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SYMPOSIUM: NATIVE AMERICANS AND THE CONSTITUTION THE COLONIAL DOUBLEBIND: SOVEREIGNTY AND CIVIL RIGHTS IN INDIAN COUNTRY

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SUMMARY:
... Federal Indian law emerges from the late eighteenth century onward as a corpus that departs distinctively from the central core of U.S. law. ... As we have seen, following an historic pattern, the federal government achieved this subversion by first translating Indian common land into federal property (in the form of the 1882 reservation), then dividing that federal property in 1977 so that thousands of **Navajos** were eventually removed from traditional lands that became part of the **Hopi** reservation by congressional mandate and court order; and lastly, in an attempted accommodation between the **Hopi** Tribe and the few thousand **Navajos** who remained on the HPL, by translating the already translated **Navajo** traditional lands into rental property for seventy-five years, at which time any party to the agreement can terminate it. ... It is this subversion of traditional sovereignty by a tribal sovereignty generated within the colonial context that leads grassroots groups such as the HPL **Navajos** in the Manybeads case to invoke a language of individual rights (in this case the right to freedom of religion) in order to assert their traditional sovereignty. ...

TEXT:
[*223]

Federal Indian law emerges from the late eighteenth century onward as a corpus that departs distinctively from the central core of U.S. law. While the latter is grounded, in the first instance, in the civil rights of the individual, understood in the Lockean sense as having a fundamental property in him or herself [n1] and thus as always an actual or potential property holder (the paradigm of property in Locke being real estate); [n2] the former [n3] impacts in the first instance on the community, the federally recognized "tribe" or "nation." [n4] Thus, since the foundational Marshall trilogy - Johnson v. M'Intosh, [n5] Cherokee Nation v. Georgia, [n6] Worcester v. Georgia [n7] - the central issue of federal Indian law has been: sovereignty, the triangulation of power and authority between the states, the tribes, and the federal government - with Congress recognized by the Supreme Court as holding "plenary power" in this configuration. [n8]

The special character of federal Indian law is a result of the historically colonized situation of American Indian communities within the lower forty-eight states [n9] in combination with the distinct traditional **[*224]** social formations of these communities and their active resistance to assimilation into the social formation of the dominant society. [n10] These traditional social formations can be characterized as communal, in the sense that their diverse social practices were and still are in crucial ways carried on through extended kinship relations to land. [n11] These relations are the antithesis of what the West has defined historically as property relations, the relations of a person or formal association of persons, defined as an individual, to a commodity. [n12] In the antithetical sense I am evoking here, property relations are quintessentially relations of alienation, [n13] whereas traditional kinship relations in this indigenous context are quintessentially reciprocal. [n14] Native land, in a traditional context, is inalienable, whereas property is defined by its alienability. The central issue of sovereignty, then, in federal Indian law is indissolubly tied to the issue of land, of who defines what land is, both in theory and in practice: property or the inalienable foundation of the processes of kinship.

Nevertheless, beginning with Talton v. Mayes, [n15] formal issues of individual civil rights began to emerge in conflict with issues of sovereignty within tribal communities. While the Supreme Court's decision in Talton affirmed tribal sovereignty in the matter of making tribal laws over an individual tribal member's federal appeal to constitutional rights, the conflict between sovereignty and individual rights persisted and intensified. This conflict culminated, in the first instance, in the Indian Civil Rights Act of 1968 (ICRA), Title I of which sought to set limits on the sovereignty of tribes over their **[*225]** members, thus modifying Talton. [n16] In the second instance, however, the conflict culminated in Santa Clara Pueblo v. Martinez, [n17] which, citing Talton as precedent, [n18] argued tribal sovereignty's precedence over civil rights, except in the case of habeas corpus appeals to federal courts sanctioned under 25

U.S.C. 1303 (ICRA), although in this case Martinez makes it clear that the respondent is not the tribe but the individual tribal official holding the prisoner. [n19] Thus, today, the ten constitutional rights of Indians in their tribes, as enumerated in 25 U.S.C. 1302, come under the sole authority of tribal courts; and the tribes are protected from federal lawsuits in this area through the principle of "sovereign immunity," [n20] which the Martinez decision reasserts. [n21]

We should not assume that this situation is stable, however. In fact, because of the conflict created between the plenary power of Congress and the limited political autonomy of the tribes, stemming from Worcester, the language in Talton is ambiguous (increasingly so in the present federal policy context of tribal "self-determination"), [n22] asserting that the tribal powers under consideration "are local powers not created by the constitution, although subject to its general provisions and the paramount authority of congress." [n23] The ambiguity here resides in the question of what exactly are the "general provisions" of the Constitution, if not, in significant part, a guarantee of certain individual civil rights, uniformly applied in local situations **[*226]** under the Fourteenth Amendment, one of which rights, habeas corpus, the Court denied the appellant in Talton. [n24] The legal ambiguity is generated by the colonial situation, in which the Constitution is at once "paramount" over the tribes (being the basis in the Commerce Clause for congressional plenary power) [n25] and yet diminished within them, in the tribes' relations to their members. This ambiguity witnesses the fact that in the attempted legal division of authority between the tribe's internal political autonomy and its external political dependency on the federal government, the boundary between the "internal" and the "external" inevitably blurs.

The historic emergence of this conflict between rights and sovereignty is a result of a historic tension, or gap, between modern tribal governments and their constituents, witnessed today in conflicts such as those of: the Grass Roots Oglala Lakota Oyate with the Pine Ridge tribal council; [n26] the Black with the Blood Seminoles; [n27] and the **Navajo-Hopi** Land Dispute. [n28] The origin of such rifts was produced by the **[*227]** colonial situation, which forced a shift in Indian communities from a decentralized consensual mode of governance, where a class of governed and a class of governors did not exist, to a representational mode, where political conflict and political action within the community became mediated in a radically different way, characterized by the notion of majority rule operating through hierarchical, centralized institutions answerable to the federal government. [n29] We could trace this shift, from consensus to representation, back at least as far as the emergence of the Cherokee nation in late eighteenth and early nineteenth century culminating in the incorporation of the Cherokee constitution in 1827. This emergence produced divisions within Cherokee communities where what came to be called, in a reductive Western terminology, "traditionalists," (or "conservatives") and "progressives" conflicted over strategies for dealing with U.S. power. Traditionalists typically favored oppositional strategies, while progressives typically favored adaptive strategies; however, when applied to tribal politics categories such as "conservative" and "progressive" are bound to miss the trans-categorical nuances of kinship ties that make analyzing these politics a difficult business for non-tribal persons. [n30]

Since 1787 such conflicts were a direct result of the colonization of Indian communities by the federal government, the formation of what 18 U.S.C. 1151 terms "Indian Country," which includes:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. [n31]

[*228] Beginning in 1790 with the first Trade and Intercourse Act, which gave the federal government crucial power over the sale of Indian lands (implying that colonial power meant the power to translate the Indian reciprocal relation to land into property relations), the government began to elaborate a legal and administrative structure with Congress at its apex within which conquered Indian communities were compelled to operate. [n32] Without congressional authorization Secretary of War, John C. Calhoun, created the Bureau of Indian Affairs (BIA) in 1824, [n33] under the Department of War. Congress authorized a commissioner of Indian affairs in 1832. [n34] When Congress established the Department of the Interior in 1849, it shifted the BIA to Interior. [n35] The development of a reservation system, administered by the BIA, for concentrating, containing, and "civilizing" the Indians (to use the language of Indian Commissioner Lea in 1851) [n36] began immediately thereafter. [n37]

At the same time that the government was articulating the colonial administrative structure of Indian country, the Supreme Court was in the process of supplying this structure with its legal footings, its foundation in the Marshall trilogy. Johnson v. M'Intosh, in one motion, imposed the Western concept of title on Native common land and transferred that title to the federal government, affirming the displacement of Native reciprocity by property. [n38] Cherokee Nation v. **[*229]** Georgia defined the relationship of the tribes to the federal government as "domestic dependent nations," with an emphasis on dependency in Marshall's metaphor of "pupilage" (of "ward" to "guardian") to describe this relationship. [n39] And Worcester v. Georgia gave the federal government preeminence over the states in Indian affairs, reserving for the tribes what were at that time certain undefined powers of internal self-government in a situation where their sovereignty was already severely compromised. [n40]

As we know, colonialism coerces collaboration between emergent Native elites and the colonial power. In the case of North American Indians, the colonial situation produces these elites from what were egalitarian kinship-based societies governed, as noted, by group-wide consensus. Through complex political and social processes of acculturation, including gaining literacy in the English language often through intermarriage, and not without a certain degree of community support (however ambivalent or resistant), certain groups within the tribes positioned themselves to mediate between the federal government and their communities for essential goods and services. [n41] Until 1871, when Congress interdicted the making of further treaties with Indian tribes, [n42] this mediation was conducted under the representative structure of the treaty apparatus, where leaders acceptable to the colonial power negotiated what was increasingly a form of surrender to the federal government. From 1871 until 1934, the time of the Wheeler-Howard, or Indian Reorganization Act (IRA), [n43] the BIA was instrumental in imposing or attempting to impose Native governments. From 1934 onward, tribes, out of necessity of dealing with the federal government's bureaucratic control of Indian country, **[*230]** adopted Western style constitutions or, refusing such constitutions, similar representative structures, typified by an elected tribal council, headed by a chair or responsible to a president.

It is within this history of colonialism, understood as a history of displacements (of consensus by representation, of kinship by individualism, of communal land by property) that the emergence of the conflict between sovereignty and civil rights in Indian country must be understood. I should emphasize here that by "history of displacements" I understand an ongoing process of conflict in which one set of terms (representation, individualism, property) has not effaced the other (consensus, kinship, communal land) but remains in conflict with it. This remains true however disproportionate the power of the Western legal vocabulary, founded on property and individualism, may be. It is within the confines of this vocabulary, and this is the colonial nexus, that the terms sovereignty and civil rights are generated-and this is crucial-as antagonistic terms. For there is no necessary reason, outside of a particular history, that these terms should be in opposition. In fact in other histories we might imagine, U.S. history, for example, they could be understood as mutually supportive, even synonymous. I am thinking here, for example, of a notion like sovereignty of the individual. [n44]

What produces these antagonistic terms, as in federal Indian law, is a certain fiction of the inside and the outside, of pre-and post-contact, embedded in the legal arguments of Talton and Martinez, in which sovereignty is read as an indigenous concept of Native societies pre-dating the U.S. Constitution, whereas the concept of civil rights is understood as alien to these societies, and a later imposition of Western law. Thus, in arguing for the containment of civil rights by tribal forums, the Martinez decision asserts:

By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under [25 U.S.C.] 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts ... . Although we early rejected the notion that Indian tribes are "foreign states" for jurisdictional purposes ... we have also recognized that the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State Governments. As is suggested by the District Court's opinion in this case, efforts by the federal judiciary to apply statutory prohibitions of [section] 1302 in a civil **[*231]** context may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity. [n45]

As in the passage just cited, the structural function of the fiction of the inside and the outside (of pre-and post-contact, of the indigenous and the foreign) in federal Indian law is to repress the colonial context of this law even as it articulates it. The key term sovereignty does this work neatly, emphasizing here the independence of Indian communities in the pre-contact period but simultaneously referring implicitly to the sovereignty of invading Western nation states over Indian communities, which reduces their implied pre-contact sovereignty, their sovereignty from a different "source," to a "quasi-sovereignty." The term sovereignty serves to homogenize and synchronize, indeed harmonize, these two heterogeneous, diachronic, and conflictive moments, pre-and post-contact. It does this by insinuating that the term itself, sovereignty, is part of both a pre-contact Native discourse and a Western legal discourse when, in fact, it is solely a production of the latter, first imposed on and then adopted and adapted by Native communities in their ongoing conflicts with and within Western law. [n46] In Worcester Chief Justice Marshall recognized the terminological issue without elaborating it:

The words "treaty" and "nation," are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth; they are applied to all in the same sense. [n47]

The term sovereignty is bound in a historical and cultural syntax to the Western legal terms treaty and nation, a syntax that is itself grounded in the terms of property. The Cherokees were the first tribe to use these terms and this syntax before the Supreme Court, where their right to use it in the fullest sense was denied, an irony that Marshall does not note in his later decision in Worcester, which

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seems to recognize in some of its dicta the very sovereignty refused in Cherokee Nation. [n48] If the term sovereignty has any translations in pre-contact Indian **[*232]** vocabularies, we can be sure that these translations are antithetical to Western uses of the term, based, as these uses are, in the syntax of land as property. And it is these uses of sovereignty, and only these uses, that federal Indian law recognizes.

Contrary to Martinez, then, sovereignty and civil rights are not opposed terms, one guaranteeing, the other usurping, Indian autonomy. They are, rather, complexly linked terms functioning in concert as part of the same hegemonic, colonial discourse. Within this discourse, where federal Indian law has generated not only conflicts between Indian tribes and the federal government but as an intimate part of these conflicts inter and intra tribal conflicts as well, the federal enforcement of civil rights (for enforcement and rights cannot be separated as Justice White points out in his dissent in Martinez) [n49] could, if it were in effect, both threaten and support Indian sovereignty **[*233]** at the same time in the same place. This is the double bind of the colonial situation of Indian country, as my analysis of the **Navajo-Hopi** Land Dispute, for example, will point out. It is also worth remembering in working out the historical calculus of sovereignty and civil rights in Indian country that in the beginning of the establishment of federal Indian law, at the same time that the Cherokees were pursuing their treaty rights under the legal terminology of sovereignty, the Pequot writer and activist William Apess was pursuing, under the legal terminology of civil rights, the sovereignty claims of the Marshpee tribe in its struggle with Massachusetts for autonomy. [n50] The historic seesawing back and forth between sovereignty and civil rights that we see from Talton to Martinez occludes the complex legal-historical relationship of these two subject matters and in doing so insures the continuance of the colonial status quo, which inevitably pits Indians against Indians in agonistic discourses grounded in the language of both sovereignty and civil rights.

II.

The **Navajo-Hopi** Land Dispute, which has been characterized as "the greatest title problem of the West," [n51] began in 1882, when an executive order issued by President Chester A. Arthur designated as a reservation 2,500,000 acres of land encompassing the three mesas in northeastern Arizona on which the **Hopi** tribe had lived from pre-contact times. Because **Navajos** and Hopis have had a long history of cultural contact - including intermarriage, and trading, as well as conflicts from time to time particularly as a result of pressures generated by European invasions of the area including: first, Spanish; then, Mexican; and, finally, Anglo [n52] - there were by government estimates, not surprisingly, 300 **Navajos** living within the boundaries of the 1882 **[*234]** reservation at the time of the executive order, [n53] which not only included the Hopis but "such other Indians as the Secretary of the Interior may see fit to settle thereon." [n54] Eighty years later, the United States District Court for the District of Arizona in its decision in **Healing** v. **Jones** determined that these "other Indians" were **Navajos** residing on the 1882 reservation:

The evidence is overwhelming that **Navajo** Indians used and occupied parts of the 1882 reservation, in Indian fashion, as their continuing and permanent area of residence, from long prior to the creation of the reservation in 1882 to July 22, 1958, when any rights which any Indians had acquired in the reservation became vested. [n55]

The **Navajo-Hopi** Land Dispute, generated by the creation of this reservation, has of this moment a 120-year ongoing history, which I have detailed and analyzed elsewhere. [n56] Preceding my own work there is a significant, though by no means homogeneous, historical literature on the Dispute. [n57]

[*235] What my reading of the legal, historical, and ethnographic literatures germane to the **Navajo-Hopi** Land Dispute suggests is that the name of the Dispute itself is a misnomer, implying a clearly antagonistic relationship between **Navajos** and Hopis that pre-dates the colonial intervention of the U.S government in their lives. [n58] In fact, what prompted the executive order that established the 1882 reservation was not **Navajo-Hopi** conflict but resistance by **Hopi** traditionalists to the forced removal of **Hopi** children to government boarding schools. [n59] What developed after the court cases began in 1959 was not, then, part of an ongoing conflict between the **Hopi and the Navajo** people but a conflict between tribal councils, often hard to differentiate from collaboration or collusion, [n60] in which traditional **Hopi** leaders (Kikmongwis) joined traditional **Navajos** to resist the councils' conversion of sacred land into property. [n61] Notions of a national, or tribal, sovereignty among the **Navajos** and Hopis predating the U.S. imposition of tribal councils on the two peoples in the twentieth-century badly misrepresents social structures that were neither tribal nor national but based on matrilineal clans crisscrossing decentralized villages (at **Hopi**) and dispersed bands (at **Navajo**). [n62]

[*236] The case-law literature on the Dispute began in 1959 with the start of the generative **Healing** v. **Jones** case, [n63] brought pursuant to a congressional act waiving the sovereign immunity of both tribes so that they could sue each other in federal court to determine property rights in the 1882 reservation. [n64] At the time, the government estimates of **Navajos** living there "exceeded eighty-eight hundred," [n65] then more than twice the entire **Hopi** population. [n66] The case, generated and argued by two Anglo lawyers, Norman Littell for the **Navajos** and John Boyden for the Hopis, under pressure from Peabody Coal to determine subsurface rights on the reservation, resulted in the creation of the **Hopi** Reservation from 650,013 acres at the southern end of the 1882 reservation, while the remainder of the 1882 reservation was designated for shared use by the two tribes, an area subsequently known as the Joint Use

Area (JUA). [n67] The mineral rights remained equally vested in the two tribes, [n68] where they had been since an Interior Department ruling in 1946.

However, the **Hopi** tribal council, which was represented by Boyden (who was also retained by Peabody Coal - a conflict of interest revealed after his death in 1980), [n69] was not satisfied with the decision and pursued a partition of the JUA in both the courts and Congress. [n70] Official **Hopi** pressure paid off in 1974 with the passage of Public Law 93-531, which mandated partition through federal mediation, and failing that, through court order. [n71] Given the agonistic structure of the Dispute generated by the federal government, the tribal governments, the lawyers, and the mineral interests, it is not surprising that mediation failed. Consequently, in February 1977, the Federal District **[*237]** Court of Arizona drew a line partitioning the JUA into what are known as the **Hopi** Partitioned Lands (HPL) and the **Navajo** Partitioned Lands (NPL). The principle of partition, that "where feasible ... [the partitioned lands] be contiguous to the reservation of each ... tribe," [n72] left 100 Hopis but 15,000-17,000 **Navajos** on the wrong side of the line. [n73] Public Law 93-531 "recommended that ... there be undertaken a program of relocation of members of one tribe from lands which may be partitioned to the other tribe in the joint use area." [n74] To date, 12,000-14,000 HPL **Navajos** have been relocated from their traditional homelands on the HPL [n75] with devastating results. Charles Wilkinson, a **Hopi** partisan, sums up the human cost of relocation:

Relocation, which still had not been completed by the late 1990s, brought protracted agony to the affected Indian people on Black Mesa. Most of these have been elderly, traditional people and, for both **Navajo and Hopi**, their land was sacred. For many, it was the only land they had ever known. Health specialists agreed that the stress of removal would be overwhelming, leading to disorientation, sickness, depression, even early death. Still, the relocation program has marched on. Some resisters, most notably **Navajos** near Big Mountain in north central Black Mesa, simply will not go. [n76]

The number of relocatees on both sides tell us what the Wilkinson quote erases: that the social devastation of relocation fell and still falls overwhelmingly on **Navajos.** [n77]

Since 1977 and the relocation mandate, the Land Dispute has generated further legal action. In 1988 the case of Manybeads v. United States was brought by forty-seven HPL **Navajos** who claimed, in the first instance (among seven assertions), that their First Amendment right to religious freedom (and by extension the rights of all **[*238]** HPL **Navajos**) were being violated by the relocation mandate stemming from Public Law 93-531. [n78] This is because in traditional **Navajo** practice, as is generally true for Native Americans, land and religion are inseparably linked. [n79] Initially filed in United States District Court for the District of Columbia, the case was transferred to the Federal District Court of Arizona in Phoenix, where Judge Earl Carroll rejected all the claims, four of which were directly linked to the First Amendment argument. [n80] In dismissing this argument, Carroll cited Lyng v. Northwest Indian Cemetery Protective Association, to the effect that government property rights trumped Indian religious rights. [n81]

In 1991 Manybeads was appealed to the Ninth Circuit, which mandated a mediation procedure between the interested parties (HPL **Navajos, the Navajo** Nation, the **Hopi** Tribe, and the United States) to arrive at a resolution of the relocation crisis. The result of the mediation, which lasted four years [n82] and was, to say the least, a highly vexed process, [n83] was Public Law 104-301, the **Navajo-Hopi** Land Settlement Act of 1996. [n84] Folded into this act is a document known as the Accommodation Agreement (AA), [n85] which spells out the conditions under which the 2,000-3,000 **Navajos** remaining on the HPL could continue to reside there. [n86] The AA constitutes the current status quo for the **Navajos** on the HPL. [n87] Fundamental to this status quo are two **[*239]** provisions of the AA, which will concern us here: first, HPL **Navajos** who agree to sign the AA receive seventy-five year leases to their homesites, [n88] demarcated in three-acre lots with an additional, though not necessarily contiguous, ten acres of farmland and beyond that certain grazing rights to "be regulated pursuant to **Hopi** Ordinance 43"; [n89] second, the

HPL **Navajo** signing this agreement and all other persons (minors and guests) occupying his/her homesite are subject to the jurisdiction of the [**Navajo**] Nation and its courts with regard to issues which are entirely **Navajo** related, including probate, domestic relations, child custody and adoption, tribal benefits and services. Otherwise they are subject to the civil and criminal jurisdiction of the **Hopi** Tribe and the **Hopi** Tribal Court while they reside on the HPL. [n90]

Given that land is the basis of Native sovereignty, the historical trajectory of the Land Dispute has subverted the sovereignty of the **Navajos** who were living on what became the 1882 Reservation. As we have seen, following an historic pattern, the federal government achieved this subversion by first translating Indian common land into federal property (in the form of the 1882 reservation), then dividing that federal property in 1977 so that thousands of **Navajos** were eventually removed from traditional lands that became part of the **Hopi** reservation by congressional mandate and court order; and lastly, in an attempted accommodation between the **Hopi** Tribe and the few thousand **Navajos** who remained on the HPL, by translating the already translated **Navajo**

traditional lands into rental property for seventy-five years, at which time any party to the agreement can terminate it. [n91] While the HPL **Navajos** have certainly maintained their tribal sovereignty as part of the **Navajo** Nation, the limits of this sovereignty and its radical difference from that Native sovereignty of pre-contact origin invoked by Martinez [n92] has certainly been made clear by the Land Dispute.

Simply put, as I have argued in the first part of this essay, what we might term Native, indigenous, or traditional sovereignty, which is neither tribally nor nationally located but rather kin-based, [n93] is subsumed in this case (as it is in the post-contact era), by that sovereignty generated within the legal vocabularies of Western nation-states. It is this subversion of traditional sovereignty by a tribal sovereignty generated within the colonial context that leads grassroots groups such **[*240]** as the HPL **Navajos** in the Manybeads case to invoke a language of individual rights (in this case the right to freedom of religion) in order to assert their traditional sovereignty. Thus, from the perspective of tribal councils opposing traditional grassroots movements, the language of sovereignty and the language of rights may be opposed, as it is in the progeny of Talton. Yet from the perspective of grassroots resistors these two languages are one, as we have read in the public statements of the Grass Roots Oyate. [n94]

If in the first instance the traditional sovereignty of the HPL **Navajos** is radically compromised by the federally generated dispute between two tribal sovereignties, **Hopi and Navajo,** in the second instance, HPL **Navajo** sovereignty is further compromised by the jurisdictional outcome of the Dispute noted above, in which the HPL **Navajos** find themselves caught between two tribal jurisdictions without representation on the councils of either tribe. While HPL **Navajos** have representation as individuals in the Chapters (**Navajo** Nation voting districts) that border their homes on the HPL, they have no representation on the **Navajo** Nation Council as a traditional sovereign community with a unique history and a set of needs arising from that history. In addition, they have no representation whatsoever on the **Hopi** tribal council, though they are subject to **Hopi** civil and criminal law, as outlined above. [n95] Thus whether we talk in terms of Native or Western sovereignty, the HPL **Navajos** have been displaced by federal Indian law to a jurisdiction that is beyond the bounds of their sovereign rights.

I suggest it is the colonial history of this jurisdiction, in which sovereignty and civil rights are simultaneously opposed and synonymous, that ought to be the subject matter of the progeny of Talton.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawCongressional Duties & PowersGeneral OverviewGovernmentsFederal GovernmentEmployees & OfficialsGovernmentsNative AmericansGeneral Overview

FOOTNOTES:

n1. 27 John Locke, The Second Treatise of Government (1960).

n2. Id. at 32.

n3. See 25 U.S.C. 1-4307 (2000).

n4. See Donald L. Burnett, Jr., An Historical Analysis of the 1968 "Indian Civil Rights' Act, Harv. J. on Legis. 557, 578 (1972):

This tribal orientation has been reinforced by the fact that all of the rights which the United States reserved to Indians by treaty pertained to the tribes as group entities rather than to individuals and in light of the conflict with white society over control of group-owned reservation resources.

n5. 21 U.S. (8 Wheat.) 543 (1823) (asserting that the Piankeshaw Indians could not grant valid title to land because they never "owned" it).

n6. 30 U.S. (5 Pet.) 1 (1831) (holding that the Cherokee nation is not a foreign state).

n7. 31 U.S. (6 Pet.) 515 (1832) (reversing lower court judgment convicting Worcester of being a white person on Indian land; striking down Georgia's laws redrawing the boundaries of Indian lands, stating that allowing states to redraw Indian lands is repugnant to the constitution and the notion of civilization of tribes).

n8. See Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

n9. While both Alaskan and Hawaiian Natives are impacted by certain provisions of federal Indian law, the significant relationship of Natives to their lands comes under a different legal agenda than that of the trust relationship which defines the tribal/federal relationship in the lower forty-eight states. For a discussion of Native Alaskan and Hawaiian rights, see David H. Getches et al., Cases and Materials on Federal Indian Law 905-74 (4th ed. 1998).

n10. See generally Eric Cheyfitz, Doctrines of Discovery: The Foundation of Colonialism in Federal Indian Law, 2 Common-Place No. 1 (Oct. 2001), at http://www.common-place.org/vol-02/no-01/cheyfitz/ (last visited Jan. 22, 2003).

n11. See Eric Cheyfitz, The Poetics of Imperialism: Language and Colonization, in "The Tempest" to "Tarzan" 44-58 (Univ. of Pa. Press 1997) (1991).

n12. See Kevin Gray & Susan Francis Gray, Elements of Land Law 2-3 (3d ed. 2001):

Nevertheless the consensus view is that the idea of property - particularly in relation to the all-important commodity of land - plays an indispensable role in the organization of our social and business life. We can no more contemplate a society without some notion of property than we can imagine a society which has yet to discover the device of contract. Some theorist have gone even further in underscoring the link between the phenomenon of property and the endorsement of the individual's sense of personal integrity.

The "we" in the previous statement, who cannot "contemplate a society without some notion of property" is a decidedly Western "we."

n13. Id. at 100-01 ("English property law is accordingly pervaded by a strong bias in favour of alienability, the common law long regarding alienability as of the essence of property in land.").

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n14. See Cheyfitz, supra note 11, at 54-55.

n15. 163 U.S. 376 (1896) (holding that the murder of a Cherokee Indian by another member of the tribe, within tribal territory, does not constitute an offense against the United States).

n16. 25 U.S.C. 1301-1303 (2000). For a history of the Indian Civil Rights Act, see generally Burnett, supra note 4.

n17. 436 U.S. 49 (1978).

n18. Id. at 56.

n19. Id. at 59.

n20. For a comprehensive discussion of the issue of "sovereign immunity," see Getches, supra note 9, at 383-88. The fundamental principle of "sovereign immunity" is stated in Kiowa Tribe of Oklahoma v. Manufacturing Technologies, 523 U.S. 751, 754 (1998): "As a matter of federal law, a tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."

n21. Santa Clara Pueblo v. Martinez, 436 U.S. at 59 ("In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.").

n22. See Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450a(b) (2000):

The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

n23. Talton v. Mayes, 163 U.S. 376, 382 (1896) (emphasis added).

n24. Id. at 379.

n25. U.S. Const. art. I, 8, cl. 3. gives Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Chief Justice Marshall's interpretation of this clause in Cherokee Nation v. Georgia grounds his generative definition of Indian tribes as "domestic dependent nations." 30 U.S. 1, 17-20 (1831). But see Justice Thompson's dissent, in which he criticizes Marshall's interpretation of the Commerce Clause as "a mere verbal criticism," which cannot support the conclusion that "Indian tribes are not foreign nations." Id. at 62 (Thompson, J., dissenting).

n26. According to a chronology on the Grass Roots Oyate website, on "January 16th, 2000: Grass Roots Oyate took peaceful control of the Red Cloud Building, tribal administrative offices of the Oglala Sioux Tribe (OST)." Chronology - The Awakening of Our Tribe, at http://www.fireonprairie.org/Oglala%20takeover%20chronology.html (updated Feb. 27, 2000) (last visited Jan. 22, 2003). The "most important demands," listed on this site, included "referendum vote to abolish I.R.A. government formulation of self-governance system." Id.

In their "Official Proclamation" the Oyate urge the abolishment of the IRA system of tribal government and its replacement by the traditional system. Grass Roots Oglala Lakota Oyate, Official Proclamation, available at http://www.ouachitalk.com/proclamation.htm (last visited Oct. 23, 2002) [hereinafter "Official Proclamation"]. The language of the "Official Proclamation" is worth noting in that it links the sovereignty of the people to their "human rights," asserting that "the sovereignty of our Oyate lies within the individuals of each Tiwahe [family]." Id. What this language does is try to salvage the notions of "sovereignty" and "rights" from the system of federal Indian law, where they are opposed, and translate them to a traditional order, where they are linked. The notion of tradition I reference here is not to some unchanging past but to a dynamic history of resistance. In this case, the Oyate are making their appeal to "the United Nations Security Council, the General Assembly, and Human Rights Commissioner to monitor and oversee the orderly transfer of power and authority back to the people." Id. The rejection of U.S. federal Indian law is predicated on an appeal to international law.

n27. For a brief interpretation of the history of the Black and Blood Seminole conflict see Brent Staples, The Seminole Tribe, Running from History, N.Y. Times, Apr. 21, 2002, Editorial at 12. What we have here is a federally constituted tribal council trying to exclude part of the historic tribe from a tribal windfall by using blood quantum measures, developed in the late nineteenth century by the federal government to gain control of Indian identity and after 1934 employed by the tribes to control membership in a field of limited federal benefits.

n28. See infra Part II.

n29. See Burnett, supra note 4, at 578:

The traditional lack in most tribes of established social classes further cements tribal ties since there are fewer sources of localized power and sub-group disaffection ... The social adhesive in the tribal systems appears to have been the collective manner in which decisions were made - community consent was required before the council would act.

n30. For a history of the shift from traditional modes of governance to representational modes among the Cherokees, with the concomitant development of "conservative" and "progressive" factions, see James Mooney, Myths of the Cherokee 83, 88, 101-114 (Dover 1995) (1900). It should be noted that, based on a traditional notion of land as inalienable, opposition to removal in the wake of the Indian Removal Act of 1831 cut across factional divisions. As Moody notes in his description of the development of representational government among the Cherokees: "it was made treason, punishable with death, for any individual to negotiate the sale of lands to the whites without the consent of the national council." Id. at 107. While the Cherokees had since the end of the eighteenth century been forced to alienate their lands in treaties with the U.S., what this 1820 law demonstrates is a continuing resistance to the idea of land as property.

n31. 18 U.S.C. 1151 (2002).

n32. Trade and Intercourse Act, 1 Stat. 137, 4 (1790) reprinted in Documents of United States Indian Policy 14-15 (Francis Paul Prucha ed., 3d ed. 2000) [hereinafter U.S. Indian Policy].

n33. Creation of a Bureau of Indian Affairs in the War Department, H.R. Doc. No. 146, at 6 (1824), reprinted in U.S. Indian Policy, supra note 32, at 37-38.

n34. Authorization of a Commissioner of Indian Affairs, 4 Stat. 564 (1832) reprinted in U.S. Indian Policy, supra note 32, at 62.

n35. Transfer of Indian Affairs to the Department of the Interior, 9 Stat. 395 (1849) reprinted in U.S. Indian Policy, supra note 32, at 79-80.

n36. Indian Commissioner Lea on the Civilization of the Indians, H.R. Exec. Doc. No. 2, at 273-74 (1851), reprinted in U.S. Indian Policy, supra note 32, at 85-86.

n37. See Commissioner of Indian Affairs Mix, in Felix Cohen, Handbook of Federal Indian Law 15 (William S. Hein Co. 1988) (1941) ("The policy of concentrating the Indians on small reservations of land, and sustaining them there for a limited period, until they can be induced to make the necessary exertions to support themselves, was commenced in 1853, with those in California.").

n38. See Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823) and id. at 603, for example, both of which inscribe Indian lands within the rubric of title:

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

Id. at 574. "It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right." Id. at 603. For an analysis of the way Johnson translates Indian notions of common land into the Western idea of property, see Eric Cheyfitz, Savage Law: The Plot Against American Indians in Johnson and Graham's Lessee v. M'Intosh and The Pioneers, in The Cultures of U.S. Imperialism (Donald Pease & Amy Kaplan eds., 1993). For an analysis of the history of the term property and its power in colonial encounters from 1492 to the present, see generally Cheyfitz, supra note 10.

n39. 30 U.S. (5 Pet.) 1, 17 (1831).

n40. See 31 U.S. (6 Pet.) 515, 561 (1832):

The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

n41. See generally Mooney, supra note 30 (discussing adaptive processes among Cherokees).

n42. See Act of Mar. 3, 1971, 16 Stat. 566 (March 3, 1871), reprinted in 1 Indian Affairs: Laws and Treaties 8 (Charles J. Kappler ed., AMS Press 1971) (1904).

n43. Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984 (1934).

n44. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71-72 (1978) (emphasis added) (internal citations omitted).

n45. Id. at 71-72 (emphasis added) (internal citations omitted).

n46. See supra notes 25 and 41 and accompanying text. I will also discuss such an adaptation by grass roots Navajos in the second part of this essay.

n47. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832) (emphasis added).

n48. See id. Here is the full context of the quote given above in Worcester, supra note 9. The dictum could constitute an argument for full sovereignty:

The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power ... . The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth; they are applied to all in the same sense.

Id. at 559-560. Further, Marshall's reasoning in Worcester that "the settled doctrine of the law of nations is, that a weaker power does not surrender its independence - its right to self-government - by associating with a stronger, and taking its protection" paraphrases the argument that Justice Thompson uses in his dissent in Cherokee Nation, when he defines a foreign nation. Id. at 56061. See also Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 53 (1831). It remains

for Justice McLean in a concurring opinion in Worcester to state explicitly, referring to Cherokee Nation, that the Cherokees are a state but not a foreign one:

At no time has the sovereignty of the country been recognised as existing in the Indians, but they have been always admitted to possess many of the attributes of sovereignty. All the rights which belong to self-government have been recognised as vested in them. Their right of occupancy has never been questioned, but the fee in the soil has been considered in the government. This may be called the right to the ultimate domain, but the Indians have a present right of possession ... . It must be admitted, that the Indians sustain a peculiar relation to the United States. They do not constitute, as was decided at the last term, a foreign state ... and yet, having the right of self-government, they, in some sense, form a state. In the management of their internal concerns, they are dependent on no power. They punish offences, under their own laws, and in doing so, they are responsible to no earthly tribunal. They make war, and form treaties of peace. The exercise of these and other powers, gives to them a distinct character as a people, and constitutes them, in some respects, a state, although they may not be admitted to possess the right of soil.

Worcester, 31 U.S. at 580-81 (McLean, J., concurring). It would seem then that the line between being a state and a fully sovereign, or foreign, state is precisely the line between property and mere possession.

n49. See Martinez, 436 U.S. at 83 (White, J., dissenting):

The extension of constitutional rights to individual citizens is intended to intrude upon the authority of government. And once it has been decided that an individual does possess certain rights vis-a-vis his government, it necessarily follows that he has some way to enforce those rights. Although creating a federal cause of action may "constitute an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself," in my mind it is a further step that must be taken; otherwise, the change in the law may be meaningless.

(emphasis in original) (internal citations omitted).

n50. See generally William Apess, Indian Nullification of the Unconstitutional Laws of Massachusetts Relative to the Marshpee Tribe; or, The Pretended Riot Explained, in On Our Own Ground: The Complete Writings of William Apess, A Pequot (Barry O'Connell ed., Univ. of Mass. Press 1992) (1835). Apess recounts the beginnings of his relationship with the Marshpees in the following terms:

Then, wishing to know more of their grievances, real or supposed, and upon their invitation, I appointed several meetings; for I was requested to hear their whole story and to help them. I therefore appointed the twenty-first of May, 1833, to attend a council to be called by my brethren. In the meanwhile I went to Falmouth, nine miles distant, where I held forth upon the civil and religious rights of the Indians.

Id. at 173. And in the Resolution issued by the Marshpees, we find: "Resolved, That we, as a tribe, will rule ourselves, and have the right to do so; for all men are born free and equal, says the Constitution of the country." Id. at 175. Thus, Marshpee sovereignty is declared in the language of U.S. civil rights.

n51. **Healing** v. **Jones**, 210 F. Supp. 125, 129 (D. Ariz. 1962).

n52. See David M. Brugge, The **Navajo-Hopi** Land Dispute: An American Tragedy 3-23 (1994).

n53. See **Healing**, 210 F. Supp. at 145. See also John Redhouse, Geopolitics of the **Navajo Hopi** Land Dispute 5 (1985). Redhouse estimates the number of **Navajos** living within the 1882 Reservation as between 300-600. In a personal communication, Bill Sebastian of the Northern Arizona Indigenous Peoples Legal Defense Fund remarks:

The often quoted statistic of a population of 300-600 that increased to 9,000, 15,000 by the 1950s should be considered carefully, as it plays into the **Hopi** contention in **Healing** v. **Jones** [210 F. Supp. 125] of a massive influx of **Navajo** after creation of the reservation. While some migration did occur, the 30

fold increase may result more from increasingly accurate population measurements as the involvement of government officials in the area increased. The BIA's activities up through 1882 were almost exclusively focused on the **Hopi** settlements, and no one made any type of systematic effort to collect such information from the Dineh [**Navajo**]-occupied lands.

Letter from Bill Sebastian, Northern Arizona Indigenous Peoples Legal Defense Fund, to Eric Cheyfitz, University of Pennsylvania (undated) (on file with author). Because of their concentrated settlement patterns in fixed villages, it certainly would have been easier to gather demographic information on the Hopis than on the **Navajos**, whose traditional settlement patterns were dispersed. We also should note that in 1882 the western boundary of the **Navajo** reservation, created in 1868, was contiguous with most of the eastern boundary of the 1882 reservation, and that given the interaction of the two peoples over hundreds of years, we could expect **Navajo** settlements around the three **Hopi** mesas.

n54. **Healing**, 210 F. Supp. at 129.

n55. Id. at 144-45. The **Healing** court also recognized the long historical **Navajo** occupancy of the lands constituting the 1882 reservation, and determined that the Secretary of the Interior had officially settled these "other Indians" there between 1931 and 1937, and that by extension the **Navajos** as a tribe had vested rights in the reservation. Id at 169-70.

n56. See generally Eric Cheyfitz, The **Navajo-Hopi** Land Dispute: A Brief History, in 2 Interventions 248 (2000) [hereinafter A Brief History]; see also Eric Cheyfitz, Theory and Practice: The Case of the **Navajo-Hopi** Land Dispute, 10 J. Gender Soc. Pol'y & L. 619 (2002) [hereinafter Theory and Practice].

n57. See generally, e.g., Emily Benedek, The Wind Won't Know Me: A History of the **Navajo-Hopi** Land Dispute (1992) (discussing the actors in the dispute); see also generally Brugge, supra note 52; Catherine Feher-Elston, Children of the Sacred Ground: America's Last Indian War (1988); Jerry Kammer, The Second Long Walk: The **Navajo-Hopi** Land Dispute (1980); Redhouse, supra note 53 (documenting the role of energy interests in the dispute); Charles Wilkinson, Fire on the Plateau: Conflict and Endurance in the American Southwest (1999) (discussing the current social and environmental situation on the Colorado plateau); Indian Law Resource Center, Report to the **Hopi** Kikmongwis and Other Traditional **Hopi** Leaders on Docket 196 and the Continuing Threat to **Hopi** Land and Sovereignty (Washington, D.C., March 1979) [hereinafter Kikmongwis].

n58. See A Brief History, supra note 56, at 252-53; Theory and Practice, supra note 56, at 110.

n59. See A Brief History, supra note 56, at 258-60. The 1882 reservation emerged from complaints to the Commissioner of Indian Affairs by the agent at **Hopi**, J.H. Fleming, that two Anglos, who lived among the Hopis, were obstructing his attempts to "civilize" the Indians by helping them resist Fleming's attempts to send their children to Christian and government boarding schools. Until the President issued his executive order, the **Hopi** lands were public lands and Fleming had no authority to evict the Anglos, E.S. Merritt and Dr. Jeremiah Sullivan, who had been employees of the **Hopi** agency under Fleming's predecessor.

n60. See Redhouse, supra note 53, at 11 (detailing the cozy relationship between the **Hopi** lawyer John Boyden, the **Navajo** lawyer Norman Littell, and the tribal councils leading up to the **Healing** v. **Jones** case). In sum, Littell convinced the **Navajo** tribal council to pass two resolutions in aid of financing the **Hopi** suit against the **Navajos**. Congress rejected both resolutions, but they suggest the "friendly" nature of the suit once it was filed.

n61. See Kikmongwis, supra note 57, at 171-74. Prior to, and in the wake of the Relocation Act, traditional **Navajo and Hopi** leaders formed a joint resistance. See Relocation Act, 25 U.S.C. 640 (1950), repealed by **Navajo-Hopi** Land Settlement Act of 1974, Pub. L. No. 93-531, 88 Stat. 1712, 26, 25 U.S.C. 640d (1974) [hereinafter **Navajo-Hopi** Land Settlement Act].

n62. See Mischa Titiev, Old Oraibi: A Study of the **Hopi** Indians of Third Mesa 67 (Univ. of N.M. Press 1992) (1944):

Each Village chief's jurisdiction is strictly limited to his own pueblo; there is no recurrent occasion when all the village chiefs meet together; and there is no such thing as a tribal council. Politically speaking, the **Hopi** can hardly be called a tribe, and apart from their participation in the Pueblo Revolt of 1680, there is no record of a co-operative action embracing all the **Hopi** towns.

See also David Wilkins, Governance within the **Navajo** Nation: Have Democratic Traditions Taken Hold?, 17 Wicazo Sa Review 91, 129 (2002):

From a Western European political perspective, the **Navajo** Nation was nonexistent as a representative political body until the 1920s. The **Navajo** people were, of course, cohesive in that they had a common linguistic and cultural heritage, lived within a well-defined territory, and referred to themselves as Dine. But their political organization, in general, did not extend beyond local bands that were led by head-men, or nataanii.

Unfortunately, Wilkins's essay does not take into account the matrilineal, matrifocal clan structure at **Navajo**, in which women play the central part, so while his general characterization of traditional **Navajo** governance as decentralized in bands is accurate, he gives the impression that this governance is patriarchal in structure, which couldn't be farther from the truth. See generally Gary Witherspoon, **Navajo** Kinship and Marriage (1975). For a description of matrilineal, matrifocal kinship at **Hopi**, see Titiev, supra, at 7-58.

n63. See **Healing** v. **Jones**, 210 F. Supp. 125 (D. Ariz. 1962).

n64. See id. at 129-30.

n65. Id. at 145.

n66. See Benedek, supra note 57, at 154 (stating the **Hopi** population in the area at the time to be 3,700).

n67. See **Navajo-Hopi** Land Settlement Act, supra note 61.

n68. See A Brief History, supra note 56, at 260-62 (discussing the **Navajo-Hopi** Land Settlement Act).

n69. See Wilkinson, supra note 57, at 298-300.

n70. See A Brief History, supra note 56, at 263.

n71. Navajo-Hopi Land Settlement Act, supra note 61, at 1(a), 4(a).

n72. Id. at 6(e).

n73. For a discussion of population figures on the HPL see A Brief History, supra note 56, at endnote 9.

n74. Navajo-Hopi Land Settlement Act, supra note 61, at 5(a)(3).

n75. See A Brief History, supra note 56 (analyzing population figures). Navajo Nation Council Resolution CF-19-97 (Feb. 7, 1997) gives the number of HPL Navajos relocated as "more than 12,400 ... (2,815 families) ... . " This uses a coefficient of 4.4 people per family, which, as I explain in the reference noted above, is conservative, given the extended family structure of Navajo families. In its summary of the Land Dispute, the Ninth Circuit noted in Clinton v. Babbitt that "as of 1996, the United States had spent more than $ 330 million to relocate more than 11,000 tribal members." Clinton v. Babbitt, 180 F.3d 1081, 1084 (9th Cir. 1999).

n76. Wilkinson, supra note 57, at 290.

n77. As my published research on the Land Dispute attests, see A Brief History, supra note 56, I have, since 1997, been working with a group of HPL Navajos on Big Mountain on matters of community organization. The Navajo community organizers with whom I work have been using traditional methods of consensus building to try and overcome the agonistic structure that the Dispute has imposed both within the Navajo community fractured by the Dispute and between HPL Navajos and the Hopi tribe.

n78. 730 F. Supp. 1515, 1516-17 (D. Ariz. 1989). For a discussion of this case, see A Brief History, supra note 56.

n79. See Navajo Nation Council Resolution CD-107-94 (Dec. 13, 1994):

This religion, Beauty Way of Life, holds this land sacred and that we, the Navajo People, must always care for it. Through this sacred covenant, this sacred ancestral homeland is the home and hogan of all Navajo people. Further, if the Navajo left their homelands, all prayers and religion would be ineffective and lost forever.

n80. See Manybeads, 730 F. Supp. at 1516-20.

n81. Id. at 1517 (citing Lyng v. N.W. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988)).

n82. See Letter from Lee Brooke Phillips to Ferrel H. Secakuku, October 2, 1995, in the Accommodation Agreement; see infra notes 84 and 85 and related text.

n83. See A Brief History, supra note 56, at 270. The HPL Navajos were represented in the mediating process by a group known as Dine Dayikah Ada Yalti (DDAY). This group was represented by Lee Brook Phillips, the lawyer who prepared and argued the Manybeads case. By the time the mediation was over, there was significant dissension among the HPL Navajos over this representation and splinter groups formed, some of whom retained other attorneys. After the mediation ended and PL 104-301 was enacted, DDAY, with the sanction of the Navajo Nation, continued to represent the HPL Navajos in negotiations with the Hopi Tribe but dissension continues and the community organizers with whom I consult are working toward forming a new representative structure, one which is endorsed by the whole community.

n84. The Navajo-Hopi Land Dispute Settlement Act of 1996, Pub. L. No. 104-301, 110 Stat. 3649 (1996), 25 U.S.C. 640d note (2000).

n85. Id. at 2 (3).

n86. See A Brief History, supra note 56, at endnote 9 (analyzing population figures).

n87. On April 18, 2000, the Ninth Circuit affirmed the District Court's dismissal of the Manybeads suit "for want of a necessary and indispensable party, the Hopi tribe," which had "not waived its sovereign immunity." See Manybeads v. United States, 209 F. 3d 1164, 1165-1166 (9th Cir. 2000).

n88. See The Navajo-Hopi Land Dispute Settlement Act of 1996, supra note 84.

n89. Accommodation Agreement, A, B, and C.

n90. Id. at E(1).

n91. Id. at E(2).

n92. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71-72 (1978); see also supra note 44 and accompanying text.

n93. See **Healing** v. **Jones,** 210 F. Supp. 125 (D. Ariz. 1962).

n94. See Official Proclamation, supra note 26.

n95. See "A Statement and Request from Non-Signers of the Accommodation Agreement" (October 28, 1999 through December 7, 1999) to The **Navajo**-Nation, and **Navajo-Hopi** Work Group (this document was faxed to me by community organizers on Big Mountain on Feb. 15, 2000) (on file with author):

H.P.L. Dineh have no direct representation in the **Navajo** Nation. Because of the unique political and legal status of HPL residents, the Chapter Houses are unable to serve this purpose. We are expected to live under the jurisdiction of the **Hopi** Tribe and be subjected to all the laws they create, yet we are denied any representation in the **Hopi** Tribe.

"Non-signers" are a relatively small group of the remaining 2,000-3,000 HPL **Navajos,** who have refused to sign an AA because of their traditional convictions. See also A Brief History, supra note 56, at 268-69.