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## “INDIANS, IN A JURISDICTIONAL SENSE”: TRIBAL CITIZENSHIP AND OTHER FORMS OF NON-INDIAN CONSENT TO TRIBAL CRIMINAL JURISDICTION

Paul Spruhan\*

In 1844, an exasperated Agency Superintendent reported to the Commissioner of Indian Affairs details of a troubling case. William Armstrong described the hanging of Jacob West, a white man of no Indian ancestry, at the order of a Cherokee court for participating in the murder of a Cherokee.<sup>1</sup> West had been married to a Cherokee and had lived in the Cherokee Nation.<sup>2</sup> Under Cherokee law in effect at the time, he qualified to be a naturalized citizen of the Nation.<sup>3</sup> West unsuccessfully sought a writ of habeas corpus from the federal district court in Arkansas to release him from Cherokee custody.<sup>4</sup> According to Armstrong, the court denied West's request because West had married into the Cherokee Nation and “had, for all legal purposes, become one of the tribe.”<sup>5</sup> Based on West's execution at the order of the tribal court, Armstrong asked,

are all other tribes to exercise the same jurisdiction? Are the Osage to be suffered to scalp any white man married among them, whenever, according to their peculiar customs, he may have incurred that penalty? . . . If an American, by marriage and residence among the Cherokees becomes for all legal purposes an Indian, it is difficult to conceive why the same consequences should not result from marrying and residing among any other tribe.<sup>6</sup>

Fast forward to 2011. The Court of Appeals of the Port Gamble S'Klallam Tribe faced a similar question, though under somewhat different facts: could a non-Indian be subject to the tribe's criminal jurisdiction by simply signing a form indicating his consent?<sup>7</sup> In *Port Gamble S'Klallam v. Hjert*, the non-Indian defendant consented to

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<sup>1</sup> Sen. Doc. No. 1, 28<sup>th</sup> Congress, 2<sup>nd</sup> Session 461 (1844-45). Armstrong's correspondence is also discussed in Bethany Berger, “Power over this Unfortunate Race”: Race, Politics and Indian Law in *United States v. Rogers*, 45 WM. & MARY L. REV. 1957, 1998-99 (2004).

<sup>2</sup> Sen. Doc. No. 1, *supra*, note 1, at 461.

<sup>3</sup> See An Act to Legalize Intermarriage with White Men, September 28, 1839, reprinted in The Constitution and Laws of the Cherokee Nation 1839-51, at 32-33 (N.D.).

<sup>4</sup> Sen. Doc. No. 1, *supra*, note 1, at 461.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 461-62.

<sup>7</sup> See *Port Gamble S'Klallam v. Hjert*, No. POR-CR-09/09-169 (slip op. December 15, 2011).

prosecution by the tribal court for alcohol offenses by signing such a form.<sup>8</sup> Hjert had previously pled guilty before the tribal court to similar offenses and been sentenced to detention, fines, and probation.<sup>9</sup> The form, apparently prepared by the tribal prosecutor, explicitly limited the scope of consent to prosecution in that case, and not a general consent to tribal authority.<sup>10</sup> Despite his consent, and his apparent failure to seek dismissal of the prosecution, the tribal trial court dismissed the case on its own, ruling that the tribe had no jurisdiction.<sup>11</sup> The tribal Court of Appeals affirmed the dismissal, holding that though non-Indians generally might be able to consent to tribal jurisdiction, the absence of an affirmative tribal statute authorizing such consent meant that the tribe currently lacked such jurisdiction.<sup>12</sup> Further, the court ruled that the consent itself did not comport with the due process requirements of the Indian Civil Rights Act in the absence of evidence that it was “freely and expressly given, voluntary, intelligent and case specific.”<sup>13</sup>

These different outcomes reflect not only differences in the two tribal nations’ laws at the time of the cases but also significant changes in the federal view of and influence on tribal criminal jurisdiction. Between 1844 and 2011 federal courts would claim to reduce tribal criminal jurisdiction over non-Indians to the point that standard descriptions of federal Indian law state that tribes lack any such jurisdiction, or, at least that such authority is restricted solely to contempt and exclusion from tribal lands.<sup>14</sup> Indeed, a mere two years after Armstrong’s report on West’s execution, the United States Supreme Court decided *United States v. Rogers*, ruling that the United States had jurisdiction to prosecute a white man married into the Cherokee Nation.<sup>15</sup> In *Rogers*, the Supreme Court concluded that a white man could not claim to be an “Indian” exempt from federal jurisdiction based on his status as a citizen of the Nation.<sup>16</sup> According to the Court, Indian status was racial under federal criminal law, barring white men from being “Indians.”<sup>17</sup> Though, as discussed below, the ruling did not forbid tribal jurisdiction over the same offense or the naturalization of non-Indians as tribal citizens, it nonetheless interfered with tribes’ citizenship determinations by stripping exclusive tribal jurisdiction. More significantly, the United States Supreme Court some one hundred and thirty five years after *Rogers* ruled in *Oliphant v. Suquamish* that tribes lacked criminal jurisdiction over non-Indians at all.<sup>18</sup> Though this ruling did not explicitly

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<sup>8</sup> *Hjert.*, slip op. at 1-2.

<sup>9</sup> *Id.* at 1.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 15.

<sup>13</sup> *Id.* at 16.

<sup>14</sup> See, e.g., FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 9.04 (2005 Nell Newton, ed.); STEPHEN PEVAR, THE RIGHTS OF INDIANS AND TRIBES 140-41 (4<sup>th</sup> ed. 2012).

<sup>15</sup> *United States v. Rogers*, 45 U.S. 567, 572-73 (1846). For a detailed discussion of the background of the case, see Berger, *supra*, note 1; DAVID WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT 38-49 (1997).

<sup>16</sup> See *Rogers*, 45 U.S. at 572-73.

<sup>17</sup> *Id.* at 573.

<sup>18</sup> *Oliphant v. Suquamish*, 435 U.S. 191, 212 (1978).

prohibit consent, the sweeping nature of the ruling created more doubt on its viability.<sup>19</sup> The Cherokee Nation's decision to execute West was not made with any consideration of federal views expressed in *Oliphant*, while such views greatly affected the S'Klallam's decision to dismiss Hjert's prosecution, as the Court of Appeals discussed in detail in its opinion.<sup>20</sup>

In the face of these developments that purport to restrict if not outright bar consent, the question still remains: Can tribes exert criminal jurisdiction over non-Indians who consent, by whatever means, to adhere to tribal laws? Has federal Indian law, and tribes' reaction to it, changed the universe of tribal jurisdiction so significantly that non-Indians can truly never be subject to tribal criminal law? This article explores the concept of consent as a still viable theory of tribal criminal jurisdiction. I first examine some historical examples of non-Indian consent through adoption or naturalization under tribal law, and reactions to such consent by federal officials. I then discuss modern examples of tribal law theories of consent, primarily through recent statutory law and opinions of the Navajo Nation. Finally, I suggest different forms of consent tribes might consider, and their relative potential success in surviving federal scrutiny. Ultimately, I conclude that the grant of tribal citizenship to non-Indians has the greatest likelihood of establishing consent. However, I also conclude that non-Indians should consent to tribal criminal jurisdiction to foster true tribal sovereignty.

At the outset, it is important to define clearly what I mean by "consent." I am not defining it to mean mere physical presence on tribal lands, as the United States Supreme Court in *Oliphant* and *Duro v. Reina*, discussed below, has clearly rejected that theory of consent.<sup>21</sup> What I mean by "consent" is a voluntary acceptance, whether explicit or implicit, by a non-Indian of tribal criminal jurisdiction. This voluntary acceptance may be through the grant of citizenship by a tribe; marriage or other familial affiliation with a tribal member; or written acknowledgment of tribal authority generally or in a specific case, whether as a stated condition of living or working on tribal lands or not. In reality, on the ground in Indian Country, non-Indians quietly but routinely consent through compliance with tribal police on roads or in their homes on the reservation, through waivers of their federally-recognized right to file a writ of habeas corpus, or other jurisdictional challenge to tribal authority.<sup>22</sup> These consents are done with little

<sup>19</sup> See *Hjert*, slip. op. at 9-10 (discussing whether *Oliphant* means that tribes lack subject matter or personal jurisdiction over non-Indians, and therefore whether non-Indians can ever consent); Christopher Chaney, *The Effect of the United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction*, 14 BYU J. PUB. L., 186 (2000) (discussing concern that *Oliphant* precludes jurisdiction based on general rule that subject matter jurisdiction cannot be created by consent).

<sup>20</sup> See *Hjert*, slip op. at 4-13 (discussing federal limitations on tribal jurisdiction).

<sup>21</sup> *Oliphant v. Suquamish*, 435 U.S. at 212 (stating flatly that "Indian tribes do not have inherent authority to try and punish non-Indians."); *Duro v. Reina*, 495 U.S. 676, 696 (1990) (rejecting argument that defendant's contacts with tribe justified tribal jurisdiction as merely a different articulation of argument that physical presence is enough to establish criminal jurisdiction). For further discussion of the federal theory of consent in *Duro*, see *infra*, notes 123-26.

<sup>22</sup> Indeed, on some Indian reservations, tribal police are the only, or, at least, closest first responders to incidents involving non-Indians when 911 or other requests for assistance are made to law enforcement.

fanfare, and evade documentation through tribal or federal court decisions.<sup>23</sup> What I am interested in here, however, are attempts under affirmative tribal law to establish consent as a means of tribal authority. How have tribes conceptualized consent, and how might they in the future, whether with federal review in mind or not? To answer this question, it is important to first consider how tribes have historically dealt with jurisdiction over non-Indians through consent.

### HISTORICAL EXAMPLES OF TRIBAL LAWS OF CONSENT THROUGH ADOPTION OR NATURALIZATION

One simple way non-Indians historically consented to tribal authority was through adoption or naturalization as citizens of the tribal nation. Accounts of tribal societies include numerous references to non-Indians living among Indians, whether by marrying into the tribe or simply settling among them.<sup>24</sup> Accounts of so-called “white Indians” described persons taken captive by tribes during times of conflict, who elected to remain with the tribe even after attempts to ransom or return them to white society.<sup>25</sup> Some tribes engaged in elaborate adoption ceremonies for non-Indians and through such ceremonies some captives replaced family members killed in wars.<sup>26</sup> Some of these non-Indians who married into tribal society lived their whole lives in it, and produced “mixed-blood” children.<sup>27</sup> Other tribes, even into the late nineteenth century, adopted whites married into the tribe or otherwise residing among them, through approval by

<sup>23</sup> The U.S. Supreme Court in *Duro v. Reina* believed this acquiescence to tribal jurisdiction may be why there were, in its view, few federal challenges to tribal court jurisdiction. See *Duro v. Reina*, 495 U.S. at 689.

<sup>24</sup> See, e.g., Letter of Lewis Cass and Duncan McArthur to Acting Secretary of War George Graham, September 30, 1817, reprinted in 2 American State Papers, Indian Affairs 138, 139 (1834) (discussing non-Indians living among Wyandot who “have identified themselves in feelings, manners, and interest with the Indians.”); Letter of Thomas McKenney to Secretary of War James Barbour, September 2, 1825 reprinted in 2 American State Papers, at 651 (listing one hundred and forty seven white men and seventy three white women married into Cherokee Nation); Jedidiah Morse, Report to the Secretary of War on Indian Affairs, Appendix 37 (1822) (discussing white and black men married into Fond Du Lac tribe); James Axtell, *The White Indians of Colonial America*, 32 WILLIAM AND MARY QUARTERLY 55, 56 (1975) (reporting that “large numbers of Englishmen had chosen to become Indians- by running away from colonial society and joining Indian society, by not trying to escape after being captured, or by electing to remain with their Indian captors when treaties of peace periodically afforded them the opportunity to return home.”).

<sup>25</sup> Letter of Lewis Cass, *supra*, note 24, at 139 (“Some have been taken prisoners in early life [and] have married Indian women[.]”); Axtell, *supra*, note 22, at 56-58; see generally, JOHN DEMOS, *THE UNREDEEMED CAPTIVE* (1994) (recounting story of Eunice Williams, daughter of a New England preacher taken captive by Kahnawake Mohawks who refused to return to English society).

<sup>26</sup> See Axtell, *supra*, note 24 at 59, 67, 69-73; Demos, *supra*, note 25, at 81-82, 137, 163 (describing adoption of captives and assignment of captives to Mohawk clans).

<sup>27</sup> See, e.g., Demos, *supra*, note 25, at 142, 186 (discussing white men and women captured at a young age who married and had children with Iroquois Indians); see generally S.C. GWYNNE, *EMPIRE OF THE SUMMER MOON* (2011) (discussing Cynthia Parker, a white woman captured by the Comanche at age nine who refused to leave the Comanche until forcibly returned, and her mixed-blood son, Quanah Parker, who waged war against white settlers).

tribal councils.<sup>28</sup> Some tribes allowed them to vote or participate in negotiations on important tribal matters, including agreements to cede tribal lands.<sup>29</sup>

Three of the five so-called “Civilized Tribes” had formal citizenship laws that authorized whites married to tribal citizens to become citizens of the Nation. Similar in content, each tribe’s law recognized the ability of whites to be naturalized or adopted. An early Cherokee statute passed in 1819, before removal of the Nation to the Indian Territory, required white men to get a license from the national clerk and to marry a Cherokee woman through a minister or “other authorized person” before they could be recognized as citizens of the Nation.<sup>30</sup> In 1836, the Choctaw Nation similarly recognized the right of naturalization for a white man married to a Choctaw woman, and, like the Cherokee Nation, stated that if the white man parted from his wife “without just provocation,” he would forfeit his citizenship.<sup>31</sup> Both later required such white men to swear allegiance to the tribe and to abide by its laws.<sup>32</sup> Later statutes passed by both tribal nations, as well as the Chickasaw Nation, required certification by a certain number of citizens vouching for the white man’s character before naturalization could occur.<sup>33</sup> In its 1855 constitution, the Chickasaw Nation recognized the authority of the legislature to adopt anyone except “a negro, or descendant of a negro,” though such adoption only granted the right “to settle and remain in the nation, *and to be subject to its laws.*”<sup>34</sup> It further made intermarried men *and* women eligible for annuities as citizens, though they were barred from “any office of trust or profit in [the] Nation.”<sup>35</sup>

The Cherokee, Creek, Choctaw and Seminole Nations recognized the right of blacks to citizenship under certain circumstances. Though intermarriage with blacks had been prohibited under Cherokee law in 1839,<sup>36</sup> the Cherokee Nation in 1866 amended

<sup>28</sup> See, e.g., Letter of Commissioner D.W. Browning to the Secretary of the Interior, June 7, 1895, reprinted in Transcript of Record, United States ex. rel. West v. Hitchcock, No. 194, 27, 31 (discussing Wichita tribal council decision to approve adoption of white men and white women as citizens); Letter of D.W. Browning to Jane Shirley, April 3, 1894, reprinted in Transcript of Record, *supra*, at 44-45 (discussing adoption of white man by Comanche, Wichita, and Caddo tribes); Letter of Acting Secretary M.L. Joslyn to Commissioner of Indian Affairs, December 13, 1884, reprinted in Transcript of Record, *supra*, at 39-40 (discussing adoption of whites by Quapaw tribe).

<sup>29</sup> See, e.g., 2 American State Papers, *supra*, note 24, at 239 (1820 report of treaty commissioners of appointment of principal chiefs and “six white men and half-breeds” to Choctaw negotiation committee); Sen. Ex. Doc. No. 14, 52<sup>nd</sup> Cong., 1<sup>st</sup> Sess. 14-15 (1892) (listing at least one white man as “male adult member” of Wichita tribe empowered to vote on agreement).

<sup>30</sup> Act of November 2, 1819, reprinted in 2 American States Papers, *supra*, note 24, at 283.

<sup>31</sup> Act of October 8, 1836, reprinted in The Constitution and Laws of the Choctaw Nation (1840).

<sup>32</sup> Act of November 10, 1843, Constitution and Laws of the Cherokee Nation 1839-1841, 92 (N.D.); Act of October 30, 1888, Constitution and Laws of the Choctaw Nation (1894).

<sup>33</sup> Act of October 19, 1876, §1, reprinted in Laws of the Chickasaw Nation, I.T. relating to Intermarried and Adopted Citizens and the Rights of Freedmen 26 (N.D.).

<sup>34</sup> General Provisions, § 11, Constitution of 1856, reprinted in Constitution, Laws and Treaties of the Chickasaws (1860) (emphasis added).

<sup>35</sup> Constitution of the Chickasaw Nation, 1855, General Provisions, Section 9, reprinted in Constitution, Laws and Treaties of the Chickasaws, *supra*, note 34.

<sup>36</sup> Act of September 19, 1839, reprinted in Constitution and Laws of the Cherokee Nation, *supra*, note 32, at 19.



its constitution to recognize the right of former slaves and free blacks living within the Nation at the beginning of the Civil War, and their descendants, to citizenship in the Nation.<sup>37</sup> Such amendment appears to be based on the Cherokee's agreement in its 1866 treaty with the United States to recognize such "Freedmen" as entitled to "all the rights of native Cherokees."<sup>38</sup> The Seminoles similarly agreed in their 1866 treaty that certain "persons of African descent and blood," and their descendants, as well as "such other of the same race" were allowed to live in the Nation and "enjoy all the rights of native citizens."<sup>39</sup> The Creeks similarly agreed to recognize blacks under an almost identical provision in their treaty.<sup>40</sup> The treaty with the Choctaw and Chickasaws placed \$300,000 paid by the United States for land cessions in trust until the tribes passed laws to accept the Freedmen and their descendants as citizens.<sup>41</sup> The Choctaws accepted them through legislation passed in 1883.<sup>42</sup>

Importantly, those Nations reserved criminal authority over such naturalized citizens in their treaties with the United States. In the 1835 Treaty of New Echota, the Cherokees reserved to themselves the power to pass laws for the protection of "persons and property within their own country belonging to their people *or such persons as have connected themselves with them*."<sup>43</sup> In the Cherokee Nation's 1866 treaty, the Nation reserved "exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation[.]"<sup>44</sup> As Freedmen were granted citizenship in the same treaty, such jurisdiction appears to have extended to them as well as intermarried whites.<sup>45</sup> The Nation reiterated this authority in an 1891 agreement with the United States.<sup>46</sup> In their collective 1866 treaty, the Choctaws and Chickasaws similarly reserved such right over intermarried white persons residing on tribal lands or who had been adopted by legislative action, stating that such a white person was

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<sup>37</sup> Constitution of the Cherokee Nation, amended Article III, Section 5, November 26, 1866, reprinted in *Constitution and Laws of the Cherokee Nation* (1875).

<sup>38</sup> Treaty with the Cherokee Nation, July 19, 1866, Art. 9. In a recent opinion, the Cherokee Supreme Court concluded that the treaty provision did not grant citizenship, but only promised that the Freedmen "would be treated as equals to the citizens of the Cherokee Nation under the federal law as it existed at the time." *Cherokee Registrar v. Nash*, No. SC-2011-02, slip op. at 8 (August 22, 2011).

<sup>39</sup> Treaty with the Seminoles, March 21, 1866, Art. 2.

<sup>40</sup> Treaty with the Creeks, June 14, 1866, Art. 2.

<sup>41</sup> Treaty with the Choctaws and Chickasaws, April 28, 1866, Art. 3.

<sup>42</sup> See *Lucas v. United States*, 163 U.S. 612, 614 (1896) (discussing legislation).

<sup>43</sup> Treaty with the Cherokees, December 29, 1835, Art. 5 (emphasis added).

<sup>44</sup> Treaty with the Cherokee Nation, *supra*, note 38, Art. 13.

<sup>45</sup> The United States Supreme Court concluded as much in *Alberty v. United States*, which concerned the prosecution of a Cherokee Freedmen for the murder of an illegitimate child of a black female slave and a Choctaw man. See 162 U.S. 499, 500-01 (1896). The wife of the victim was a black "freed woman" made a citizen of the Cherokee Nation by the Treaty of 1866. *Id.* at 501. Though the Court believed *Alberty*, the defendant, was a citizen of the Cherokee Nation and under its jurisdiction if the victim were also a citizen, it concluded Cherokee law precluded the victim from being a citizen, as marriage to a freedman did not confer citizenship on the spouse. See *Id.* at 499, 501.

<sup>46</sup> Agreement with the Cherokee Nation, December 19, 1891, Art. 2.

deemed to be a member of said nation, and . . . subject to the laws of the Choctaw and Chickasaw Nations according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw.<sup>47</sup>

The Seminoles similarly stated in their treaty that “the laws of said nation shall be equally binding upon all persons of whatever race or color, who may be adopted as citizens or members of said tribe.”<sup>48</sup> The Creeks included an almost identical provision in their treaty, with the addition that all citizens were also entitled to equal protection under their law.<sup>49</sup> Through these treaty provisions, tribal nations asserted their right to exert jurisdiction over non-Indians who became tribal citizens.

### HISTORICAL FEDERAL RECOGNITION OF NON-INDIAN TRIBAL CITIZENS

How did federal courts and federal officials react to such assertions of the right to confer citizenship and prosecute based upon such citizenship? Read in isolation, the holding of *U.S. v. Rogers*, that a white man married into a tribe could not be an “Indian” under federal criminal law, might be seen as the beginning of the complete racialization of Indian status, or at least the federal repudiation of non-Indian tribal citizenship. However, the Court made that ruling only in the context of the definition of “Indian” for *federal* criminal jurisdiction. The Court explicitly disclaimed any conclusion on whether a white man could nonetheless consent to tribal jurisdiction, stating that “he *may* by such adoption become entitled to certain privileges in the tribe, *and make himself amenable to their laws and usages*.”<sup>50</sup> While as a practical matter, extension of federal jurisdiction over crimes committed by naturalized tribal citizens might have divested a tribal nation’s prosecutorial authority, as the person might have been in federal custody before the tribe could assert its jurisdiction, *Rogers* did not divest such jurisdiction as a matter of law.<sup>51</sup>

Importantly, for the tribal nations with a treaty-recognized right to exclusive criminal jurisdiction over adopted or naturalized citizens, *Rogers* became a legal nullity. The 1866 treaty with the Cherokee Nation authorized federal jurisdiction over crimes between two naturalized Cherokee citizens, and therefore effectively overturned *Rogers*. The Choctaw and Chickasaw treaty’s recognition of authority was even

<sup>47</sup> Treaty with the Choctaw and Chickasaw Nations, *supra*, note 41, Art. 38.

<sup>48</sup> Treaty with the Seminoles, *supra*, note 37, Art. 2.

<sup>49</sup> Treaty with the Creeks, *supra*, note 38, Art. 2.

<sup>50</sup> See *Rogers*, 45 U.S. at 573.

<sup>51</sup> Indeed, *Rogers* himself was put into federal custody by Cherokee law enforcement, as there were no Cherokee jails to keep him, on the expectation he would then be returned for prosecution by the Cherokee Nation. See Berger, *supra*, note 1, at 1984. Instead, federal officials kept him, transferred him to Little Rock, Arkansas, and initiated federal prosecution. *Id.* at 1985-88. In a curious twist, *Rogers* himself died while escaping from federal custody before his case even reached the Supreme Court. See *Id.* at 1999. The Court was then answering a theoretical question that would have had no practical effect on *Rogers* himself. See *Id.* at 1999-2003.



broadly, as it reserved criminal jurisdiction to those nations seemingly regardless of the status of the victim.

Federal courts grappled with these treaty exceptions to *Rogers*, but ultimately upheld the tribes' exclusive criminal jurisdiction. For example, "Hanging judge" Parker of the Circuit Court of Western Arkansas found ways around the treaty requirements in several cases.<sup>52</sup> In *Ex Parte Kenyon* (1878), ironically the main case cited by the U.S. Supreme Court to bolster its decision in *Oliphant*,<sup>53</sup> Judge Parker ruled the Cherokee Nation lacked jurisdiction over a white man who had been naturalized through marriage.<sup>54</sup> Kenyon, the white man, had stolen a horse, the horse of his deceased Cherokee wife in fact, and had been sentenced by the Nation to five years detention.<sup>55</sup> Parker granted a writ of habeas corpus, holding that the Nation generally lacked jurisdiction over a non-Indian.<sup>56</sup> Though Judge Parker acknowledged Kenyon was a citizen of the Nation under its exclusive jurisdiction granted by the treaty, Judge Parker reasoned that Kenyon's Cherokee citizenship lapsed under Cherokee law when he left the Nation with the horse and his children.<sup>57</sup> In another case, Judge Parker evaded the Choctaw treaty by questioning the status of Choctaw wives in *Ex Parte Reynolds* (1879). This case concerned a murder of one white citizen by another.<sup>58</sup> Judge Parker focused on paternal descent to find one of the wives was not truly Choctaw. Therefore, the case was not within the exclusive Choctaw jurisdiction under the treaty, because this finding meant one of the white men in the controversy was not actually a Choctaw citizen.<sup>59</sup>

Though Judge Parker's decisions found ways around exclusive tribal jurisdiction, the United States Supreme Court later affirmed the tribes' exclusive authority over such cases in several opinions. In *Nofire v. United States* (1897), the United States attempted to prosecute several Cherokees for the murder of a naturalized white Cherokee citizen.<sup>60</sup> The circuit court had concluded that the evidence of the victim's compliance with the requirements of Cherokee marriage laws, and therefore evidence of his citizenship, was insufficient.<sup>61</sup> The Supreme Court disagreed, and held that the victim had married a Cherokee woman in a manner consistent with the Cherokees' requirements for white intermarriage discussed above, and by doing so the victim was

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<sup>52</sup> The moniker "hanging judge" was quite appropriate, as between 1875 and 1896 his court hanged seventy-nine people, including many Indians. Berger, *supra*, note 1, at 1998. Justice Rehnquist's opinion in *Oliphant* includes a lengthy digression in a footnote discussing Judge Parker and his knowledge of Indians in a notably positive light. See *Oliphant*, 435 U.S. at 200 n. 10.

<sup>53</sup> *Oliphant*, 435 U.S. at 199-200.

<sup>54</sup> 14 F. Cas. 353, 355 (1878) (No. 7,720).

<sup>55</sup> *Id.* at 353.

<sup>56</sup> *Id.* at 355.

<sup>57</sup> *Id.*

<sup>58</sup> 20 F. Cas. 582, 582-83 (C.C.W.D. Ark. 1879) (No. 11,719).

<sup>59</sup> *Id.* at 585. For a discussion of that case and its influence over the conception of Indian status in the late nineteenth century, see Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian law to 1935*, 51 S.D. L. REV. 1, 22-23 (2006).

<sup>60</sup> See 164 U.S. 657, 658 (1897).

<sup>61</sup> *Id.*

“to a certain extent allying himself with the Cherokee Nation.”<sup>62</sup> The Court similarly held in *Ex Parte Mayfield* (1891) that a Cherokee citizen, whether a citizen by birth or adoption, could not be convicted of adultery in federal court because of the Cherokees’ exclusive jurisdiction.<sup>63</sup> The Supreme Court suggested crimes between Freedmen were also within the Cherokee Nation’s exclusive jurisdiction in *Alberty v. United States* (1896).<sup>64</sup> The Court ultimately upheld federal jurisdiction over the Freedman defendant because the victim was the illegitimate son of a Choctaw man and a black slave, and according to the Court not an “Indian,” and the victim’s marriage to an adopted black woman did not grant him citizenship under Cherokee law.<sup>65</sup> Further, in *Lucas v. United States*, the Court, following *Alberty*, concluded that the murder of a black Freedman in the Choctaw Nation by a Choctaw Indian would be under exclusive tribal jurisdiction.<sup>66</sup> According to the Court, the prosecution implied to the trial court that “there were negroes who were, and those who were not, *Indians*, in a jurisdictional sense.”<sup>67</sup> The Court reversed the trial court on the issue of how the black victim’s citizenship in the Choctaw Nation was to be proven, rejecting the lower court’s presumption that a “negro” in the Nation was not a tribal citizen.<sup>68</sup>

Not only did the federal courts weigh in on tribal citizenship, but federal officials also recognized adopted or naturalized white men as “Indians” when they abided by requirements of tribal approval of land cessions. Indeed, in the late nineteenth century, during the dismantling of tribal lands through allotment, negotiators for the United States openly sought out and recorded the signatures of intermarried men as fully empowered to act along with other tribal citizens in certain situations. For example, the agreement with the Sioux Nation to break up the Great Sioux Reservation in 1889 was signed by some ninety-four white men, who were described as “white man” or “squaw man”<sup>69</sup> openly in the federal commissioners’ report to Congress.<sup>70</sup> They were nonetheless listed as adult male members of the Nation empowered to approve the agreement.<sup>71</sup> Justification for such treatment appears to have been based on a reference in the 1868 Treaty of Fort Laramie to persons “legally incorporated,” with the tribe, a provision which also appears in several treaties negotiated with the Navajo Nation and other tribes in the same year.<sup>72</sup> The United States Supreme Court observed in *Red Bird v. United*

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<sup>62</sup> *Id.* at 662.

<sup>63</sup> See 141 U.S. 107, 114 (1891).

<sup>64</sup> 162 U.S. 499, 501-02.

<sup>65</sup> See *Id.* at 501, 504-05.

<sup>66</sup> 163 U.S. 612, 614-15 (1896).

<sup>67</sup> *Id.* at 615.

<sup>68</sup> See *Id.* at 616.

<sup>69</sup> “Squaw man” was a term used in the nineteenth century to describe a non-Indian married to an Indian woman. [www.merriamwebster.com/dictionary/squaw man](http://www.merriamwebster.com/dictionary/squaw%20man) (accessed April 5, 2012). While used pejoratively in some circumstances, it was also used sometimes, as here, as a neutral description. See Spruhan, *supra*, note 58, at 21.

<sup>70</sup> See, e.g., Sen. Ex. Doc. No. 51, 51<sup>st</sup> Cong., 1<sup>st</sup> Sess. 253, 259, 275-77, 279, 289-92.

<sup>71</sup> See *Id.*

<sup>72</sup> See *Id.* at 253 (identifying signatory as “White; incorporated into tribe in 1868”), 275-77, 279 (identifying several signatories as “squaw man since 1868”); Treaty with the Sioux, April 29, 1868, Art. 6. See also Treaty with the Navajo, June 1, 1868, Art. 5; Treaty with the Crow, May 7, 1868, Art. 6. Historian Harry

*States*, a case challenging the right of certain white men to Cherokee allotments, that the agreement to allot the Cherokee Nation would not have been approved without the participation of white naturalized citizens.<sup>73</sup> Also, an agreement with the Wichita included the signature of at least one intermarried white man, W.C. West, as an Indian empowered to sign, and authorized allotments to citizens of the tribe “native and adopted.”<sup>74</sup>

Congress also recognized naturalized or adopted citizens of the Civilized Tribes as subject to the jurisdiction of their respective tribal nation, and as eligible for tribal property. Though Congress generally barred white men who married Indian women after August 9, 1888 from claiming an interest in tribal property, it nonetheless exempted such men who were “otherwise a member of any tribe of Indians.”<sup>75</sup> In an 1890 act to organize the territory of Oklahoma, Congress recognized that “the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil *and criminal* cases arising in the country in which members of the Nation, *by nativity or adoption*, shall be the only parties.”<sup>76</sup> Under the instructions of the Dawes Commission, a quasi-judicial tribunal created by Congress, whites and Freedmen who established their right to citizenship to the satisfaction of the Commission were allotted land from the collective property of their adopted tribe.<sup>77</sup> Further, when Congress decided to release whites and Freedmen from restrictions on their allotments earlier than other tribal citizens, it used the curious phrase “Indians who are not of Indian blood” to describe such citizens in the title of the legislation.<sup>78</sup> However, Congress did preclude other non-Indians from claiming allotments through judicial action, by granting a cause of action against the United States to establish eligibility only to “persons who are in whole or in part of Indian blood.”<sup>79</sup>

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Anderson has referred to white men recognized under the Treaty of Fort Laramie as “68-ers.” SOUTH DAKOTA HISTORY: *THE WALDRON-BLACK TOMAHAWK CONTROVERSY AND THE STATE OF MIXED-BLOODS AMONG THE TETON SIOUX* 30, 34 (2007).

<sup>73</sup> See 203 U.S. 76, 93 (1906). Nonetheless, the Supreme Court held that white men married to Cherokees after 1875 were ineligible for allotments based on Cherokee law. *Id.* at 79, 95 (affirming ruling of Court of Claims).

<sup>74</sup> See Senate Ex. Doc. 14, 52<sup>nd</sup> Cong., 2<sup>nd</sup> Sess., at 12, 14-15 (1892). For a further discussion of W.C. West and his unsuccessful suit against the secretary of the interior to compel the grant of an allotment, see *infra*, text accompanying notes 80-92929279-91.

<sup>75</sup> 25 U.S.C. § 181. Curiously, this provision is still in the current United States Code.

<sup>76</sup> Act of May 2, 1890, § 30, 26 Stat. 81 (emphasis added). This provision supported the U.S. Supreme Court’s decisions that the tribal nations had exclusive jurisdiction over crimes between tribal citizens, whether Indians by blood, naturalized or adopted. See, e.g., *Alberty v. United States*, 162 U.S. 499, 502 (1896) (discussing statute).

<sup>77</sup> See H.R. Rep. 60-1454, at 2-4 (1908) (listing numbers of Indians by blood, intermarried whites, and freedmen granted allotments among the Five Civilized Tribes). The U.S. Supreme Court did deny some white claimants allotments in the Cherokee Nation by upholding restrictions on their citizenship under Cherokee law. See *Red Bird*, 203 U.S. at 95.

<sup>78</sup> See Act of April 21, 1904, ch. 1402, 33 Stat. 189, 204.

<sup>79</sup> See 25 U.S.C. § 345. See also *Drapeau v. United States*, 195 F. 130, 136 (C.C.D.S.D. 1912) (holding no jurisdiction over suit by white man claiming allotment as tribal citizen of Sioux Nation).

Though Congress recognized non-Indian citizenship in certain situations, the Supreme Court's opinion in *United States ex rel. West v. Hitchcock*, which arose out of the 1891 agreement with the Wichita discussed above, suggests that the federal government can intrude on tribal decisions to adopt or naturalize non-Indians as tribal citizens.<sup>80</sup> The Department of the Interior denied W.C. West, an intermarried white man and signatory to the agreement, an allotment, despite his claim that Wichita leaders adopted him as a tribal citizen.<sup>81</sup> West filed a writ of mandamus against Secretary of the Interior Ethan Hitchcock, alleging that his adoption by the Wichita council required the secretary to issue him an allotment.<sup>82</sup> Secretary Hitchcock responded by arguing, among other things, that he had the sole "power and authority to place an effective veto upon [West's] adoption by the Wichita Indian Tribe."<sup>83</sup> Interestingly, the record in the case included correspondence showing that the Office of Indian Affairs had rejected such adoptions in other situations under a general departmental policy to disapprove such adoptions except for "exceptionally good reasons,"<sup>84</sup> including a request of the Comanche Nation to adopt Mexican captives.<sup>85</sup> In his brief, West pointed out the ironic position Interior was taking given his approved signature as an Indian on the agreement ceding tribal lands to the United States<sup>86</sup>:

[s]o long as his services in negotiating the agreement were necessary and his influence with the *other Indians* was desirable, his title to tribal membership was clear enough and strong enough to satisfy the most jealous guardian of tribal rights to be found in the Indian Office. Only when the need for him was past and when he demanded his part of the consideration for the grant of these lands was it discovered by the Interior Department that it was the function of the Secretary and not of the tribe in council to determine who was and who was not of its membership.<sup>87</sup>

Unmoved, the Supreme Court sided with the Department of the Interior. The Court, through an opinion authored by Justice Oliver Wendell Holmes, held that mandamus was inappropriate because the secretary indeed had the discretionary right to accept or deny whites as tribal citizens, regardless of the actions of tribal leaders under tribal law.<sup>88</sup> The Court did not clearly identify the source of this right, but cited "long-established" Department of the Interior practice and a broad statutory provision

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<sup>80</sup> 205 U.S. 80 (1907).

<sup>81</sup> *Id.* at 83.

<sup>82</sup> *Id.* at 82-83.

<sup>83</sup> *United States ex Rel. West v. Hitchcock*, No. 194, Records and Briefs of the United States Supreme Court, Brief on Behalf of Defendant in Error 32.

<sup>84</sup> Letter of Secretary of Interior C.L. Bliss to Commissioner of Indian Affairs, February 7, 1898, reprinted in Transcript of Record, *supra*, note 28, at 39.

<sup>85</sup> See Letter of Acting Commissioner A.C. Tonner to Mr. Davidson and Riddle, September 30, 1901, reprinted in Transcript of Record, *supra*, note 28, at 46.

<sup>86</sup> See *supra*, text accompanying note 74.

<sup>87</sup> *United States ex rel. West v. Hitchcock*, No. 194, *supra*, note 84, Brief for Plaintiff in Error 17 (emphasis added).

<sup>88</sup> *Hitchcock*, 205 U.S. at 84.

generally empowering the secretary in Indian affairs.<sup>89</sup> However the Court also stated later in the opinion that “someone must decide who the members are.”<sup>90</sup> The Court did state, in response to West’s argument that the tribal nation should decide, that secretarial approval was indeed a good thing for the “rather helpless” Indians, as “the temptation to white men to go through an Indian marriage for the purpose of getting Indian rights is sufficiently plain.”<sup>91</sup> Though decided in the context of the right to tribal property, the case suggests that the Department of the Interior generally has the authority to deny tribal adoptions and decline to recognize non-Indians’ consent through tribal citizenship.

The Bureau of Indian Affairs later asserted the same power to deny tribal adoption or naturalization through its power to approve tribal constitutions under the Indian Reorganization Act. In a general letter to BIA employees and tribal leaders in 1934, John Collier, then Commissioner of Indian Affairs, at least entertained the possibility that a non-Indian married into a tribe might be accepted as a tribal citizen.<sup>92</sup> However, in Circular 3123, issued in 1935, Collier stated that the Bureau should only approve adoption provisions in proposed constitutions if

[t]he provisions for the adoption of non-members . . . require approval by the Secretary of the Interior for each applicant, unless such individual must be a person of Indian descent related by marriage or descent to the members of the tribe.<sup>93</sup>

Collier therefore sought to continue the Department of the Interior’s oversight of non-Indian adoptions asserted and upheld in *West* by requiring each one to be approved by the Secretary of the Interior. The Indian Reorganization Act itself defined “Indian” as, along with those of one-half Indian blood and descendants of Indians living on reservations, “all persons *who are of Indian descent* who are members of any recognized Indian tribe now under federal jurisdiction.”<sup>94</sup> Non-Indian tribal citizens, if any still existed at the time, therefore were excluded from the act under the three categories in the definition.

IRA-era tribal constitutions generally followed this formulation of tribal citizenship. Many contain general provisions acknowledging the possibility of adoption, and some

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 85, 86.

<sup>91</sup> *Id.* at 85.

<sup>92</sup> See Letter of John Collier to Superintendents, Tribal Councils and Individual Indians, January 20, 1934, at 6 (posing the question whether “all the residents of the reservation who are of Indian descent, *or married to an Indian*, be admitted to citizenship or membership in the proposed community, or shall restrictions, depending on degree of blood or length of residence on the reservation, be provided?” (emphasis added)).

<sup>93</sup> Circular 3123, Office of Indian Affairs (November 18, 1935), reprinted as Exhibit 1, Index 36, 2 Appendices to the Final Report, Task Force No. 9, Law Consolidation, Revision, and Codification, American Indian Policy Review Commission (1977).

<sup>94</sup> Indian Reorganization Act, ch. 576, 48 Stat. 984, § 19.



contain a requirement for secretarial approval of such adoptions.<sup>95</sup> However, whether at the choice of the tribal nation, or at the insistence of the Bureau of Indian Affairs, explicit naturalization or recognition of non-Indian tribal citizens essentially disappeared.

One anecdotal example of discussions between a tribal nation and the federal government on the issue involved two Pima-Maricopa tribal communities in Arizona. According to Felix Cohen, then an attorney working with Collier, the Pima-Maricopa communities at Gila River and Salt River had proposed a joint constitution that would have recognized “Caucasians” previously married into the community as members.<sup>96</sup> According to Cohen, the same constitution would have barred future “[m]ixed marriages of any kind” on pain of a forfeit of membership by the member engaging in the marriage.<sup>97</sup> Cohen used this proposal in a memorandum on the drafting of tribal constitutions as an example of a constitution that “considers the complications arising out of intermarriage.”<sup>98</sup> However, the final constitutions, approved by the Office of Indian Affairs in 1936, contained no such recognition of non-Indian spouses, but neither did they bar future mixed marriages.<sup>99</sup> Instead, they simply barred adoptions completely.<sup>100</sup>

### CURRENT STATUS OF NON-INDIAN CONSENT

Fast forward to 2012. You would be hard pressed to find examples of consent through citizenship, adoption, or otherwise. The long history of non-Indian adoption and naturalization is mostly forgotten, with the exception of ongoing controversies within the five Oklahoma tribes concerning the status of Freedmen descendants.<sup>101</sup> As discussed by Kirsty Gover, tribal constitutions since 1934 have increasingly applied explicit blood quantum or lineal descent from persons of Indian blood as requirements to define tribal citizenship.<sup>102</sup> Even the tribal nations that previously naturalized or adopted intermarried whites and/or Freedmen, except for the Seminoles, have amended their citizenship laws through various methods to restrict citizenship to those able to document their descent from persons with Indian blood.<sup>103</sup> Why such changes were made is controversial, and

<sup>95</sup> See KIRSTY GOVER, TRIBAL CONSTITUTIONALISM 133 (2010). In her empirical study of tribal constitutions, Gover states that 92 per cent of constitutions ratified before 1941 contain an express reference to tribal adoptions. *Id.* According to Gover, the proportion of constitutions referencing adoptions has since dropped to 74 per cent, explained as resulting from the omission of adoption provisions in new constitutions, and not because of amendments to older ones. *Id.*

<sup>96</sup> See FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS 15 (D. Wilkins, ed. 2006).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 14.

<sup>99</sup> Constitution of the Gila River Pima-Maricopa Indian Community, Art. II (May 14, 1936); Constitution of the Salt River Indian Community, Art. II (June 11, 1940).

<sup>100</sup> *Id.*

<sup>101</sup> See *infra*, notes 103, 104, 105.

<sup>102</sup> See Gover, *supra*, note 96, at 132.

<sup>103</sup> The Choctaw, Chickasaw, and Creek constitutions restrict membership to descendants of individuals identified on Indian by blood rolls constructed by the Dawes Commission. See Constitution of the Chickasaw Nation, August 27, 1983, Art. 2, § 1; Constitution of the Choctaw Nation, July 9, 1983, Art. 2, § 1; Constitution of the Muscogee (Creek) Nation, June 24, 1995, Art. 3, § 2.

The Cherokee Nation amended its constitution in 2007 by referendum approved by the Cherokee people to require Cherokee, Delaware, or Shawnee Indian blood, thereby intentionally excluding



beyond the scope of this article.<sup>104</sup> Importantly, the BIA continues to suggest to tribes that adoption or naturalization should generally not occur, as, according to the Bureau “inclusion of non-Indians as members” is one of several provisions that “render proposed constitutions inappropriate.”<sup>105</sup> Gover suggests that such attitude is consistent with the Bureau’s general view that blood quantum requirements ensure the political cohesion of a tribal nation.<sup>106</sup> Whatever the reason, there are very few tribes that explicitly authorize adoption or naturalization of non-Indians as tribal citizens.<sup>107</sup>

Some tribes do assert consent through other theories than adoption or naturalization. Indeed, as shown by the *Hjert* case discussed above, at least the Port Gamble S’Klallam tribe has recently attempted to prosecute a non-Indian through written consent.<sup>108</sup> There may be other tribes that similarly accept consent in individual or general situations, including as a condition of living or working on tribal lands. Absent known affirmative statutory law on the practice, is hard to gauge how common such consent really is within tribal nations.

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Cherokee Freedmen and intermarried whites. See *Cherokee Registrar v. Nash*, No. SC-2011-02, slip op. at 4-5 (Cherokee Sup. Ct. August 22, 2011). The Cherokee Supreme Court recently upheld the referendum by concluding it lacked the jurisdiction to review it. See *Id.* at 7. Interestingly, as part of its ruling, the Cherokee Supreme Court stated that the Treaty of 1866 never granted citizenship to the Freedmen, but only “that the Freedmen would be treated as equals to the citizens of the Cherokee Nation under the federal law as it existed at the time.” *Id.* at 8.

The Seminole constitution defines citizenship eligibility as “all Seminole citizens whose names appear on the final rolls of the Seminole Nation of Oklahoma [from 1906] and their descendants,” and therefore does not exclude Freedmen. Constitution of the Seminoles, March 8, 1969, as amended, Art. 2. Further, the Seminole membership code indicates that “each Seminole Freedman enrolled member” is entitled to membership in a Freedman Band of the Nation. Seminole Code, Title 22, § 102(d). However, the Seminole Nation has barred Freedmen from certain tribal programs through requirements for a certificate of Indian blood or descendency from a member of the Seminole Nation as it existed in Florida in 1828, fueling litigation and controversy. See, e.g., *Davis v. United States*, 343 F.3d 1282, 1285-88 (10<sup>th</sup> Cir. 2003) (describing dispute). The Seminole Nation did attempt to change its membership criteria through constitutional amendment to eliminate Freedmen citizenship, but the Bureau of Indian Affairs disapproved the amendment. See *Seminole Nation v. Norton*, 2001 WL 36228153 at \* 17 (D.D.C. 2001) (affirming BIA disapproval of Freedmen amendments).

<sup>104</sup> For further discussion of these controversial citizenship issues within the Cherokee and other Oklahoma tribal nations, see, e.g., CIRCE STURM, BLOOD POLITICS: RACE, CULTURE AND IDENTITY IN THE CHEROKEE NATION OF OKLAHOMA 168-200 (2002) (discussing Cherokee Freedmen), KEVIN NOBLE MAILLARD, REDWASHING HISTORY: TRIBAL ANACHRONISMS IN THE SEMINOLE NATION CASES, IN THE INDIAN CIVIL RIGHTS ACT AT FORTY 87 (2012) (discussing Freedmen controversy in Seminole Nation).

<sup>105</sup> United States Department of the Interior, Developing and Reviewing Tribal Constitutions and Amendments: A Handbook 6-7 (1987), quoted in Gover, *supra*, note 96, at 119.

<sup>106</sup> Gover, *supra*, note 96, at 127-28.

<sup>107</sup> The Seminole Nation of Oklahoma’s constitution allows enrollment of Freedmen descendants and assignment to a Freedman Band of the Nation. See *supra*, note 103. However, such Freedmen may indeed have Indian ancestry, though the Dawes Commission may not have documented it when it went about classifying Indians by blood and Freedmen for the Seminole rolls. See Maillard, *supra*, note 105, at 97-98; Ariela Gross, What Blood Won’t Tell 155-160 (2008) (discussing subjective decisions of Dawes Commission in classifying individuals as Indians by blood or Freedmen for preparation of Dawes Rolls). Interestingly, Congress authorized only one Seminole roll, but the Dawes Commission itself separated out the rolls between Seminoles by blood and Freedmen. Gross, *supra*, at 153.

<sup>108</sup> See text accompanying notes 7-13.

The Navajo Nation has affirmatively asserted a theory of consent for a certain class of non-Indians. The Navajo Nation Council amended its criminal code in 2000 to assert full criminal jurisdiction over all persons married to Navajos, called *hadane* in the Navajo language.<sup>109</sup> At the same time, the Nation purported to be able to “civilly prosecute” other non-Indians.<sup>110</sup> Apparently based on the Navajo Supreme Court opinion *Means v. District Court of the Chinle Judicial District*,<sup>111</sup> the Council in 2000 stated that

[n]othing in this Section shall be deemed to preclude exercise of criminal jurisdiction over one by reason of assuming tribal relations with the Navajo people or being an “in law” or *hadane* or relative as defined by Navajo Common law, custom or tradition, submits himself or herself to the criminal jurisdiction of the Navajo Nation.<sup>112</sup>

In *Means*, the Court applied Navajo common law to conclude that such “in-laws” consent to Navajo jurisdiction through the reciprocal obligations they owe the clan of their Navajo spouse.<sup>113</sup> Interestingly, the Court justified such theory of consent through citations to *Nofire* and the other U.S. Supreme Court opinions discussed above, even though those opinions affirmed non-Indian consent recognized by the United States through treaty and statute.<sup>114</sup> Though *Means* concerned a non-member Indian, the Council extended the theory of consent to non-Indian spouses. Importantly, the Navajo Nation Code prohibits adoption of non-Navajos, and does not otherwise recognize the naturalization of non-Indian *hadane* as citizens of the Nation.<sup>115</sup> The Nation applies a one-quarter blood quantum requirement to be recognized as a Navajo citizen.<sup>116</sup> The only explicit benefit for in-laws under the Navajo Code is that they receive second-tier employment preference below enrolled Navajos, but above other Indians not married to Navajos, under the Navajo Preference in Employment Act.<sup>117</sup>

However, though the Navajo Criminal Code purports to extend the Nation’s criminal jurisdiction to non-Indians, in reality the Navajo Division of Public Safety, the

<sup>109</sup> See 17 N.N.C. § 204(C) (2005).

<sup>110</sup> 17 N.N.C. § 204(A) (2005).

<sup>111</sup> 7 Nav. R. 382 (1999).

<sup>112</sup> 17 N.N.C. § 204(C) (2005).

<sup>113</sup> *Means*, 7 Nav. R. 392-93. For a detailed discussion of the *Means* case, which concerned American Indian Movement activist Russell Means and his challenge to Navajo criminal jurisdiction, see Paul Spruhan, *Case Note: Means v. District Court of the Chinle Judicial District and the Hadane Doctrine in Navajo Criminal Law*, 1 TRIBAL L. J. 3 (2000-2001).

<sup>114</sup> *Means*, 7 Nav. R. at 391-92.

<sup>115</sup> See 1 N.N.C. § 702(A) (2005). Interestingly, this provision was intended to prevent non-Indian actors from claiming to have been adopted or made honorary members of the Nation while filming movies in the area during the 1930s. See Paul Spruhan, *The Origins, Current Status, and Future Prospects of Blood Quantum as the Definition of Citizenship in the Navajo Nation*, 8 TRIBAL L. J. 1, 4 (2008).

<sup>116</sup> 1 N.N.C. § 701(C) (2005). For a discussion of this provision and its origins, see Spruhan, *supra*, note 115, at 3-10.

<sup>117</sup> See 15 N.N.C. § 614(A) (2005).

Office of the Prosecutor, and the Navajo Nation courts have not invoked such authority in an actual situation at the time of the writing of this article. Part of the reason for this is that the Nation's police officers are cross-commissioned or otherwise authorized to enforce Arizona and New Mexico state law.<sup>118</sup> They therefore can arrest non-Indians without having to invoke Navajo law and can transfer them to state authorities if consistent with the Nation's extradition laws.<sup>119</sup> Further, many of the Nation's officers and criminal investigators have Special Law Enforcement Commissions from the Bureau of Indian Affairs.<sup>120</sup> Such commissions allow the Nation's officer and criminal investigators to make federal arrests, including of non-Indians, and transfer such offenders to federal custody for crimes under federal jurisdiction.<sup>121</sup> Therefore, as a practical matter, the Nation's law enforcement need not invoke Navajo law to arrest and seek prosecution of non-Indians, though Navajo law allows it. Whether declination of prosecution by the state or federal governments will trigger the desire to test its stated authority over non-Indian *hadane* remains to be seen.

### A REVIEW OF POSSIBLE THEORIES OF CONSENT

What ways might tribal nations think about asserting jurisdiction through consent? There are three examples discussed above: (1) recognizing citizenship in the nation through formal or informal adoption or naturalization, (2) imputing consent under tribal law by marrying a tribal citizen or otherwise becoming part of an Indian family or tribal society, and (3) accepting an invocation of consent in writing. Each of these three examples involves either complex questions of tribal law and policy.

All involve complex questions of tribal law and policy. Granting citizenship to non-Indians is the most controversial. Tribal citizenship for a given tribal nation may be so inherently a matter of family, clan, or "blood" that a tribe will not admit anyone not biologically descended from a tribal member or at least from a person with Indian ancestry. A tribe's traditional law may preclude it, or the prevailing policy views of the tribe and its citizens may be against granting citizenship to non-Indians. However, tribal nations might seriously consider it, if not inconsistent with its own views of its identity and such identity's relationship to political citizenship in the tribe.<sup>122</sup>

<sup>118</sup> See, e.g., A.R.S. 13-3874(A) (empowering tribal police to enforce Arizona laws if APOST certified); Cross-Commission Agreement between the Navajo Nation and the McKinley County Sheriff's Office (December 8, 2007) (authorizing Navajo police to act as county sheriffs in McKinley County, New Mexico).

<sup>119</sup> See 17 N.N.C. §§ 1951, et seq. (2005) (setting out requirements for extradition of Indians by state authorities). While restricted in the statute to Indians, it may be that a Navajo Nation court would require an extradition request from a state government even for a non-Indian in Navajo custody, particularly one married to a Navajo.

<sup>120</sup> See 25 U.S.C. 2804(a) (authorizing tribal and other non-federal law enforcement to be commissioned as federal officers by the Bureau of Indian Affairs); 12 C.F.R. § 12.21(a) (discussing SLECs).

<sup>121</sup> See 18 U.S.C. § 1152 (authorizing federal criminal jurisdiction over crimes by non-Indians against Indians).

<sup>122</sup> For discussions supporting consideration of such a proposal, see Matthew Fletcher, *Race and Indian Tribal Nationhood*, 11 WYO. L. REV. 295, 324 (2011); John Snowden, et al., *American Indian Sovereignty and Naturalization: It's a Race Thing*, 80 NEBR. L. REV. 171, 237-38 (2001).

It would appear that granting full citizenship, with the right to vote and otherwise politically and socially participate in tribal government, has the best chance of justifying tribal criminal jurisdiction through consent under federal law. Indeed, the reasoning of the recent United States Supreme Court opinions limiting tribal criminal jurisdiction, particularly in *Duro v. Reina*, suggests as much. In *Duro*, Justice Kennedy tied the inherent authority of tribal nations to Anglo-American theories of consent by the governed.<sup>123</sup> Kennedy concluded that a tribe lacked criminal jurisdiction even over citizens of other tribes, so-called “non-member Indians,” because they were not citizens of the prosecuting tribe and therefore can never “consent” to tribal government.<sup>124</sup> Kennedy rejected the argument that a defendant’s contacts with the tribe or a tribal member justified the tribe’s assertion of jurisdiction, stating that such an argument was just another attempt at establishing jurisdiction through mere physical presence on tribal lands.<sup>125</sup> Importantly, Kennedy explicitly reserved the question whether a nonmember could consent to tribal jurisdiction through some other method.<sup>126</sup>

In Justice Kennedy’s formulation, the definition of tribal citizenship through familial or biological ties is the key stumbling block for tribal jurisdiction. The use of tribal or Indian blood quantum by definition bars naturalization of anyone not already in possession of the necessary ancestry. Fixing that is as easy as changing the citizenship criteria of the tribal nation. It is important, however, to add the caveat that the Department of the Interior might assert itself directly through disapproval of any necessary tribal constitutional changes to citizenship rules or by generally opining that such change is impermissible.<sup>127</sup> Whether something as seemingly radical, at least from a modern perception of Indian identity, as citizenship for non-Indians is a plausible political and social possibility in any tribal nation is another question.<sup>128</sup>

The Navajo Nation approach has the attractive quality of being based on tribal traditional law, but has the weakness of imputing consent by conduct. The Nation does not seek any affirmative acceptance of the responsibility of an in-law to Navajo law, but simply states that marriage to a Navajo subjects the non-Indian spouse to its jurisdiction. Marriage to a Navajo is indeed more than simple conduct, as it creates a legal relationship between the spouses. However, the Nation’s assertion of jurisdiction does not depend on creating a legal relationship under the laws of the Navajo Nation or on explicit consent to Navajo law as part of the marriage ceremony, as apparently anyone married to a Navajo under any state or tribal law subjects himself or herself to

<sup>123</sup> See *Duro*, 495 U.S. at 693-94.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 695.

<sup>126</sup> *Id.* at 698 (“We have no occasion in this case to address the effect of a formal acquiescence to tribal jurisdiction that might be made, for example, in return for a tribe’s agreement not to exercise its power to exclude an offender from tribal lands[.]”)

<sup>127</sup> See *supra*, text accompanying notes 93-94, 106, 105.

<sup>128</sup> See, e.g., Fletcher, *supra*, note 123, at 324-25 (discussing “zealous” defense of citizenship criteria by Grand Traverse Band of Ottawa and Chippewa Indians as example of potential resistance by tribes to expanding citizenship rules).

Navajo jurisdiction through the marriage itself. With no corollary right to vote or directly participate in the government of the Nation, such theory does not appear to alleviate the concerns expressed by Justice Kennedy.<sup>129</sup> Whether the Nation or any other tribe should be concerned about conforming their views on jurisdiction to external expectations, particularly when supported by and consistent with tribal traditional law, is another question.

The Port Gamble S'Klallam approach, if authorized by the tribal nation's own law, and if done carefully, has its strengths. Here, there is no imputation of consent; consent is clearly given. The use of a form clearly stating the non-Indian's right to consent or not, and an explanation of the conditions under which the tribe will accept the consent, goes a long way in bolstering the perception that tribal nations adhere to notions of fairness familiar to outside federal courts. It may be that the Port Gamble S'Klallam Court of Appeals' emphasis on a clear and intelligently given consent reflects the tribal justices' expectations that non-Indians be given full due process rights as a matter of tribal concepts of fairness and justice. Regardless, such emphasis clearly assuages their stated concerns over compliance with the federal Indian Civil Rights Act and federal notions of due process and equal protection.<sup>130</sup> Such requirements may then fulfill tribal law and, whether consciously or not, conform to federal requirements as well.

That approach appears stronger than generally purporting to subject a non-Indian to criminal jurisdiction as a condition of residence on tribal lands or employment by the tribe or one of its members.<sup>131</sup> However, the explicit conditioning of residency on tribal lands or employment by a tribe or its enterprises at least involves some benefit in exchange for the consent, unlike the bare consent in *Hjert*,<sup>132</sup> though not the right to political participation contemplated in *Duro*.<sup>133</sup> Indeed, as a tribe has the power to exclude non-members from tribal lands,<sup>134</sup> why can't a tribe condition the privilege of living on such lands through consent to all tribal laws? Indeed, even under stringent United States Supreme Court case law such consent at the very least can establish some civil jurisdiction over non-Indians.<sup>135</sup> However, the Court also has stated that the assertion of tribal civil jurisdiction must have a nexus to the non-Indian's consent, and consent in one area does not result in general consent to all tribal jurisdiction.<sup>136</sup> If such blanket consent is questionable in the civil context, it is even less likely allowable in the criminal context. However, as a practical matter, if the non-Indian breaches the agreement by filing a federal petition for habeas corpus to preclude prosecution, the

<sup>129</sup> For a further discussion of this problem of imputed consent under the *hadane* theory, see Spruhan, *supra*, note 114.

<sup>130</sup> See *Hjert*. No. POR-CR-09/209-169, slip op. at 16.

<sup>131</sup> See *Id.* Applying an immigration analogy, Professor Fletcher supports a requirement that non-members consent to full tribal jurisdiction as a condition of living in tribal housing or on tribal lands. See Fletcher, *supra*, note 122, at 326.

<sup>132</sup> No. POR-CR-09/209-169.

<sup>133</sup> 495 U.S. 676.

<sup>134</sup> See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-45 (1982).

<sup>135</sup> See *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

<sup>136</sup> *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001).



tribe can simply exclude him or her or terminate their employment, assuming such action is otherwise consistent with tribal law. For non-Indians with tribal member spouses and children, such consequences can be a compelling incentive for compliance. However, it is unclear whether any tribe actually enforces such consent,<sup>137</sup> and such theory is therefore untested.

### CONCLUSION

In the end, the great divide between tribes and the United States Supreme Court reflects quite different theories of consent. For the tribes discussed in this article, consent by non-Indians is almost exclusively based on conduct less than full political participation and citizenship. From mere physical presence to marriage to case-specific consent, tribes have conceptualized consent under their own laws and policies, and have not extended full political rights to non-Indians as a condition of the assumption of criminal authority. Whether tribes adjust their views to comply with the Court's vision of consent by the governed, seemingly requiring full political participation, or transcend that vision to conform to their own unique views of government authority, is within the right of each tribe to decide. However, the consequences of those choices on tribal societies must be fully acknowledged and understood, as any attempt to assert criminal jurisdiction ultimately can subject the tribe to federal court review.

Regardless of the relative merits of these different theories of consent, there is a simpler way for a tribe to exercise its full sovereignty: a non-Indian can simply consent by not objecting to such jurisdiction. Barring sua sponte action by the tribal court, as happened in *Hjert*,<sup>138</sup> the non-Indian defendant has all the power to consent he or she needs. He or she can simply decline to seek dismissal of the case on jurisdictional grounds or seek habeas review in federal court. Indeed, if non-Indians living and working within tribal nations truly believe the rhetoric of tribal sovereignty, they should practice it through consent. It may be difficult for anyone subjected involuntarily to a criminal justice system to forego an argument that could bar prosecution. However, for non-Indians caught up in day-to-day incidents within Indian Country, it is time to consider something larger: the continued vitality of tribal governments through the practical application of tribal sovereignty. For non-Indians married into the tribe, or who are employed by the tribal government or one of its members, or have permission to reside on tribal lands, compliance is a natural outgrowth of the privileges received. This also means, however, that a tribal government may have to adjust its views on who their constituents are, and to whom tribal services are provided.

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<sup>137</sup> The Pueblo of Isleta recently began requiring non-members, apparently not just non-Indians, to pass a background check before being allowed to reside within the Pueblo. See Ungelbah Daniel-Davila, Non-Tribal Residents of Isleta Pueblo Must Undergo Background Checks, Albuquerque Journal, February 29, 2012, <http://www.abqjournal.com/main/2012/02/29/abqnewsseeker/non-tribal-residents-of-isleta-pueblo-must-undergo-background-checks.html>. Though there is no apparent requirement to consent to tribal criminal laws, the Pueblo ordinance is one method of conditioning residency on adherence to tribal requirements.

<sup>138</sup> No. POR-CR-09/209-169.



Put another way, non-Indian obedience to tribal law is active resistance to the ongoing federal reduction of tribal authority. Ultimately, even if the U.S. Supreme Court denies a tribal nation's power to condition citizenship, residence, or employment by consent to criminal jurisdiction, a non-Indian still can empower tribal nations through on the ground compliance with tribal law. That can never be taken away.