be to surrender the kind of local control that is at the very heart of the sovereign police powers that define state governmental authority.[72]

Although Judge Pope ignored the *Kagama* decision, his analysis gave him no reason to attend to it. *Kagama* only applied where the predicate for congressional power existed. Remove the predicate and the only precedent that mattered was *Joseph*. It was in this posture that the Supreme Court took up the case, the United States appealing Judge Pope's decision to sustain the demurrer and dismiss Sandoval's prosecution.

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[71] 18 U.S.C. § 1401(b).

[72] The strength of Judge Pope's view on this point is evident from the outset of the opinion:

> It is not overlooked, in making the present disposition of the case, that it is one of great importance to the Indians in question, and that the effect of the decision may be to break down a safeguard which Congress and the framers of the New Mexico Constitution have attempted to provide for the Pueblo Indians. However, mere desirability of a result can furnish, as against constitutional limitation, no justification for an assumption of federal power, nor for a denial of state jurisdiction. The matter being purely one for the state, it will be assumed, . . . that the Legislature of the state will perform its duty in this respect. If, as suggested at the bar, state legislation already passed on the subject is fully adequate, it is to be anticipated that the state courts, by the enforcement of such statutes, will afford the Pueblo Indians the protection which Congress and the state constitutional convention have indicated a desire to give them. To assume otherwise is to say that representative government is a failure.

Sandoval 198 F. at 556–57.

The Supreme Court Decision

The Supreme Court was faced with a problem posed by the analysis of the treaty language as well as the arm chair anthropology of the earlier territorial courts and the Supreme Court itself in the *Joseph* case. Presented with the characterization of the Pueblo Indians as civilized and industrious people made citizens by the Mexicans, and thus beyond the reach of the congressional power, the Supreme Court through Justice Willis Van Devanter took a different tack. Justice Van Devanter was himself a westerner, having served on the Wyoming territorial court. He had also represented the state of Wyoming in a major United States Supreme Court case upholding the very equal footing doctrine that Judge Pope had found so useful in his opinions in *Varela* and *Sandoval*.[73]

First, he said, the Pueblo Indians are not as civilized or distinct from the general run of other Indians under federal jurisdiction as the district court would have us believe.[74] He turned to early ethnographers to demonstrate that the Pueblo Indians were governed by fear and petty despotism. Their social and religious life, according to the opinion, was dominated by superstition, fetishism, and debauchery. According to reports that the Court cites, the Pueblo Indians did not compare favorably with the Sioux.[75] Not only were they not civilized, they were obdurate and unwilling to adopt the white man's ways. They wanted to remain separate. These facts, according to Justice Van Devanter's opinion, do not dispose the dispassionate observer to conclude that the Pueblos are not Indian in either race or condition. So if the Court was supposed to resolve the issue of Congress' power over the Pueblos based on their race and condition, he was prepared to answer that Congress had such power. The Pueblo Indians were clearly an inferior race in need of tutelage, and Congress had taken that obligation seriously by providing them with the essentials of civilized life, even if the Pueblos had not made the best use of them.

Yet, according to the district court, a signal marker of the Pueblos' march toward civilization was their land tenure. Wasn't it true that they owned their land in fee? Yes, Justice Van Devanter noted, it was true that the Pueblos held their land in fee derived from royal grants; but the grants were to the *Pueblos*, not to individual members of the communities. Thus the land was community land which the community could deal with as it saw fit, owned in a manner that was distinct from the ways in which non-Indians held title. Moreover, it was not so different from the ways other Indians held land.

> . . . [T]he lands are public lands of the pueblo, and so the situation is essentially the same as it was with the Five Civilized Tribes, whose

[73] The case is *Ward v. Race Horse*, 163 U.S. 504 (1896). For discussion of the case and Van Devanter's role, see David E. Wilkins, *Indian Treaty Rights: Sacred Entitlements or "Temporary Privileges?"* 20:1 Am. Indian Culture and Research J. 87 (1996).

[74] United States v. Sandoval, 231 U.S. 28, 43 (1913).

[75] *Id.* at 42.

> lands, although owned in fee under patents from the United States, were adjudged subject to the legislation of Congress enacted in the exercise of the government's guardianship over those tribes and their affairs.[76]

Thus the Court rejected the claims of fee title ownership as unavailing as proof of non-Indian status. Just as it was willing to disregard the romance in Judge Pope's anthropology, it was willing to see past the Pueblos' "race and condition" that his opinion had identified as central to Indian legal identity. The Supreme Court understood that the Pueblos peoples' status as Indians was tied not just to their freedom to buy wine on the Pueblo but was also to the freedom for non-Indians to take land from them or for the local authorities to tax the land out from under them.[77] One should always be suspicious of protective legislation, but perhaps especially so when it is removed without one's consent.

Would the Supreme Court sacrifice the dignity of the state on the rude altar of the plenary power? New Mexico's trump card was the claim that the Pueblo Indians had lost their legal identity as Indians when they were made citizens by the entry of New Mexico territory into the United States after the Mexican–American War. If they were citizens, then the federal government's attempt to regulate them would be revealed both as overreaching beyond the power of the federal government and a derogation of state police power under the equal footing doctrine. More than that, it would be an absurd attempt by the federal government to base its authority on the illegitimate categorization of people. Judge Pope believed he had demonstrated on the facts that the Pueblo Indians were not Indians in the sense contemplated by the federal statute prohibiting liquor sales in Indian country, and thus they were not within the statute's regulatory ambit. That ought to be sufficient, in his view, to invalidate Sandoval's prosecution. But if more were needed, Judge Pope's other point was that the Pueblo Indians' citizenship removed them from the ambit of the statute. Either line of legal analysis led to a conclusion that robbed the federal government of the competence to exercise its power over the Pueblo Indians and their territory. In response, Justice Van Devanter was sensitive to both arguments. Having disposed of the ethnographic point he felt it unnecessary to address the citizenship point, since, as he pointed out, the federal government had long exercised its jurisdiction over Indians who were both citizens and tribal members. "As before stated, whether [the Pueblo] are citizens is an open question, and we need not determine it now, because citizenship is not in itself an obstacle to the exercise by

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[76] *Id.* at 48.

[77] *Id.* at 41 ("It is my opinion that in the event taxation is imposed it will be but a short time before the masses of the New Mexico Pueblo Indians will become paupers. Their lands will be sold for taxes, the whites and Mexicans will have possession of their ancient grants, and the government will be compelled to support them or witness their extermination.").

Congress of its power to enact laws for the benefit and protection of tribal Indians as a dependent people."[78]

But that cannot be the end of it. Judge Pope's opinion was making an explicitly racial claim. He was saying that federal jurisdiction could not be predicated on the mere fact that the Pueblo people were Indian by blood, even if state racial segregation laws were regularly upheld at that time.[79] Sandoval's attorney, making arguments long reflected in arguments made by the state, was suggesting that once the racial claim to regulating Indians was lost it would be like regulating other ethnic groups, an absurd and unconstitutional basis for anchoring federal power. Moreover, if such a basis for federal jurisdiction were to be found constitutional, it would be without limit. Citizens and states would be at the mercy of unbounded federal power. The Court recognized the force of this criticism and replied:

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.[80]

The district court had made a fundamental error in thinking it was within either the province of the court or the state to determine who was or was not an Indian. Once the determination had been made, as it clearly had been in the case of the Pueblos, the degree of their civilization, religion, or government was a matter of moment only for the federal government. It and not the state could decide whether further superintendence was required, but the identity of the Pueblo Indians as Indian did not hinge on the degree of solicitude shown by the non-Indian neighbors of the Pueblos.[81] Moreover, *Kagama* located that power to assess Indian status squarely within the boundaries of the federal legislature, not the executive or the judiciary. The district court could no more validate the decisions of the territorial legislature than it could the decisions of the state legislature with regard to the status of the Pueblo people. That was the meaning of the language of the enabling act.[82] Any fair analysis reveals that the language making New Mexico a State took no more power away from New Mexico than the conversion of Article IX of the Articles of Confederation into the commerce clause did from the founding states of the union.

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[78] *Id.* at 48.

[79] *See, e.g.*, Plessy v. Ferguson 163 U.S. 537 (1896).

[80] *Sandoval*, 231 U.S. at 46.

[81] *Id.* at 45–47.

[82] *Id.* at 38.

The Immediate Impact of Sandoval

The *Sandoval* decision should have ended the debate over the distribution of power to say who is an Indian for purposes of federal law. It did not have that immediate effect, however, partly because it did not supply a clear standard for determining when Congress can validly declare a group of people to be Indians and under the jurisdiction of the federal government. What does seem clear is that a group has to be in some sort of dependence; but what that meant at the time was obscure. Given the direct conflict with the *Joseph* decision, *Sandoval* should have overruled it, but it did not. Remember, *Joseph* held that the Trade and Intercourse Act did not apply to Pueblo Indians. Justice Van Devanter's opinion distinguished *Joseph* as based on a more limited legislative initiative and outdated findings about the Pueblos:

> We are not unmindful that in [*Joseph*] there are some observations not in accord with what is here said of these Indians, but as that case did not turn upon the power of Congress over them or their property, but upon the interpretation and purpose of a statute not nearly so comprehensive as the legislation now before us, and as the observations there made respecting the Pueblos were evidently based upon statements in the opinion of the territorial court, then under review, which are at variance with other recognized sources of information, now available, and with the long-continued action of the legislative and executive departments, that case cannot be regarded as holding that these Indians or their lands are beyond the range of congressional power under the Constitution.[83]

Unfortunately, this refusal to squarely take the power out of the hands of the locals and vest it in the hands of the federal government (recognizing that the federal government should not always, and especially not in the late nineteenth century, be understood as a friend to Indians) meant that the depredation on the lands of the Pueblos could continue apace. The covetous colonials, whether the new Americans who had come in from the east or the Mexicans who had been there from the time of the Spanish, continued to compete with the Pueblos for land and what precious little water there was. In addition, the search for minerals never really ended with the failure to find the Seven Cities of Cíbola. The prosecution of Felipe Sandoval did not expressly empower the federal government to impose restrictions on non-Indians from settling on Indian land. It was not until the case of *United States v. Candelaria*[84] that the Supreme Court finally held that the Pueblos were also protected by the Nonintercourse Act; but by then so much Pueblo land had been lost that it was a bittersweet victory that merely allowed the United States to sue on their behalf.

The *Candelaria* decision came down in 1926, two years after Con-

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[83] *Id.* at 48–49.

[84] 271 U.S. 432 (1926).

gress passed the Indian Pueblo Land Act,[85] an act designed to settle non-Indian claims against the Pueblos. There were thousands of non-Indian claims against Pueblo lands, some old, some relatively new. The Act was designed to have a board investigate the claims, and that board was also given the power to determine the exterior boundaries of the Pueblo lands. In essence, the board could determine the validity of the land grants regardless of their source. Once the board made its findings, the attorney general would bring quiet title actions on behalf of the non-Indians who had proved out their claims. These actions were basically adverse possession suits where the non-Indians could demonstrate that they held title under color of title since January 6, 1902 and had paid taxes on the land, or where they proved that they had been in continuous possession of the land by virtue of the payment of taxes since March 16, 1889. If a unanimous board confirmed the claims, the Indians lost their land. The vast bulk of non-Indian land claims prevailed.[86] The United States was obligated to reimburse the Pueblos for lands and water rights lost to non-Indians based on a failure of the federal government to prosecute squatters and trespassers on Pueblo lands.

There were three glaring problems with this arrangement. First, the determination of fair market value is always subject to a discount for time. Second, the Pueblos did not want money, they wanted their land. Third and finally, if the *Joseph*, *Varela* and the other cases were to be believed, the power of the federal government to prosecute squatters and trespassers would have been left to the territorial government, and since that government was clearly acting in the interests of the non-Indians there would have been precious few incidents of "failure to prosecute." Certainly there would have been none under the Trade and Intercourse Act. Nonetheless, and perhaps in an effort to satisfy the non-Indian claimants who did not prevail, Congress passed a further appropriations act to compensate the losing claimants and the Pueblos.[87] For the people of the Pueblos, losing land like the Jemez Caldera could never be paid for in cash or promises.

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[85] Pub. L. No. 68–253, 43 Stat. 636 (June 7, 1924).

[86] According to *Cohen's Handbook of Federal Indian Law*, eighty percent of the non-Indian claims were confirmed by the board. Nell Jessup Newton et al., *Cohen's Handbook of Federal Indian Law* 327 (2005 ed.).

[87] Pub. L. No. 73–28, 48 Stat. 108 (1933). The funds were to be expended, subject to each Pueblo's approval, "for the purchase of lands and water rights to replace those which have been divested from said pueblo under the Act of June 7, 1924, or for the purchase or construction of reservoirs, irrigation works, or other permanent improvements upon or for the benefit of the lands of said pueblos."

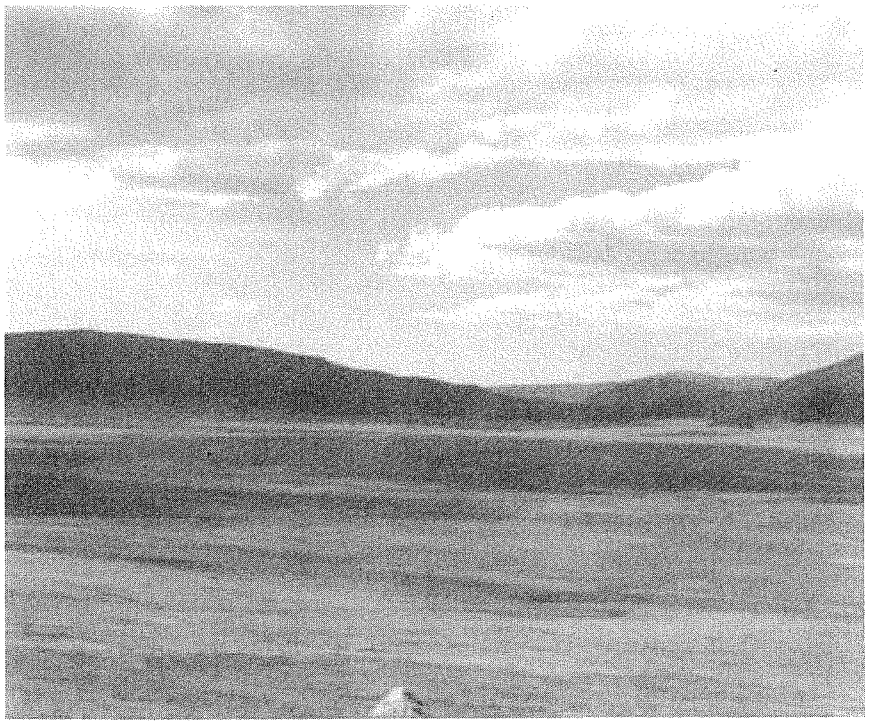

Photo: Jemez Caldera (Valles Caldera) New Mexico.[88]

The Continuing Importance of Sandoval *Today*

We study *Sandoval* today for a number of reasons. It contains threads of analysis that remain strikingly and disturbingly current. The story it tells also implicates the complicated evolution of the American imagination with empire, with race, and with its own internal governance. The events that ultimately resulted in the *Sandoval* case were long in unfolding, and the specific events arose in the detritus of our first international war and just as the Spanish–American War had concluded and the world was building to its first global conflagration. Domestic and international chaos was barely at bay and the law needed new tools to keep up. The local administration in the New Mexico territory treated the central government like a distant annoyance. In addition, the incorporation of New Mexico into the Union meant that it would be adding a state that was largely non-white and non-English speaking. The transformation of the elite was a critical piece of the social/political evolution that was necessary before the territory would be ready for statehood.[89]

Where Indians, particularly the Pueblos, fit into all of this was a critical piece of the puzzle. They were especially important because of

[88] Photo by Gerald Torres (2009).

[89] *See* Gómez, *supra* note 4 at 430.

their claim to important land and water resources. Land theft is a familiar trope in the relationship between Indians and non-Indians. All the better when it is done legally. But in New Mexico, the existence of land claims based on ancient grants complicated the picture, because wholesale disregard of the validity of these grants would mean that the negotiation with non-Indian elites would be more complicated and certainly bloodier.

One of the most important issues that arose in the *Sandoval* litigation was the role of race as a defining characteristic of Indian identity. Their "race and condition" was a factor that drove the so-called ethnographic inquiry in both the district court and the Supreme Court. We should not be comforted by the pleasant romanticism of Judge Pope's opinion in the district court or outraged by the racist characterizations of the Supreme Court. Instead, we should be worried that race mattered at all to the relationship between the Pueblos and the non-Indian governments that were trying to exercise control over them. The question of race would matter in future cases, such as those involving tribal recognition[90] or those involving the status of Native Hawaiians;[91] and although race would be avoided in *Morton v. Mancari*,[92] it continues to cast a shadow in litigation arising under the Indian Child Welfare Act.[93]

In *Sandoval*, the Supreme Court elided some of this difficulty by focusing on the question of dependence rather than race; but here too the Court relied on a degraded conception of dependence that would finally be incorporated into federal law and stripped of its political dignity. Nearly one hundred years after *Sandoval*, in a case interpreting the statute that codified the definition of Indian country, the Court would point out that "[t]he entire text of § 1151(b), and not just the term 'dependent Indian communities,' is taken virtually verbatim from *Sandoval*. . . ."[94] As the Court went on to explain:

> In attempting to defend the Court of Appeals' judgment, the Tribe asks us to adopt a different conception of the term "dependent Indian communities." Borrowing from Chief Justice Marshall's seminal opinions in *Cherokee Nation v. Georgia* . . . and *Worcester v. Georgia* . . . the Tribe argues that the term refers to *political* dependence, and that Indian country exists wherever land is owned by a federally recognized tribe. Federally recognized tribes, the Tribe contends, are "domestic dependent nations," *Cherokee Nation*

[90] *See, e.g.*, Torres & Milun, *supra* note 68, especially the discussion of the trial court's treatment of the presence of "black" blood in the Mashpee community that would in the American racial iconography render them black and not Indian.

[91] *See* Rice v. Cayetano, 528 U.S. 495 (2000).

[92] Morton v. Mancari, 417 U.S. 535 (1974) (see Chapter 12, this volume).

[93] 25 U.S.C. §§ 1901–1963. *See* Carole Goldberg, *Descent Into Race*, 49 UCLA L. Rev. 1373 (2002).

[94] Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520, 530 (1998).

> *v. Georgia* . . . and thus *ipso facto* under the superintendence of the Federal Government.[95]

The concept of dependence put forward in *Sandoval* was not the kind of dependence the tribes had in mind when they signed the treaties or entered into a political alignment with a superior power. It is certainly not the kind of dependence that would support a parallel sovereignty in a tripartite form of federalism. It is the worst kind of factual dependence that would tie political protection and support to an empirically corrupted condition. In many ways the Supreme Court and the lower court in *Sandoval* seem to agree about whether the Pueblo people were Indians based on the condition of their social life. The two courts merely disagree about the facts and who gets to make the decision.

Both of these threads, the racialism and the different concept of dependence, bear deeply on the question of who is an Indian and who gets to make that decision. The one thing that *Sandoval* makes clear is that for purposes of federal law, Congress gets to make the decision; and so long as Congress does not correct the Court, federal common law will define the parameters of that policy. This approach takes considerable agency away from the tribes to say who they are and who they shall have as members. *Sandoval* left the tribes as mere objects of policy, not authors. Such was the legacy of the tribes in all of the Mexican cession.

While it might seem churlish to lay the issue of Indian land disputes at the feet of the *Sandoval* Court, it was not wine so much as land, water, and other resources that lay behind the dispute in the case. In the same way that many people thought *Brown v. Board of Education* overruled *Plessy*, many have thought that *Sandoval* overruled *Joseph*. It may have been the predicate, but it was not enough. And perhaps it was not enough for the same reasons. The problem was that a precipitous move would have upset the locals in either case. The Pueblo Land Act of 1924 was designed to clear the titles of the *non-Indians*! To have overruled *Joseph* and run the trespassers off of the land of the Pueblos undoubtedly would have upset settled expectations, but then the settled expectations of thieves have never been widely respected in Anglo–American property law. The job of the board set up by the Pueblo Land Act was precisely to determine who was holding the land in good faith adverse possession, something Anglo–American law has protected since time immemorial.[96] The question of the settled expectations of the powerful is always on the mind of the Court, especially if it can avoid forcibly upsetting those expectations in the short term. The reverberations of *Sandoval* are felt in reservation diminishment cases for much the same reason.[97] "Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian

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[95] *Id.* at 531 n.5.

[96] At least since 1276.

[97] *See, e.g.*, Solem v. Bartlett, 465 U.S. 463 (1984). These cases address whether federal statutes opening up tribal lands for allotment to individual Indians and for non-Indian homesteading also had the effect of reducing the acreage of those reservations.

character, we have acknowledged that *de facto,* if not *de jure,* diminishment may have occurred."[98]

Finally, the failure explicitly to acknowledge the pre-political sovereign existence of the Pueblos raised the possibility that the Pueblos exercised their own authority as a form of derivative power from the federal government. That question, while not directly in play in *Sandoval*, is hovering in the background as the state and the federal governments fight it out on the platform provided by the Pueblos. The federal government never acknowledged that it was defending Puebloan independence from local power rather than defending its own legislative prerogatives derived from the status of the Pueblos as Indian. The *Sandoval* Court's reliance on *Kagama* is chilling for the tribes even as it was perhaps inevitable.

Conclusion

It is impossible to read the eight centuries of Pueblo history and not feel as though the current epoch is one the Pueblos will survive intact as well. In comparison to the two thousand years of continuous habitation on the three mesas of Hopi, the traces of non-Indian history on North America are little more than current events. But the encroachments that began with Spanish errors and continue to this day have pressed at the edges of Pueblo life; and the accommodations that the Pueblos have undertaken ensure that the Pueblos will evolve in ways that non-Pueblo people cannot understand. When Indian culture is made coeval and thus legitimately on a par with western culture, and modern statecraft is associated with recognition of cultural pluralism, political elites are conceptually trapped. The sovereignty of the tribes inheres in their existence as a people. If the federal government had been honorable, the Indians in New Mexico could have had sovereignty, land, and resources without being subject to the strangling embrace of the plenary power doctrine, and they could have provided a model for parallel development without being subject to the superior sovereignty of the federal government or the state. In other words, we might have seen the evolution of a world where pluralism, cultural and otherwise, is really taken seriously.

[98] *Id.* at 471.