A People Without Law

RICHARD B. COLLINS* AND KARLA D. MILLER*

ABSTRACT:

---

* Richard Collins, Professor, University of Colorado School of Law. Karla Miller, J.D. 1994, University of Colorado School of Law. The authors thank Kevin P. Nelson, J.D. 2004, Matthew Niznik, J.D. 2006, and Edward J. Hafer, J.D. 2009, for research assistance.

American Indian nations seldom brought lawsuits to enforce their rights prior to the 1960s but have often done so since. Why were so few cases filed until recently? In addition to such obvious barriers as poverty, racial hostility, and smothering federal control, legal and popular literature raised doubt about whether Native American tribes had legal capacity to sue. Our article examines the grounds for this view, from its beginning in 1830 until its last gasp in 1968.

The incapacity question was one of the grounds for tracts in pamphlets and journals published in the 1880s by the self-proclaimed Friends of the Indian, a group of eastern reformers preaching assimilation as the cure-all for Native American grievances. Led by Harvard professor James Bradley Thayer, the Friends provided strong support for the ill-fated allotment policy that undermined tribal societies for over 70 years. The issue also became entangled in the jurisdiction of the Court of Claims over Indian treaty claims and over the notorious "Indian depredation" cases.

We conclude that the incapacity claim never had legal validity but at times suited the political agenda of powerful men and was the subject of careless and ignorant dicta. When the issue reached the U.S. Supreme Court, it was consistently rejected without a dissenting vote. We could not determine whether the capacity error was a serious impediment to Indian claims; proof of a negative is always difficult. But in any case, other barriers were more than sufficient to deny justice to Native American claims.

I INTRODUCTION

Since the late 1960s, American Indian nations have often sued to enforce rights under federal law. The "proliferation" of Native American rights law has made it a major specialty in the legal profession.[1] For more than a century before, tribes had pursued damages claims against the federal government.[2] But "claims cases" were based on specific statutes authorizing suit, which limited the remedy to money damages in moderate amounts. Other forms of legal actions by tribes were rare. Why?

The question has obvious importance. Delay in seeking legal redress has many negative consequences for those whose rights lie dormant. The costs to Indian nations of slow recognition of their property claims are manifest.[3] A recent Supreme Court decision increased the detriment, hold-

1 See David H. Getches, Charles F. Wilkinson & Robert A. Williams Jr., Cases and Materials on Federal Indian Law, 5th ed. (St. Paul: West, 2005) at 1.

2 See Nell Jessup Newton et al., Cohen's Handbook of Federal Indian Law (Newark: LexisNexis Matthew Bender, 2005) at 442-446 [Newton et al., Cohen's Handbook].

3 See text accompanying notes 196-217.

ing that a tribe's effort to revive tribal sovereignty was barred by the equitable defences of laches, acquiescence and impossibility.[4] A lower court then applied the laches defence to defeat a land claim.[5]

We came to the question of why there were few tribal lawsuits with several assumptions and points of prior knowledge. Tribes were poor, and the means to sue have become widely available only in modern times. Tribal leaders were demoralized by 19th century conquests and lacked knowledge of the legal system. Racial hostility near Indian communities led to assumptions that courts would be inhospitable to Native American claims. Indian law was (and is) inordinately complex. Few lawyers understood much about the subject, which was not organized until 1941.[6] Tribal rights depended on treaties with the United States, but Congress withheld Indian treaty claims from the general jurisdiction of the Court of Claims until 1946.[7] When tribes did sue, they had some successes but suffered discouraging failures, notably in Lone Wolf.[8] That decision and others gave federal authorities almost unrestricted power over tribes and their land and endorsed the 80-year federal policy of doing away with tribal governments.[9] In some instances, there were difficulties deciding on the identity of a party plaintiff claiming to be an Indian nation.[10] And, of course, resort to courts was less common in American society generally before the 1960s.

Those reasons are powerful and important, but another barrier appears in legal and political literature: the view that Indian tribes (and at times individuals) lacked legal capacity to sue, that tribes and Indians were not legal entities or persons able to bring suit. When Felix Cohen and his staff at Interior compiled the Handbook of Federal Indian Law, tribal capacity was prominent enough in the records and literature that the subject commanded a distinct section in their book.[11] The Supreme Court had decided the merits of cases brought by tribes in which the issue of capacity to sue

---

4 Sherrill (City of) v. Oneida Indian Nation of New York, 544 U.S. 197 (2005) [Sherrill]. Until this decision, the modern revival of tribal sovereignty had fared well despite the long passage of time. See Charles F. Wilkinson, American Indians, Time, and the Law (New Haven & London: Yale University Press, 1987).

5 Cayuga Indian Nation of New York v. Pataki, 413 F.3d 266 (2d Cir. 2005), cert. denied, 126 S. Ct. 2021 at 2022 (2006) [Cayuga]. In 1985, the Supreme Court had rejected a laches defence interposed against a tribe's claim to land taken in violation of federal law. Oneida (County of) v. Oneida Indian Nation of New York State, 470 U.S. 226 at 244-245 (1985). The Cayuga court interpreted the 2005 Sherrill decision, ibid., to restrict the 1985 holding.

6 See Felix S. Cohen, Handbook of Federal Indian Law (Washington: U.S. Government Printing Office, 1941) [Cohen, Handbook]. See also infra notes 11-15 and accompanying text.

7 See also text accompanying notes 134-137, 196-217.

8 Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) [Lone Wolf] (sustaining power of Congress to override treaty and convert tribal land into individual holdings). For criticisms, see "Symposium: Lone Wolf v. Hitchcock: One Hundred Years Later" (2002) 38 Tulsa L. Rev. 1.

9 Newton et al., Cohen's Handbook, supra note 2 at 75-84, 185.

10 Ibid. at 134-137. See also text accompanying notes 165-170, 215, 224.

11 Cohen, Handbook, supra note 6 at 283-285. See also the Handbook's section titled "Corporate Capacity" (ibid. at 277-279).

was not raised, and the Court had expressly held that the Pueblo tribes had capacity to sue.[12] New York state courts had held that tribes lacked legal capacity,[13] but no other state or federal court had done so. Cohen acknowledged that the Pueblo cases could have been construed to apply only to those tribes. For other tribes, he noted the adverse dictum in the Jaeger case, which "may be seriously questioned," but "in the absence of any clear holding, judgment must be reserved."[14] Cohen's own view surely favoured tribal capacity to sue, but he cautiously said that the question was not settled. He also pointed out that some tribal issues had been litigated in suits filed by tribal members in a representative capacity.[15]

We think the issue was clear enough in favour of tribal capacity to sue that Cohen was too cautious. In any case, events between 1946 and 1968 settled the issue conclusively in favour of tribal capacity. Tribal plaintiffs filed a number of lawsuits in which the courts reached the merits unimpeded by any doubt that tribes might lack capacity to sue.[16] In 1946, Congress gave tribes the same general right to sue the United States for damages as other claimants.[17] In 1966, Congress expressly authorized tribes to bring federal question actions in federal district courts without regard to the amount in controversy.[18] As there has never been any question about the power of Congress to authorize tribes to sue, this removed any remaining doubt in federal courts, and the New York courts had reformed.[19] Two years later, the Supreme Court expressly rejected the argument that individual Indian beneficiaries could not sue to protect property held in trust for them by the United States.[20] Thus, by the time a new edition of the Handbook was published in 1982, the issue had become historical.[21]

---

12 See text accompanying notes 185-195.

13 See text accompanying notes 170-183.

14 Cohen, Handbook, supra note 6 at 284-285, 285 n.169, citing Jaeger v. United States, 27 Ct. Cl. 278 (1892) [Jaeger]. Jaeger is discussed below in the text accompanying notes 144-165.

15 Cohen, Handbook, ibid. at 285. Lawyers filing these suits invoked the rule of equity that allowed unincorporated associations such as partnerships, which could not sue or be sued at law, to sue and be sued on certain equitable claims. See Edward H. Warren, Corporate Advantages Without Incorporation (New York: Baker, Voorhis & Co., 1929) at 42-43. See also text accompanying note 170.

16 See e.g. Skokomish Indian Tribe v. France, 269 F.2d 555 (9th Cir. 1959); Oglala Sioux Tribe of the Pine Ridge Reservation v. Barta, 146 F.Supp. 917 (D. S. Dak. 1956).

17 See text accompanying notes 196-217. Cohen's treatise was revised by staff at the Interior Department and published as a revised edition in 1958. This edition copied much of the 1941 Handbook, changing only parts that were ideologically out of favour in the Department. The 1946 statute was inserted, but the general section on tribal capacity to sue was not part of the impetus for change and was retained almost verbatim. U.S. Department of the Interior, Federal Indian Law (Washington: U.S. Government Printing Office, 1958) at 489-495.

18 See text accompanying notes 221-222.

19 See infra note 183 and accompanying text.

20 Poafpybitty v. Skelley Oil, 390 U.S. 365 (1968). See text accompanying note 195.

21 See Rennard Strickland et al., Felix S. Cohen's Handbook of Federal Indian Law (Charlottesville: Michie/Bobbs-Merrill, 1982) at 325, 527. In Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, 538 U.S. 701

Cohen's 1941 caution reflected statements in a few legal opinions and in articles in popular and scholarly journals in the late 19th and early 20th centuries.[22] These sources are the focus of our inquiry. Why and to what extent did the legal community hold the view, unsupported by authoritative legal holding, that Indian tribes could not bring suit in any court? When did this viewpoint change? And how has it affected the course of Indian law?

In part II, we review the Supreme Court's famous decision in Cherokee Nation v. Georgia.[23] In part III, we discuss abundant nonjudicial opinions of the late 19th century arguing that Indian country was lawless because Indians and tribes had no right to sue in federal or state courts. In part IV, we examine the influence of those opinions on the law and bring the subject forward to its conclusion in the 1960s.

II JOHN MARSHALL'S GHOST

Claims cases aside, there were many reported legal decisions prior to 1880 of lawsuits brought by individual plaintiffs identified as Indian, but tribal plaintiffs appeared in only a handful of cases in a few locations.[24] Only one tribal suit is widely known, Cherokee Nation v. Georgia, the Cherokee Nation's failed attempt to invoke the Supreme Court's original jurisdiction.[25]

The bearing of Cherokee Nation on capacity of tribes to sue confronts complexities and ambiguities in the Court's several opinions in that case, none of which commanded a majority of the justices. In the late 1820s, Georgia passed statutes attempting to destroy Cherokee sovereignty and control Cherokee land. After the Cherokee Nation's appeals to Congress failed, the Nation's counsel, former Attorney General William Wirt, looked for ways to seek legal protection against the state.[26] He faced many of the intricacies of the federal legal system, most importantly, where to file suit, how to overcome Georgia's sovereign immunity, and how to frame the case to overcome a political question defence.

(2003), the Court held that an Indian tribe could not maintain an action under 42 U.S.C. s 1983 (2000), but this was because of the tribe's sovereign status, not for lack of capacity to sue.

22 The only source cited was Jaeger, supra note 14. See Cohen, Handbook, supra note 6 at 284-285. But Cohen and his staff were surely aware of most or all of the other sources discussed in this paper.

23 30 U.S. (5 Pet.) 1 (1831) [Cherokee Nation].

24 All reported 19th century cases were brought by the Five Tribes before and after their removal from the southeast to Indian Territory, e.g. Cherokee Nation, ibid.; or by New York tribes, e.g. St. Regis Indians v. Drum, 19 Johns. 127 (1821); or by Pueblo tribes in New Mexico, e.g. Victor de la O v. Pueblo of Acoma, 1 N.M. 226 (1857). See also colonial cases described in Joseph Henry Smith, Appeals to the Privy Council from the American Plantations (New York: Columbia University Press, 1950). On the Five Tribes, see Grant Foreman, Indian Removal: The Emigration of the Five Civilized Tribes of Indians (Norman: University of Oklahoma Press, 1972). For an example of an individual case, see Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1856).

25 Cherokee Nation, ibid.

26 See Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality" (1969) 21 Stan. L. Rev. 500 at 503-508.

The Cherokee Nation had its own courts,[27] but haling Georgia before them would have been entirely futile. Georgia's state courts were theoretically open to an action to enforce the Cherokee treaties against the state. There the Cherokees expected overwhelming hostility that would translate into impossible legal obstacles. Wirt feared that the Georgia courts would simply refuse to enter a plea, which would bar review by the U.S. Supreme Court.[28] On the point of our inquiry, the Georgia courts could have held that the Cherokees lacked capacity to sue, normally a question of state law not reviewable by the Supreme Court.[29] And Georgia's sovereign immunity would have been a barrier.[30]

Wirt seriously considered two courses of action, filing suit against state officers in the Georgia federal circuit court with the Cherokees' principal chief as plaintiff in a representative capacity, and the bold and daring choice of an original bill for injunction filed in the Supreme Court in the name of the Cherokee Nation.[31] Regarding the first, suing state officers would have avoided an 11th amendment (sovereign immunity) defence under governing precedents.[32] But in 1830, the only general civil jurisdiction of lower federal courts was based on diversity of citizenship.[33] The chief was not a citizen of any state. The plan was to claim he was a citizen of a foreign state.[34]

The hard question was whether the courts would accept the claim that the Cherokee Nation was a foreign state, which was also the crucial question for an original bill.[35] So Wirt decided to file in the Supreme Court. Filing an original bill affected the choice of parties defendant. Article III expressly authorizes original jurisdiction in all "Cases ... in which a State shall be a Party,"[36] so Georgia qualified, and her officers did not. To avoid a political question defence, the case was to be framed as one to enforce

---

27 See supra note 23 at 6.

28 See John P. Kennedy, Memoirs of William Wirt (Philadelphia: Lea & Blanchard, 1849) vol. 2 at 294.

29 See e.g. Onondaga Nation v. Thacher, 189 U.S. 306 (1903).

30 See Printup v. Cherokee Railroad, 45 Ga. 365 (1872); Georgia Military Institute v. Simpson, 31 Ga. 273 (1860).

31 See Kennedy, supra note 28 at 294-295; Burke, supra note 26 at 510.

32 32. Georgia (Governor) v. Madrazo, 26 U.S. (1 Pet.) 110 (1828); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). The same would be true today. See John E. Nowak & Ronald D. Rotunda, Constitutional Law, 7th ed. (St. Paul: Thomson/West, 2004) at 52-56.

33 See Richard H. Fallon, Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System, 4th ed. (Brooklyn: Foundation Press, 1996) at 29-33. Federal diversity jurisdiction also required that a minimum dollar amount be in controversy, $500 at the time of the Cherokee case. Ibid. The case surely met that threshold.

34 See Kennedy, supra note 28 at 294.

35 Ibid. See also Karrahoo v. Adams, 14 F. Cas. 134 (C.C.D. Kans. 1870) (rejecting an Indian's claim to be a citizen of a foreign state, relying on Cherokee Nation).

36 U.S. Const. art. III, s 2, cl. 2.

the Cherokee treaties, relying on the Supreme Court's previous decisions allowing direct enforcement of foreign treaties.[37]

The remaining difficulty was Georgia's sovereign immunity. The 11th amendment expressly bars only diversity cases, so it could have been read to allow all others. If so, it would allow federal question jurisdiction over, in relevant part, "Cases ... arising under ... Treaties."[38] It was clear that the Court had appellate jurisdiction over claims by any plaintiff based on treaties.[39] But Wirt did not assert federal question jurisdiction. Rather, his sole claim was that the Cherokee Nation constituted a foreign state as the term is used in Article III's definition of the judicial power to include "Controversies ... between a State ... and foreign States." The assumption was that this clause allowed suit by a foreign state to override Georgia's immunity, while suit by a plaintiff not identified in Article III would not. The theory was explicitly stated in Justice Johnson's separate opinion:

> It is not enough, in order to come before this court for relief, that a case of injury, or of cause to apprehend injury, should be made out. Besides having a cause of action, the complainant must bring himself within that description of parties, who alone are permitted, under the constitution, to bring an original suit to this court.
>
> It is essential to such suit that a state of this union should be a party; so says the second member of the second section of the third article of the constitution: the other party must, under the control of the eleventh amendment, be another state of the union, or a foreign state. In this case, the averment is, that the complainant is a foreign state.[40]

In other words, it was assumed that to invoke the Court's original jurisdiction against a state of the union, the controversy must be one of those enumerated in Article III's definition of the judicial power between a state and another named party. Justice Johnson's analysis eventually proved half right. The Court in time agreed that plaintiffs not identified in the "controversies" part of Article III's definition of the judicial power were barred from suit against a non-consenting state.[41] But the Court held that suits by foreign states were barred as well.[42] Under current law, the bill would be

---

37 See e.g. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). On this subject, American constitutional law departed from English law, which did not allow suit on a treaty absent an enabling act of Parliament. See Halsbury's Laws of England, 4th ed. reissue, vol. 8 (London: Butterworths, 1996) at 221, 466-469.

38 U.S. Const. art. III, s 2, cl. 1.

39 Martin v. Hunter's Lessee, supra note 37.

40 Supra note 23 at 21. See also the dissenting opinion of Thompson J., ibid. at 52: "The controversy in the present case is alleged to be between a foreign state, and one of the states of the union; and does not, therefore, come within the eleventh amendment of the constitution."

41 Hans v. Louisiana, 134 U.S. 1 (1890).

42 Monaco (Principality of) v. Mississippi, 292 U.S. 313 (1934). Suits by Indian nations are also barred. Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991). Only

dismissed without any need to decide whether the Cherokee Nation were a foreign state.

The Court famously held that the Cherokee Nation was not an Article III foreign state, so the Court lacked jurisdiction. What bearing had this holding on the question of the Cherokees' capacity to sue? In legal theory regarding the scope of a holding for purposes of stare decisis, the answer is plainly none. But dicta and implications in Supreme Court opinions cast long shadows outside strict theory, and these were abundant in the Cherokee Nation opinions.

Most observers begin and end their analysis of Cherokee Nation with Chief Justice Marshall's opinion, called the opinion of the Court. In modern parlance it would be labelled the opinion stating the judgment of the Court.[43] While analyzing whether the Cherokee Nation were an Article III foreign state, Marshall gave implications both ways on the capacity to sue question. His negative statements have had more attention. Without any mention of the 11th amendment (probably because he did not want to forecast future decisions about it), he stated:

At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the union.

> The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the constitution, and cannot maintain an action in the courts of the United States.
>
> The mere question of right might perhaps be decided by this court in a proper case with proper parties.
>
> If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.[44]

---

suits by the United States or a sister state override state immunity. See Nowak & Rotunda, supra note 32 at 51.

43 The 1830 Court had seven members, so on the face of the reports, Marshall wrote for a plurality of three. But there are collateral reports that Justice Duvall was absent from the case, so that Marshall's opinion was joined only by Justice M'Lean. See G. Edward White, History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815-1835, vols. 3-4 (New York: Oxford University Press, 1991) at 325, 724.

44 Supra note 23 at 18-20.

The Chief Justice twice stated the scope of his opinion to be "federal courts," suggesting that tribes were barred from resort to federal courts at any level. In the final paragraph, he limited the judgment to "this ... tribunal." Based primarily on the quoted parts of Marshall's opinion, a leading Indian law scholar concluded that "Indian tribes generally could not directly enforce their rights in American courts until the last third of the twentieth century."[45]

Can the opinion of the Chief Justice be read to imply that tribes lacked capacity to sue? It is more likely that he had in mind the extant limits on jurisdiction of the lower federal courts, particularly the glaring omission of Indians from diversity jurisdiction.[46] If so, his opinion on this point became largely obsolete in 1875, when Congress opened federal district courts to all federal question cases when a minimum dollar amount was in controversy.[47] And, of course, his opinion had no bearing on the issue of capacity to sue in state courts.

Another part of Marshall's opinion with possible implications for tribal capacity to sue was his famous characterization of tribes as "domestic dependent nations ... in a state of pupilage ... [whose] relation to the United States resembles that of a ward to his guardian."[48] In later years, when Marshall's guardianship analogy was to a significant extent made operational, this gave rise to the claim that tribes' and Indians' "wardship" precluded their capacity to sue.[49] Only the United States as their guardian could sue to enforce their rights, and when the federal government was the alleged wrongdoer, they had no rights unless Congress explicitly conferred them. When this claim was made in defence to a tribal or Indian lawsuit, it was consistently rejected.[50] Its one reported judicial recognition was dictum in a case in which a tribe was a defendant.[51]

Marshall's opinion also included statements that favoured tribal capacity to sue:

> So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They

45 Robert N. Clinton, "Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law" (1993) 46 Ark. L. Rev. 77 at 89-90. See Robert N. Clinton, "The Curse of Relevance: An Essay on the Relationship of Historical Research to Federal Indian Litigation" (1986) 28 Ariz. L. Rev. 29 at 32-34. See also John Edward Barry, "Comment, Oneida Indian Nation v. County of Oneida: Tribal Rights of Action and the Indian Trade and Intercourse Act" (1984) 84 Col. L. Rev. 1852 at 1858 ("Prior to 1966 ... it was unclear whether Indian tribes could bring suit in federal court").

46 See text accompanying notes 132-135.

47 Judiciary Act of 1875, c. 137 s 1, 18 Stat. 470 (codified as amended at 28 U.S.C. s 1331 (2000)). See text accompanying notes 218-219.

48 Supra note 23 at 17.

49 See text accompanying note 190.

50 Ibid.

51 See text accompanying notes 144-162.

> have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.[52]

Federal and state courts have consistently recognized the capacity to sue of a "state" in the sense described by Marshall.[53] That the quoted passage was understood to relate to capacity to sue is shown by the other opinions in the case. Justices Thompson and Story in dissent plainly thought the Cherokees had capacity to sue because they voted in the plaintiff's favour. Justices Baldwin and Johnson voted to dismiss but refused to join Marshall's opinion. Baldwin opined:

> As jurisdiction is the First question which must arise in every cause, I have confined my examination of this, entirely to that point, and that branch of it which relates to the capacity of the plaintiffs to ask the interposition of this court. I concur in the opinion of the court in dismissing the bill, but not for the reasons assigned.
>
> In my opinion there is no plaintiff in this suit.[54]

Justice Johnson was less direct but reached a like conclusion:

> I cannot but think that there are strong reasons for doubting the applicability of the epithet state, to a people so low in the grade of organized society as our Indian tribes most generally are.[55]

Hence, Marshall's characterization of the Cherokee Nation as a state resolved an explicit disagreement among the Court's justices about tribes' legal status. And he strongly restated his view of tribes' governmental status in his celebrated majority opinion in Worcester v. Georgia:

> The Indian nations had always been considered as distinct,

---

52 Cherokee Nation, supra note 23 at 16. See also the dissenting opinion of Thompson J. on the same point, ibid. at 52-53.

53 See Colombia v. Cauca Company, 190 U.S. 524 (1903); The Sapphire, 78 U.S. (11 Wall.) 164 (1870); The Antelope, 23 U.S. (10 Wheat.) 66 (1825); King of Spain v. Oliver, 14 F.Cas. 577 (C.C.D. Pa. 1810); Honduras v. Soto, 112 N.Y. 310; 19 N.E. 845 (1889); Mexico v. Arrangois, 5 Duer 634 (N.Y. 1856). See also Pfizer Inc. v. India, 434 U.S. 308 at 318-319 (1978) (foreign nations can sue under the antitrust laws).

54 Cherokee Nation, supra note 23 at 31.

55 Ibid. at 21.

> independent political communities .... 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.[56]

The final irony of the Cherokee cases was that the Worcester decision, originating in the Georgia state courts, achieved the Cherokees' desired victory on the illegality of Georgia's actions. But a determined president and Congress snubbed the Court and removed the Cherokees from Georgia anyway.[57]

III THE FRIENDS OF THE INDIAN

The dominant government Indian policy from the nation's founding until the 1920s was to acquire Indian land for settlers and miners, at least nominally by voluntary purchase.[58] At the time of Cherokee Nation, this was achieved by treaties that ceded large tracts to the government, set aside retained tribal territory apart from white settlements, and allowed tribes a substantial measure of self-government over their reduced domains.[59] The Jacksonians accentuated the policy by adding their removal scheme. Using various forms of coercion, the government acquired all tribal land near white settlements and resettled tribes on new lands in the west that became known as Indian Territory, now mostly Oklahoma.[60]

In the 1850s, a new policy became prominent. While not abandoning removal, the government began to insert a clause into Indian treaties providing for allotting tribal common lands to individual heads of Indian families as homesteads.[61] Thus began the policy of forced assimilation of Native Americans that predominated for the next 80 years.[62] The allotment policy did generate an important decision by the Supreme Court. Three tribes in Kansas were allotted, and Kansas counties levied property taxes on the allotments. The tribes contested the taxes in Kansas courts, losing on the merits before the Kansas Supreme Court. The U.S. Supreme Court reversed and held the lands not subject to Kansas taxes.[63] Pertinent to our subject,

---

56 31 U.S. (6 Pet.) 515 at 559-560 (1832) [Worcester]. Justice Baldwin dissented again: ibid. at 562. Justice Johnson did not.

57 See Foreman, supra note 24 at 235. The Worcester decision gave rise to a report, probably apocryphal, that President Jackson said, "John Marshall has made his decision: now let him enforce it." Albert J. Beveridge, The Life of John Marshall, vol. 4 (Boston & New York: Houghton Mifflin, 1916) at 551 (citing a book by Horace Greeley).

58 See Newton et al., Cohen's Handbook, supra note 2 at 183-184.

59 Ibid.

60 Ibid.

61 Ibid. at 66-69.

62 Ibid. at 84.

63 The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867).

plaintiffs in the three cases were the respective tribal chiefs in a representative capacity.[64] No one's capacity to sue was questioned.

After the Civil War, tribal reservations became increasingly dysfunctional. Repeated pressures to cede more land created a general sense of instability. Constant encroachments by lawless settlers undermined tribal authorities and economies. Government payments for tribal land ceded in treaties, in cash and services, were either not provided or diverted by corrupt officials.[65] President Grant tried to address the issues by establishing and empowering a Board of Indian Commissioners, 10 prominent citizens named by the president to serve without compensation.[66] While ineffectual, this body in turn generated a number of other high-minded reform efforts. President Hayes appointed Senator Carl Schurz as Interior Secretary in 1877. Schurz greatly reduced corruption in the Bureau of Indian Affairs, though his tenure was marred by his defence of the government's outrageous attempt to force the Ponca tribe to remove to Indian Territory.[67]

Based on his experience as secretary, Schurz determined that major reforms in Indian policy were needed. Shortly after leaving office in 1881, he published an article that outlined his proposals.[68] Consistent with general policy since the 1850s, his overriding goal was "civilization" of Native Americans by cultural assimilation. But he sought to pursue this aim more aggressively by two policy initiatives: much more extensive allotment of tribal common land to Indian families in severalty, and greatly increased efforts for Indian education in white ways.[69]

Another part of the reform movement was establishment of prominent private groups in the eastern U.S. to promote major changes in national policy towards Native Americans. Most of these groups had similar notions of needed reforms, which they honed in the annual Lake Mohonk Conference of Friends of the Indian, at a resort near New Paltz, New York, owned by Board of Indian Commissioner Albert Smiley.[70]

Like those of Schurz and the government, the policies promoted by the Friends of the Indian had a common goal of "civilization" of Native Americans by cultural assimilation.[71] They shared Schurz's promotion of allotment of land and of education, though with more emphasis on religious education. But they added a third major initiative: extension of general laws

---

64 Ibid. at 738.

65 See Francis Paul Prucha, The Great Father (Lincoln: University of Nebraska Press, 1984) vol. 1 at 462-478 [Prucha, Great Father]. In addition, the strong pre-war governments of the Five Tribes in Indian Territory were shattered by participation in the war. See Jeffrey Burton, Indian Territory and the United States, 1866-1906 (Norman & London: University of Oklahoma Press, 1995) at 14-25.

66 See Prucha, Great Father, ibid., vol. 1 at 501-512.

67 Ibid. at 526, 566-571, 586-589.

68 Carl Schurz, "Present Aspects of the Indian Problem" (July 1881) 133 N. Amer. Rev. 1.

69 Ibid. at 6-21.

70 Prucha, Great Father, supra note 65, vol. 2 at 617-618.

71 Ibid. at 609-610.

to Indians and Indian country.[72] Their principal spokesmen, the Reverend William Justin Harsha, lawyer Henry S. Pancoast, and Harvard professor James Bradley Thayer, promoted this aim by claiming that without their reforms, Indians had no legal rights at all.[73]

Harsha

The year after Carl Schurz published his reform agenda in 1881, Presbyterian divine William Justin Harsha's article in the North American Review, "Law for the Indians,"[74] responded that Schurz had his priorities backward. According to Harsha, the first order of business should have been extension of general laws over Indians and Indian country. Lack of legal training did not deter Harsha from bold assertions about the law.

Harsha argued repeatedly that Indians had no legal capacity to bring civil lawsuits. White people knew they could steal Indian property, and the Indians had no recourse in court.[75] He discussed two instances in which tribes, the Utes and the Poncas, were forcibly removed from their reservation lands because they were not able to turn to courts for protection.[76] He called for Indians to be granted "standing in the courts necessary for protection."[77] He lauded Canada and New York State as places where whites and Indians lived peacefully and justly together because Indians had the protection of laws.[78] As an example of injustice done to Indians because they could not bring civil actions in courts, Harsha told the story of Iron Eye, an Omaha Indian who became wealthy as a merchant. He lent several hundred dollars to white men, receiving promissory notes from them. They defrauded him of every cent they owed him, claimed Harsha, because Iron Eye could not bring suit to recover his money.[79]

Harsha also quoted an Interior Department report on the Poncas' attempt to take their grievance to court in which Secretary Schurz had stated, "Such a suit cannot be brought at all."[80] He quoted Schurz as saying that the Supreme Court had repeatedly decided the question, and that "the decisions are clear and uniform on this point," and among the lawyers he consulted, not one disagreed with his view on Indians' legal status; the Indians' disability "has been decided by the Supreme Court so clearly and

---

72 Ibid.
73 Ibid. at 676-681.
74 (1882) 134 N. Am. Rev. 272.
75 Ibid. at 274-275.
76 Ibid. at 276-277.
77 Ibid. at 277.
78 Ibid. at 279-280.
79 Ibid. at 287. We have not seen any published research that says how accurate Harsha's story was.
80 Ibid. at 283, citing to Report Interior Department, 1878, at 675. Our failed attempts to verify this cite led us to believe it to be defective, though the quotation may be correct.

comprehensively that further testing seems utterly futile."[81] For further evidence of official opinion on this question, Harsha cited reports of a number of reservation Indian agents who had decried the lack of law in Indian country. He excerpted a paragraph from a dispatch from the Commissioner of Indian Affairs regarding the Ponca case:

> The ... United States District-Attorney has been directed to appear and endeavor to have the [Poncas'] writ dismissed. He takes the ground that under the law, and according to repeated decisions of the Supreme Court, the Indians stand as wards of the Government, and are under the same relations to the Government as minors to their parents or guardians; that the law forbids them to make contracts, and such contracts, if made by them, are void. No attorney has the right or can appear for an Indian, unless authorized to do so by the Indian Department.[82]

Harsha quoted President Julius Seelye of Amherst as saying that the U.S. government had given the Indian no status in courts except as a criminal.[83] He also quoted former New York governor and presidential candidate Horatio Seymour, "a wise and thoughtful student of Indian affairs," to claim that "[e]very human being born upon our continent, or who comes here from any quarter of the world, whether savage or civilized, can go to our courts for protection,except those who belong to the tribes who once owned this country."[84] Harsha also quoted S.W. Marston, Muskogee agent, Indian Territory, as saying, "If a white man sees fit, in his depravity, to infringe upon the rights of an Indian, or to violate his pledge or contract with him, he has no redress whatever, and there is no tribunal to which he can appeal for justice."[85] Bishop Whipple, a proponent of Indian education, said, "The Indian ... is not amenable to or protected by law. The man has no standing before the law. A Chinese or a Hottentot would have, but the [N]ative American is left pitiably helpless."[86]

Harsha cited no legal authority for his assertions. Further, in the case of the Poncas, he failed to note that their lawsuit had in fact succeeded, contrary to his quoted passages from Secretary Schurz and others.[87]

---

81 Ibid. at 290. As noted below, there was no authority for this claim. See text accompanying note 87.

82 Ibid.

83 Ibid. at 283.

84 Ibid. at 287.

85 Ibid. at 288.

86 Ibid.

87 United States ex rel. Standing Bear v. Crook, 25 F.Cas. 695 (C.C.D. Neb. 1879) (No. 14,891). A colourful account of the trial in this case appeared in an article about Secretary Schurz soon after his death. See "One Case Where Carl Schurz Was Not on the Side of Human Liberty" The New York Times (27 May 1906) SM6.

Pancoast

Another inspired advocate of Friends of the Indian ideals was Henry S. Pancoast. He was a young lawyer from Philadelphia who helped organize the Indian Rights Association in that city after an 1882 visit to Sioux country in Dakota Territory. In 1884, the Indian Rights Association published Pancoast's pamphlet, The Indian Before the Law,[88] in which he analyzed the legal status of Native Americans.

Pancoast stated his conviction that Indians did not have capacity to bring lawsuits either as tribes or as individuals. Without citing Cherokee Nation, he summarized its holding that Indian tribes were not within the clause of the Constitution giving "foreign nations" a right to sue in the Supreme Court. Pancoast then expanded on the holding to state that "in no other capacity could they [Indian tribes] claim redress in our courts."[89] Thus, Indian tribes were left without any legal remedies if their rights were violated.

Pancoast also believed that incapacity to bring lawsuits extended to individual Indians in civil actions. He stated that because an Indian is neither a foreigner nor a citizen, he had an anomalous status that left him without capacity to bring a civil action in his own name in either a state or federal court.[90] In summarizing the legal status of the Indian, Pancoast stated, "[O]ur Executive rules him; our Naturalization Acts do not apply to him; if he offends against our people, he is tried in our courts; if our people offend against him, our courts are practically shut upon him."[91] He ended his article by calling for Indians to be allowed to bring civil actions in either local or federal courts and to be considered persons before the law.[92]

Thayer and the Thayer Bill

Because of his academic and legal prestige, the most formidable advocate among the Friends of the Indian was Harvard law professor James Bradley Thayer. Son of a newspaper editor and silkworm farmer, Thayer caught the

---

88 (Philadelphia: The Indian Rights Association, 1884).

89 Ibid. at 7.

90 Ibid. at 11-13. It was of course true that non-citizen Indians' status deprived them of the diversity jurisdiction of federal district courts, but this was not a defect of capacity and had no application to state courts nor to federal question jurisdiction in federal courts after 1875. See text at notes 132-137.

91 Ibid. at 17.

92 Ibid. at 21-28. Pancoast was the principal source quoted and cited for the propositions that Indians "were barred from any remedy for violation of their legal rights" and "the Indian is incapacitated for bringing suit in his own name" in state or federal court in Fayette Avery McKenzie, The Indian in Relation to the White Population of the United States (Ph.D. Thesis, University of Pennsylvania, 1908) [unpublished]. McKenzie taught in a reservation school and later served as president of Fisk University.

attention of a wealthy widow from Northampton, Anne Lyman, who provided for his education.[93] His original goal was to become a Baptist missionary to the Indians. He instead chose to attend Harvard Law School, graduating in 1856.[94] He married Sophia Ripley, Ralph Waldo Emerson's niece, in 1859[95] and practiced law in Boston until 1874.[96] He was then appointed to the faculty of Harvard Law School and became a leading scholar of evidence and constitutional law.[97] In the mid-1880s he became particularly concerned with bringing Indians under American law.[98] He wrote articles promoting Friends of the Indian reforms and worked with the Indian Rights Association.[99]

Thayer first took up the issue raised by Harsha and Pancoast through the Lake Mohonk Conference and the Indian Rights Association. The latter's law committee reported in 1887 that Professor Thayer had drafted a proposed federal bill designed to bring all Indians under American law.[100] He also wrote the 1888 report of the Lake Mohonk Conference's law committee to promote his completed draft.[101] Introduced in the Senate that year, and commonly called the "Thayer Bill," it would have applied state and federal laws to Indians and Indian country, and established new "commissioners" courts for the specific purpose of affording Indians justice through the American system.[102] The first section of the bill stated:

> [A]ll Indians not citizens of the United States, whether residing on or off a reservation, are hereby declared entitled to the full protection and exemptions secured by the Constitution of the United States to persons other than such citizens; and especially they shall be entitled to the equal protection of the law, they may sue and be sued in all courts, and shall have full power to make contracts, and engage in any trade or business.[103]

---

93 See Jay Hook, "A Brief Life of James Bradley Thayer" (1993) 88 Nw. U.L. Rev. 1 at 1-2.

94 Ibid. at 2.

95 Ibid. at 4.

96 Ibid. at 3.

97 See Prucha, Great Father, supra note 65, vol. 2 at 679-680.

98 Ibid. at 680.

99 Ibid. at 680-681; Francis Paul Prucha, Americanizing the American Indians: Writings by the "Friends of the Indian," 1880-1900 (Cambridge: Harvard University Press, 1973) at 167.

100 See the Report of the Law Committee: Legislation and Legal Matters, in Fifth Annual Report of the Executive Committee of the Indian Rights Association (Philadelphia: The Indian Rights Association, 1887) at 3-7.

101 See Proceedings of the Sixth Annual Meeting of the Lake Mohonk Conference of Friends of the Indian (Lake Mohonk, N.Y.: Lake Mohonk Conference, 1888) at 42-43 [Proceedings 1888].

102 U.S., Bill S. 2341, 50th Cong., 1st Sess. (introduced 29 March 1888) (commonly known as the Thayer Bill).

103 Ibid.

Thayer's bill implied that Indians did not have the right to bring suits in courts. However, in a Harvard Law Review piece published the same year, he cited and acknowledged many cases in which Indians had been able to sue.[104] His attitude towards tribes was stated in his report for the Lake Mohonk Law Committee: "for the future, we are no longer going to keep up this nonsense of dealing with you as a separate people; we do not care anything about your tribes; keep them if you like, just as the Shakers and others keep up their private organizations; but no longer as separate nations."[105]

Frustrated by failure of his bill, Thayer elaborated his view in an 1891 article, "A People Without Law," published in the Atlantic Monthly, from which we cribbed our title.[106] His article was a historical summary of relations between Native and other Americans and an explanation of how Indian agents had become virtual rulers of Indian tribes, rather than intermediaries. This summary and explanation supported Thayer's thesis that Indians had no just system to settle their disputes; therefore, the United States should extend its laws and courts onto Indian reservations.[107] He stated that Indians did not have a legal status, merely a political condition. He added that because Indians had no courts to appeal to when they were wronged by other Indians or whites, their only resort was to fight.[108] He argued that Indians should be allowed into established courts of law and that new courts should be established specifically to afford Indians justice in disputes among themselves and between Indians and whites.[109] He again treated tribes as anachronistic and irrelevant.

The Thayer Bill went nowhere in large measure because it was opposed by Senator Henry L. Dawes, another luminary of the Friends of the Indian and chief sponsor of the General Allotment Act. At the 1891 Lake Mohonk Conference, Dawes was "quite astounded ... to hear that the Indian is without law. It is a mistake, a sore mistake."[110] Dawes explained that the Indian police and Courts of Indian Offenses established on reservations during the 1880s had provided a legal system run by Indian people themselves (albeit those hand picked by the government's Indian agents).[111]

Thayer's bill also highlighted another source of confusion about tribal capacity to sue. As his text showed, there is a tendency to think of capacity to sue and be sued as if the two are the same. But for governments they are not because of the common-law concept of governmental immunity. Indian nations have governmental immunity from suit, absent consent or override

104 See James Bradley Thayer, "In the Moot Court, Coram Thayer J." (1888) 1 Harv. L. Rev. 149.

105 Proceedings 1888, supra note 101 at 43.

106 James Bradley Thayer, "A People Without Law" (1891) 68 Atlantic Monthly 540, 676.

107 Ibid. at 542.

108 Ibid. at 540, 542.

109 Ibid. at 542.

110 See Proceedings of the Ninth Annual Meeting of the Lake Mohonk Conference of Friends of the Indian (Lake Mohonk, N.Y.: Lake Mohonk Conference, 1891) at 44 [Proceedings 1891].

111 Ibid. at 45-46.

by act of Congress.[112] Therefore, like other governments, their capacity to sue as plaintiffs is not coextensive with their capacity to be sued as defendants.

Thayer Brings in the ABA

The American Bar Association's 1891 annual meeting was held a few months before Professor Thayer's article appeared in the Atlantic Monthly. William Hornblower, a lawyer from New York City, gave a paper titled "The Legal Status of the Indians," having little relevance to our subject despite its title.[113] However, Professor Thayer was present and jumped in to advocate for courts for Indians and Indian country in terms similar to his 1888 bill, his article soon to appear, and resolutions at Lake Mohonk.[114] He proposed that the ABA resolve to support his position. After a discussion in which other members agreed with him, the resolution was unanimously adopted, advocating that "the Government of the United States should provide at the earliest possible moment for courts and a system of law in and for the Indian reservations."[115] Another member proposed to establish a standing committee to promote the resolution, which also was approved. Thayer was one of three members appointed.[116]

The committee reported to the 1893 ABA convention its Special Report on Indian Legislation, which quoted from and supported Thayer's 1891 Atlantic Monthly article.[117] The report appended a draft statute that would have extended state and territorial laws to Indian country and would have vested federal courts with exclusive general jurisdiction of suits by or against Native Americans or tribes. This was an advance over the 1888 "Thayer Bill," which had scorned tribes.[118]

---

112 Kiowa Tribe of Oklahoma v. Manufacturing Technologies, 523 U.S. 751 (1998).

113 Report of the Fourteenth Annual Meeting of the American Bar Association (Philadelphia: Dando, 1891) at 261.

114 Ibid. at 12-16.

115 Ibid. at 18-24.

116 Ibid. at 25-27.

117 See Report of the Sixteenth Annual Meeting of the American Bar Association (Philadelphia: Dando, 1893) at 351.

118 Ibid. at 361-363. The report sought ABA endorsement, but that question was committed to the Committee on Jurisprudence. That Committee's 1894 report recommended adoption of the proposed resolutions, but no formal action was taken. Report of the Seventeenth Annual Meeting of the American Bar Association (Philadelphia: Dando, 1894) at 53, 333. The next year, the ABA adopted a tamer resolution proposed by Professor Thayer. Report of the Eighteenth Annual Meeting of the American Bar Association (Philadelphia: Dando, 1895) at 18-21. The Indian Legislation Committee limped along until abolished in 1905, three years after Thayer's death.

Abbott

In 1888, Austin Abbott, a New York lawyer, published "Indians and the Law" in the Harvard Law Review.[119] Most of the piece recited events and decisions without comment. Towards the end, he described the Thayer Bill in favourable terms, reciting its purpose "to put an end to the shameful condition of lawlessness which the government is now maintaining." He recited uncritically that the bill was to enable Indians "to sue and be sued in all courts," and referred to Indians as "these now lawless people."[120]

Canfield

A more complex paper was published in 1881 in the American Law Review by George F. Canfield, a New York lawyer who was later appointed to the Columbia law faculty. In "The Legal Position of the Indian," Canfield expressed some unique ideas about the nature of Indian rights in federal and state courts.[121] Canfield emphasized the absolute nature of Congressional control over Indians and Indian tribes. He stated that because they are members of distinct political communities, Indians were not subject to federal or state laws or court jurisdiction.[122] He believed Indians could use courts, but only to enforce rights acquired by Indian laws and customs. He thought courts had lost sight of this in allowing Indians to sue on contracts and for trespass.[123] He reasoned that, because an individual Indian could successfully bring a trespass suit, an Indian tribe could bring a trespass suit in its corporate capacity as a nation.[124] Unlike other authors of his time, Canfield showed his awareness that Indians had brought lawsuits in state and federal courts. Canfield's analysis went off the rails, however, when he claimed that Indians were not "persons" protected by the Bill of Rights.[125]

IV THE FRIENDS OF THE INDIAN'S LEGACY

Did the Friends of the Indian discourage tribal lawsuits? The prominence of its members gives rise to the supposition that they did. But records of cases not filed are rare, and we have found none on point. Moreover, aside

---

119 (1888) 2 Harv. L. Rev. 167.
120 Ibid. at 174-177.
121 (1881) 15 Am. L. Rev. 21.
122 Ibid. at 29.
123 Ibid. at 33.
124 Ibid. at 34.
125 Ibid. at 28. In 1888, Robert Weil published his doctoral thesis in political science at Columbia. Robert Weil, The Legal Status of the Indian (1888) (reprinted, New York: AMS Press, 1975). His analysis of the law was mostly quite accurate, much more so than tracts by the Friends of the Indian. He included a section headed, "Is the Indian a Person," based on Canfield and accepting some of Canfield's analysis, but arguing that Indians are persons for purposes of habeas corpus and bill of rights defences to prosecution (ibid. at 74-75).

from tribes in New York,[126] the claim that Indians and tribes had no capacity to sue had no support in holdings of decided cases. Throughout the 19th century, individual Indians brought many reported cases in state and federal courts, and we have found none that failed for lack of legal capacity. The same is true of the small number of suits by tribes except for decisions in New York beginning in 1898.[127] It is equally true that the American legal system was woefully inadequate for Native Americans and tribes. Their abundant grievances against the federal government and lawless settlers had no reasonable legal redress. Indians and tribes did not lose in court for lack of capacity to sue, but they usually lost on some other ground.

The Friends' focus was exclusively on ordinary civil suits, but this was not the most important problem for Indian nations and their members. The greatest barrier to redress was immunity and other obstacles to suing the federal government and its agents. The government orchestrated dispossession of tribal land and the system of coercive assimilation. When Indian or tribal plaintiffs tried to contest government actions, the courts ruled that the government had extremely broad, discretionary power over tribal property.[128] When tribes sought compensation for land or for broken promises of money and services, they confronted sovereign immunity.[129] Congress controlled money claims against the government until the Court of Claims was given direct jurisdiction in 1863, but that statute excluded claims based on treaties, foreign or Indian.[130] Tribes could only sue on treaty violations when Congress consented to particular claims. This was often done, but remedies were restricted and achieved only years after the wrong.[131] The federal juggernaut of dispossession and assimilation was never impeded by the courts.

For ordinary civil suits within states, Indian access to courts was not impossible, as the Friends' claimed, but it was difficult. In state courts, Indians encountered bias as outsiders of a different race, particularly when they sought relief against settlers, who could vote.[132] The Constitution's framers had recognized the potential for local favouritism in state courts and responded by giving access to federal courts, where Article III judges had life tenure and some immunity from local biases, based on diversity of

126 See text accompanying notes 171-184.

127 See supra note 24 and infra notes 180-183, and accompanying text.

128 Notably in Lone Wolf, supra note 8.

129 E.g. Blackfeather v. United States, 190 U.S. 368 (1903). See infra note 149 and accompanying text.

130 Act of 3 March 1863, c. 92 s 9, 12 Stat. 765 at 767. The reasons given at the time for the treaty exclusion related entirely to foreign affairs. See Daniel Barstow Magraw, "Jurisdiction of Cases Related to Treaties: The Claims Court's Treaty Exception" (1985) 26 Va. J. Int'l L. 1 at 16-19.

131 See text accompanying notes 196-200.

132 See United States v. Kagama, 118 U.S. 375 at 384 (1886) ("[The Indians] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.").

citizenship.[133] However, only American and foreign citizens could invoke diversity jurisdiction; non-citizen Native Americans, in common with slaves, could not.[134] Diversity jurisdiction was also confined to suits in which there was a minimum amount in controversy, so that as Indians later became citizens, this was an added barrier.[135]

Until 1875, diversity jurisdiction was the only basis for federal trial courts to hear ordinary civil cases. In that year, Congress added general jurisdiction over cases arising under federal law when a like minimum dollar amount was in controversy,[136] but this did not perceptibly improve matters for Indians. The threshold amount in controversy was a barrier, the legal community was slow to assimilate the change,[137] and the great problem of the federal government's immunity from suit was unchanged.

For much of the 19th century, many Indian reservations were in federal territories rather than states; the local courts were federal and had general jurisdiction like that of state courts.[138] However, the territorial judges were not Article III judges with life tenure; they were answerable to voters like their state counterparts.[139] In any event, there was little reported success for Native Americans in territorial courts.

Congress did respond in one limited way to the importuning of the Friends of the Indian. An 1894 statute gave federal district courts original jurisdiction over actions by Indians to enforce their rights to allotments without regard to the amount in controversy.[140] Of course, this was part of the assimilationist agenda, favouring the break-up of tribal property. And even here, whenever Indians tried to use the statute, federal authorities fought diligently to narrow its interpretation and defeat its use.[141]

---

133 U.S. Const. art. III, s 2, cl. 1. See Fallon, Meltzer & Shapiro, supra note 33 at 1524.

134 Cherokee Nation, supra note 23; Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); Karrahoo v. Adams, 14 F. Cas. 134 (C.C.D. Kans. 1870).

135 The amount in controversy was originally $500, raised to $2000 in 1887, $3000 in 1911, $10,000 in 1958, $50,000 in 1988, and $75,000 in 1996. See Charles Alan Wright & Mary Kay Kane, Law of Federal Courts, 6th ed. (St. Paul: West Group, 2002) at 192. All American Indians became citizens under federal statutes passed between 1890 and 1924. See Newton et al., Cohen's Handbook, supra note 2 at 900-1001.

136 See Fallon, Meltzer & Shapiro, supra note 33. Until 1966, federal question jurisdiction had the same requirement of a minimum dollar amount in controversy as diversity jurisdiction. See Wright & Kane, ibid. at 193-194.

137 For example, when Senator Dawes argued in 1891 that Indians did have adequate legal redress, he nevertheless described federal trial court jurisdiction in pre-1875 terms. See Proceedings 1891, supra note 110 at 47. See also text accompanying notes 218-220.

138 See Max Farrand, The Legislation of Congress for the Government of the Organized Territories of the United States, 1789-1895 (Newark: William A. Baker, 1896) at 29-30.

139 American Insurance v. Canter, 26 U.S. (1 Pet.) 511 (1828). See Farrand, ibid.

140 Act of 15 August 1894, c. 290 s 1, 28 Stat. 286 at 304 (codified as amended at 25 U.S.C. ss 345-346 (2000)).

141 See e.g. Scholder v. United States, 428 F.2d. 1123 at 1125-1126 (9th Cir.), cert. denied, 400 U.S. 942 (1970). See generally Newton et al., Cohen's Handbook, supra note 2 at 620-622.

Thus, the Friends of the Indian had a point about inadequate law, despite their failure to analyze the matter accurately and their misguided and patronizing choice of remedies. However, their hyperbole about lawlessness, while incorrect about Indian capacity to sue in the past, contributed prospectively to the few decisions in which tribes were denied legal capacity. The Friends' tracts, a Court of Claims decision on service of process, and holdings in the New York courts led to a 1906 legal encyclopaedia's recitation that tribes lacked legal capacity.[142] This authority was in turn invoked by the federal government to defend against tribal suits, though unsuccessfully.[143] We turn to these events.

Depredations Laws and the Jaeger Case

A federal statute enacted in 1796 provided for compensation of what were commonly called depredations of Indians by settlers and of settlers by Indians.[144] When a non-Indian harmed Indian property, he was to pay twice the fair value of the property destroyed. When the offender could not pay at least the fair value, compensation to that extent was to be paid out of the Treasury. When an Indian harmed property of a non-Indian, the victim was to apply to the government, which in turn would demand "satisfaction" from the offender's tribe. If the tribe did not respond appropriately, the statute authorized the government to deduct compensation from tribal funds or payments. Some Indian treaties had similar provisions.[145] The underlying theory reflected international norms about compensation for transnational torts that had the aim of deterring acts of revenge and retaliation.[146] Both provisions were re-enacted several times and as amended remain on the statute books.[147]

The reality was that the provision to compensate Indians for settlers' wrongs was rarely used. Even when Native Americans knew about the law, most were too unfamiliar with the ways of white courts and government to use it.[148] Moreover, when they eventually did try to enforce it in the courts, the Supreme Court held that the provision for payment from the Treasury was not a sufficiently clear waiver of sovereign immunity.[149]

---

142 See infra note 186 and accompanying text.

143 See text accompanying notes 186-187.

144 Act of 19 May 1796, c. 30 ss 4, 14, 1 Stat. 469 at 470, 472 (codified as amended and re-enacted at 18 U.S.C. s 1160 & 25 U.S.C. s 229 (2000)).

145 See Larry C. Skogen, Indian Depredation Claims, 1796-1920 (Norman & London: University of Oklahoma Press, 1996) at 27-28.

146 See e.g. Goodell v. Jackson, 20 Johns. 693 at 714 (Sup. Ct. Jud. N.Y. 1823) (Kent, Ch.).

147 18 U.S.C. s 1160 & 25 U.S.C. s 229 (2000).

148 See Skogen, supra note 145 at 209, 234 n.11, 236 n.39.

149 Blackfeather v. United States, 190 U.S. 368 (1903). Stingy interpretation of consents to sue remains a major obstacle to justice for Native Americans. See e.g. United States v. Navajo Nation, 537 U.S. 488 (2002).

By contrast, as a dissenting member of Congress predicted in 1796, the provision to compensate settlers spawned a major enterprise of claims for "Indian depredations" lasting more than a century.[150] This hugely wasteful and sometimes fraudulent scheme seldom directly charged tribal funds.[151] But the money it siphoned often came from appropriations that would have otherwise assisted Native Americans.[152]

The section to compensate settlers had no provision for payment from the Treasury, so it generated bureaucratic systems for claims that in turn depended on discretionary appropriations by Congress.[153] The bureaucrats were in, successively, the War Department, its Indian Office, and the Department of the Interior. When Interior's system was exposed as corrupt, Congress restricted the bureaucrats' power.[154] Tiring of this ponderous system in the 1880s, Congress ordered Interior to inventory all outstanding claims with an eye towards closing out the program but with no period of limitations after 1870. Not surprisingly, this generated thousands of new filings.[155] Despairing of Interior ever clearing its files, in 1891 Congress empowered the Court of Claims to adjudicate all Indian depredations cases.[156] The statute allowed all pending claims and all new claims accruing after 1865, provoking still more new claims.[157]

One of the earliest decisions reported by the Court of Claims involved Lewis Jaeger's claim for loss of a Colorado River ferryboat in 1872. One of his ferryboats broke loose from its mooring and floated down the river until it ran against the bank near a Yuma Indian community. Jaeger tied up the boat, but it was accidentally destroyed by the Yumas' fires, for which he sought $3000.[158]

Justice Department lawyers moved to dismiss Jaeger's claim on the ground that no service of process had been made on the Yuma Indians, as due process demanded. This required the court to sort out the Yumas' status under the statute, a matter of some ambiguity.

For a successful plaintiff, the statute directed judgment "against the United States, and against the tribe of Indians committing the wrong, when such can be identified."[159] The statute made the tribe primarily liable to satisfy the judgment out of tribal funds and gave the tribe an independent

---

150 See Skogen, supra note 145 at 25, 210-211 & passim.

151 Ibid. at 186-209. As Skogen states, an exception was during a corrupt period in the later 1860s and early 1870s. Ibid. at 90-91, 197-199.

152 Ibid. at 188, 190.

153 Ibid. at 26-36, 50-51, 186-206. An 1834 statute did provide for payments from the Treasury when Indian annuities were unavailable, but it was repealed in 1859: Ibid. at 192. An 1870 law barred use of annuities to pay depredations claims, but the authority was restored in 1891: Ibid. at 187-189.

154 Ibid. at 26-36, 90-91, 115-116, 187-188.

155 Ibid. at 103-116.

156 Act of 3 March 1891, c. 538, 26 Stat. 851.

157 See Skogen, supra note 145 at 126. The statute required claims to be filed by 3 March 1894, and disallowed claims accruing after 3 March 1891. See ibid.

158 Jaeger, supra note 14. See also Skogen, supra note 145 at 141.

159 Act of 3 March 1891, supra note 156 at s 5.

right of appeal, naming it as a "party" to the appeal.[160] These provisions appeared to entitle the tribe to receive service of process or other notice of the claim, as the government's motion argued. However, other provisions were fuzzier. The statute required the plaintiff's petition to the court to identify the "persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged acts were committed, as near as may be." Its provision for process directed service on the Attorney General, who was required to appear and defend both the United States and the Indians, provided that "any Indian or Indians interested in the proceedings may appear and defend, by an attorney employed by such Indian or Indians with the approval of the Commissioner of Indian Affairs, if he or they shall choose to do so."[161]

The court could have satisfied due process by requiring service on the Yumas, or it might have interpreted the statute to require the government to notify the tribal defendant. Instead, it acknowledged the due process issue but dodged it by an extended discussion of the status of Indians and tribes right out of the Friends of the Indian's playbook. Of seven relevant pages in the reports, the most pertinent passages were:

> If it be true, as insisted by the defendants, that the Indian tribe, band, or nation alleged to have been the parties guilty of the wrong is a necessary party and a defendant within the ordinary meaning of the law, then the court is without jurisdiction as to persons, until a notice in some form is given to such Indians.
>
> The civil policy of the United States, as it has been developed in the form of treaties and statutes, has been radically different from the policy which they have pursued in the government and protection of the civilized order of men. The courts have not been opened to the Indian, and the civil liberty which is the boast of our system has not been given to the Indians in any period of our history.
>
> Congress have legislated on the rights of the Indians on the theory that they were dependent and helpless, to such an extent that the nation had a right to assume unlimited control of them.
>
> The civil rights incident to States and individuals as recognized by what may be called the "law of the land" have not been accorded either to Indian nations, tribes, or Indians. Whenever they have asserted a legal capacity in the maintenance of their rights, it has been in pursuance of some statute of the United States specially conferring upon them the civil rights of suitors.

160 Ibid. at ss 6, 10.
161 Ibid. at s 4.

> The General Government, in its legislative and executive departments, has been the special guardian of the Indians, and it is to be presumed, when their rights become the subject of judicial administration that the same care and guardianship will be extended over them.
>
> If the Yuma Indians have funds in the control and custody of the United States, the United States have a perfect legal right to deal with it as they see fit, and the reference of a question to this court affecting the integrity of that fund does not confer upon the Indians the legal rights of a suitor.
>
> [C]onsidering that the Indians are peculiar in their relations to the United States in not having incident to them the common-law rights of suitors, that their standing in courts is purely statutory and within the discretion of the United States, we are of opinion that the Indians are not defendants in the proceedings in the sense of being distinct from the United States entitled to notice.[162]

The Jaeger opinion suggests that the judges and lawyers confused the question of tribal capacity to sue and be sued with lack of Court of Claims jurisdiction to hear treaty claims.[163] For treaty claims against the United States, tribes needed the special jurisdictional acts mentioned by the Jaeger court, and most Indian claims in 1891 were based on treaties. This confusion persisted as late as the 1940s.[164]

When the Court of Claims got around to the merits, Jaeger lost. The court ruled that the compensation statute covered only intentional torts, and it held that the jurisdictional act did not apply to the Yuma tribe.[165] The latter ruling has a relationship to our inquiry. The amazing split decision that tribes were parties primarily liable, against whom judgment could be entered, and entitled to appeal as parties, but who were not entitled to notice or service of process, required the court to identify the tribe whose property was to be taken without notice. Until then, identifying tribes had been a political issue for the Executive and Congress.[166] The 1891 statute made it a judicial question with all the formality and hairsplitting that implies. Over the statute's operational life of 29 years, the Court of Claims, and on a notable occasion the Supreme Court on appeal, repeatedly strained to identify the proper tribal party.[167]

---

162 Jaeger, supra note 14 at 282-288.

163 See text accompanying notes 7, 128-131 above, and text accompanying note 196 below. On the distinction between tribal capacity to sue and to be sued, see supra note 112 and accompanying text.

164 See text accompanying notes 207-212.

165 Jaeger v. United States, 29 Ct. Cl. 172 (1894), motion for new trial overruled, 33 Ct. Cl. 214 (1898).

166 E.g., United States v. Holliday, 70 U.S. (3 Wall.) 407 (1866).

167 See Newton et al., Cohen's Handbook, supra note 2 at 146-148 (discussing Montoya v. United States, 180 U.S. 261 (1901) and Court of Claims rulings on tribal identity).

The analogous issue when a party files suit claiming to be an Indian tribe, or claiming to be head of a tribe in a representative capacity, is whether the party plaintiff is in fact a tribe. In most instances, this presents little difficulty because of recognition in a treaty or by the Interior Department. In modern times, a statute mandates that Interior maintain a formal registry of recognized tribes, and there is an administrative procedure for gaining recognition as a tribe.[168] But on occasion there has been doubt, and at least one instance contributed to a New York court finding that tribes have no capacity to sue.[169] More recently, a tribal claim lost when a federal jury decided that an Indian nation had ceased to maintain itself as a tribe.[170]

New York

As an original state, New York was long thought by many to be outside the coverage of federal Indian law, so the state developed its own legal relationship with Native Americans, asserting broad powers to regulate their affairs comparable to those claimed by Congress.[171] Key events for our inquiry occurred in May of 1845. On the 6th, in Strong v. Waterman, the Chancellor affirmed an injunction that two Seneca chiefs had obtained against a non-Indian trespasser on tribal land.[172] The trespasser's counsel apparently argued that the Senecas had an adequate remedy at law, precluding an injunction in equity. The Chancellor rejected this contention in a brief opinion, reasoning:

> No provision, however, has been made by law for the bringing an ejectment to recover the possession of [I]ndian lands in the Cattaraugus reservation. For the right to the possession is in several thousand individuals, in their collective capacity; which individuals, as a body, have no corporate name by which they can institute an ejectment suit.
>
> The laws of this state do not recognize the different tribes of [I]ndians, within our bounds, as independent nations,

---

The statute required that tribes to be charged be "in amity with the United States." Act of 3 March 1891, supra note 156 at s 1. This phrase was the focus of many decisions, including Montoya. See also Dobbs v. United States, 33 Ct. Cl. 308 at 314-316 (1898). The Court of Claims ruled against the majority of claimants on the merits, and very few successful claims were charged against tribes. See Skogen, supra note 145 at 201-206.

168 25 U.S.C. s 479a-1 (2000); 25 C.F.R. part 83 (2005).

169 See infra notes 180-182 and accompanying text.

170 Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979). On tribal recognition generally, see Mark D. Myers, "Federal Recognition of Indian Tribes in the United States" (2001) 12 Stan. L. & Pol'y. Rev. 271.

171 See N.Y. Indian Law (McKinney 2001 & Supp. 2006); Newton et al., Cohen's Handbook, supra note 2 at 372-373; Robert B. Porter, "Legalizing, Decolonizing, and Modernizing New York State's Indian Law" (1999) 63 Alb. L. Rev. 125 at 128-130.

172 11 Paige Ch. 607, 5 N.Y. Ch. Ann. 250 (1845).

> but as citizens merely, owing allegiance to the state government; subject to its laws, and entitled to its protection as such citizens. (Jackson v. Goodell, 20 John. Rep. 188.) The [I]ndians cannot therefore institute a suit in the name of the tribe; but they must sue in the same manner as other citizens would be required or authorized to sue, for the protection of similar rights. And as the individuals composing the Seneca nation of Indians, and residing on, and entitled to, their several reservations, are too numerous to join in this suit by name, the bill is properly filed by these complainants in behalf of themselves and the residue of the nation residing upon their reservations.[173]

Thus the Seneca Nation was held to have no capacity to sue at law, nor had its chiefs in a representative capacity, but the latter could sue in equity. The Chancellor had treated the Seneca Nation like a private, unincorporated association, not entitled to sue in its own name but able to obtain relief in equity by a representative action.[174] However, the only authority cited was the 1822 decision in Jackson v. Goodell, which the Chancellor failed to note had been reversed on appeal in an opinion by his noted predecessor, James Kent. Chancellor Kent had disagreed with the very point relied on regarding Indian citizenship.[175]

Two days later, the New York Legislature passed a statute expressly authorizing the Seneca Nation,but no other New York tribe,to sue in its tribal name and to have the legal remedy of ejectment.[176] Whether the statute had any effect on the Strong v. Waterman injunction does not appear in a reported decision.

The Chancellor's reasoning error in Strong benefited a tribe, doing justice on the facts and rejecting a technical defence. And for decades after, his opinion on tribal capacity to sue lay dormant while cases on tribal rights were decided.[177] But in the era of the Friends of the Indian,many of them New York lawyers,the 1845 events were revived. In 1888, a lower New York court addressed an ejectment action by the Seneca Nation. The court reached the merits but cited both Strong v. Waterman and the 1845 statute, saying that the Senecas had no right to sue absent the statute.[178] Similar reasoning appeared in the same case on appeal and in three other opinions

---

173 11 Paige Ch., ibid. at 610-612.

174 See Warren, supra note 15 at 42-43.

175 Goodell v. Jackson, 20 Johns. 693 at 709-718 (1823).

176 N.Y. Laws, 1845, c. 150 s 1.

177 See e.g. That Portion of the Cayuga Nation of Indians residing in Canada v. New York, 99 N.Y. 235, 1 N.E. 770 (1885).

178 Seneca Nation v. Christy, 2 N.Y.S. 546 at 551 (Sup. Ct. 1888), aff'd sub nom. Seneca Nation v. Christie, 126 N.Y. 122 at 147, 27 N.E. 275 at 282 (1891), error dism'd, 162 U.S. 283 (1896).

in cases where the Seneca Nation was plaintiff.[179] All of these were ejectment actions brought long after the relevant events. The central issue was the statute of limitations, and the judges thought the claims should be barred. The Senecas' counsel argued that statutes of limitations could not extinguish Indian title. The courts reasoned that the claims were dependent on the 1845 statute, a state law, so state limitations applied.

The Strong v. Waterman statement on lack of capacity at last became a holding against tribal capacity to sue in a case brought in the name of the Montauk tribe in 1898.[180] The same view was taken by New York's highest court in decisions rendered in 1900 and 1901.[181] These were again suits brought to recover land alienated long before, and in the Montauk case there was doubt about the status of the tribal plaintiff, so the courts were searching for a rationale to dismiss.[182] Without noticing the Chancellor's error, Strong v. Waterman was elevated to a major precedent, and the rule adopted remained New York law until modern times.[183] Moreover, recent federal decisions holding tribal claims barred by laches[184] arose in New York, the one state where tribes were held to lack capacity to sue.

The Supreme Court

In 1890 and 1902, the Supreme Court decided cases brought by the Cherokee Nation without questioning the Nation's capacity to sue, though the Cherokees lost both cases on the merits.[185] But in 1906, the Cyclopedia of Law and Procedure opined, "It is generally held that an Indian tribe cannot sue and be sued in the courts of the United States or in a state court, except

---

179 Ibid. See also Seneca Nation of Indians v. Hugaboom, 9 N.Y.S. 699 (Sup. Ct. 1890), aff'd, 132 N.Y. 492 at 497-498, 30 N.E. 983 at 985 (1892); Seneca Nation v. Lehley, 8 N.Y.S. 245 at 246 (Sup. Ct. 1889).

180 Montauk Tribe of Indians v. Long Island Railroad, 51 N.Y.S. 142 at 143; 28 A.D. 470 at 471 (1898).

181 Onondaga Nation v. Thacher, 169 N.Y. 584, 62 N.E. 1098 (1901), writ dism'd, 189 U.S. 306 (1903); Johnson v. Long Island Railroad, 56 N.E. 992 at 993 (N.Y. 1900). In Johnson, the court held that tribal rights cannot be enforced in a representative action, either.

182 See Pharoah v. Benson, 164 A.D. 51, 149 N.Y.S. 438 (1914), aff'd, 222 N.Y. 665, 119 N.E. 1072 (1918).

183 In Oneida Indian Nation of New York v. Burr, 132 A.D.2d 402, 522 N.Y.S.2d 742 (1987), the court held that federal and state statutes authorized all tribes to sue in New York courts. The state's highest court has not reviewed the issue, but the former New York rule seems clearly gone.

184 See supra notes 4-5 and accompanying text.

185 Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902); Cherokee Nation v. Southern Kansas Railway, 135 U.S. 641 (1890). The latter case involved a statute consenting to suit for damages, but the Cherokees unsuccessfully sought equitable relief that was not authorized by the statute. A companion case to Cherokee Nation v. Hitchcock was Lone Wolf, supra note 8, brought by tribal leaders in representative capacity. Again, no issue about capacity to sue was raised.

where authority has been conferred by statute."[186] The only relevant authorities cited for lack of capacity to sue were the New York decisions discussed above. (Of course the Cyclopedia was published in New York City.)

In 1914, the Pueblo of Santa Rosa (today part of the Tohono O'Odham Nation) sued the Secretary of the Interior to enjoin him from illegally disposing of tribal land. Justice Department lawyers argued that the plaintiff had no capacity to sue, citing the Cyclopedia and Cherokee Nation v. Georgia. The District Court agreed and dismissed but was reversed by the Court of Appeals, and the Supreme Court affirmed the reversal.[187] One basis for the Court's decision was the status of pueblo tribes under the Treaty of Guadalupe-Hidalgo and Mexican law, not applicable to other tribes.[188] But in its response to Cherokee Nation, the Court said:

> The case of Cherokee Nation v. Georgia, 5 Pet. 1, on which the defendants place some reliance, is not in point. The question there was not whether the Cherokee tribe had the requisite capacity to sue in a court of general jurisdiction, but whether it was a "foreign state" in the sense of the judiciary article of the Constitution and therefore entitled to maintain an original suit in this court against the State of Georgia. The court held that the tribe, although uniformly treated as a distinct political society capable of engaging in treaty stipulations, was not a "foreign state" in the sense intended, and so could not maintain such a suit. This is all that was decided.[189]

The government also argued that wardship deprived the tribe of capacity. The Court replied:

> The defendants assert with much earnestness that the Indians of this pueblo are wards of the United States, recognized as such by the legislative and executive departments, and that in consequence the disposal of their lands is not within their own control, but subject to such regulations as Congress may prescribe for their benefit and protection. Assuming, without so deciding, that this is all true, we think it has no real bearing on the point we are considering. Certainly it would not justify the defendants in treating the lands of these Indians, to which, according to the bill, they have a complete and perfect title, as public lands of the United States and disposing of the same under the

186 Cyclopedia of Law and Procedure, vol. 22 (New York: American Law Book, 1906) "Indians", 120-121. This passage was repeated verbatim in Corpus Juris, vol. 31 (New York: American Law Book, 1923) "Indians", 488-489.

187 Pueblo of Santa Rosa v. Lane, 46 App. D.C. 411 (1917), aff'd, 249 U.S. 110 (1919).

188 46 App. D.C., ibid. at 419-430, 249 U.S., ibid. at 111-112.

189 249 U.S., ibid. at 112-113.

> public land laws. That would not be an exercise of guardianship, but an act of confiscation.
>
> Besides, the Indians are not here seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership. Of their capacity to maintain such a suit we entertain no doubt. The existing wardship is not an obstacle, as is shown by repeated decisions of this court, of which Lone Wolf v. Hitchcock, 187 U.S. 553, is an illustration.[190]

Thus the Pueblo of Santa Rosa court explicitly rejected the two main arguments made against tribal capacity over the previous 88 years. That was the state of the law when Felix Cohen's Interior team produced the 1941 Handbook of Federal Indian Law.[191] The Supreme Court next visited the capacity issue in Creek Nation, a 1943 claims case.[192] The Creek and Seminole nations sought compensation for land taken by the same railroads that the Cherokees had challenged in 1890.[193] The Court rejected their claim, in part because, according to the Court, the tribes could have protected their rights by suing the railroads, as the Cherokees had done.[194] And in 1968, the Court specifically held that individual Indian allottees had capacity to sue - as Congress had provided 74 years previously.[195]

In sum, the Supreme Court has never accepted the claim that tribes or Indians lack capacity to sue. When the issue has been presented to it, the Court has firmly rejected the claim.

The 1946 Indian Claims Act

As explained above, sovereign immunity bars unconsented claims for damages against the United States, and the Claims Court's general consent statute, later dubbed the Tucker Act, excluded claims based on treaties.[196]

---

190 Ibid. at 113-114. The decision was reaffirmed seven years later in a case involving the Pueblo of Laguna, written by the same justice, though with the government on the Indians' side. United States v. Candelaria, 271 U.S. 432 at 442 (1926).

191 See supra notes 6, 11-15 and accompanying text.

192 Creek Nation v. United States, 318 U.S. 629 (1943) [Creek Nation].

193 See supra note 181 and accompanying text.

194 Creek Nation, supra note 192 at 640. In support, the Court cited each of the Supreme Court decisions discussed in this subpart of our paper. Ibid. at 640 n.19. The dissenters did not dispute this point. Ibid. at 641-642.

195 Poafpybitty v. Skelley Oil, 390 U.S. 365 (1968). The decision had many precursors that should have settled the issue long before. See Choate v. Trapp, 224 U.S. 665 (1912); Tiger v. Western Investment, 221 U.S. 286 (1911); Act of 15 August 1894, supra note 140, and accompanying text; Ray A. Brown, "The Indian Problem and the Law" (1930) 39 Yale L.J. 307 at 314-315.

196 See text accompanying notes 128-131. The 1863 treaty exclusion was amended in 1878 and 1911 without altering its substance. Rev. Stat. c. 21 s 1066, at 197 (1878); Act of 3 March 1911, Pub. L. No. 61-475, s 153, 36 Stat. 1087 at 1138. The consent

Nontreaty tribal claims were mistakenly believed barred as well, either because the treaty exclusion was erroneously assumed to be broader, or because of doubt about tribal and Indian capacity to sue as we have explained. In any case, Indian claims were based on wrongs committed decades earlier, and the Tucker Act's statute of limitations is six years.[197] Case-by-case, special jurisdictional statutes consented to tribal claims based on treaties or any other law, and they waived statutes of limitations defences.[198] And, of course, by authorizing named tribes to sue, they avoided any claim that the tribal plaintiffs lacked legal capacity.

Tribes seeking a consent statute faced huge burdens under the case-by-case system. First, there were expenses for investigation and lawyers. Tribes had few funds other than trust funds controlled by the government, and the government had to approve both selection of lawyers and use of the money. Approving suits against itself was not a favoured action. Contingent fee agreements were a possible way to finance the effort, but few lawyers could undertake the burden. Getting bills through Congress and signed by the president was a yet greater obstacle, as bills often took years to be enacted, and many efforts failed. A successful bill simply allowed a suit to be filed and determined. Many tribes lost on the merits because of overly narrow consent statutes, onerous offset provisions, or parsimonious Claims Court decisions. From 1920, over half the claims filed resulted in no net recovery.[199] "It would be hard to imagine any more effective legislative and judicial ways to stack the deck."[200]

Calls for a special tribunal to hear all Indian claims began at least by 1910. The 1928 Meriam Report broadened support, and a bill to establish an Indian claims commission was first introduced in 1935.[201] Dissatisfaction with the ad hoc system for adjudicating claims cases grew in the 1940s. Tribes and their allies viewed the system as slow, cumbersome, uneven and thus unfair.[202] Congress found the practice of addressing every claim individually to be overly burdensome.[203] These views coalesced in 1945 into

---

statute was re-enacted and broadened to include claims based on the Constitution by the Tucker Act, 3 March 1887, c. 359, 24 Stat. 505, but the treaty exclusion was unchanged.

197 28 U.S.C. s 2501 (2000). The six-year limit originated in the Act of 3 March 1863, c. 92 s 10, 12 Stat. 765 at 767.

198 See Newton et al., Cohen's Handbook, supra note 2 at 444.

199 See Michael Lieder & Jake Page, Wild Justice: The People of Geronimo v. the United States (Norman & London: University of Oklahoma Press, 1997) at 53-58.

200 Ibid. at 58.

201 See Harvey D. Rosenthal, "Indian Claims and the American Conscience: A Brief History of the Indian Claims Commission" in Imre Suttton, ed., Irredeemable America: The Indians Estate and Land Claims (Albuquerque: University of New Mexico Press, 1985) at 40-43.

202 See e.g. U.S., Creation of Indian Claims Commission: Hearing on H.R. 1198 & H.R. 1341 Before the House Committee on Indian Affairs, 79th Cong. (1945) at 55-56 (N.B. Johnson, President, National Congress of American Indians) [Creation of Indian Claims Commission].

203 "[W]e are being harassed constantly by various pieces of legislation." Ibid. at 68 (Rep. Jackson).

bills in Congress to provide a comprehensive system to adjudicate all past tribal claims in a new, special tribunal, the Indian Claims Commission. Future tribal claims would be addressed in the Court of Claims on the same basis as those of other claimants by removing the treaty exclusion. Bills to enact this scheme were introduced in 1945 and enacted in 1946.[204] To no one's surprise, the Indian Claims Commission's remedies were limited, mostly by denial of prejudgment interest, so that full justice to tribal claims could not be rendered.[205] Nevertheless adjudicating claims before the Indian Claims Commission became a massive enterprise, though one that achieved little closure for tribes.[206]

Pertinent to the theme of this paper, the run-up to the Indian Claims Act became a reprise of the Friends of the Indian and Jaeger case debacles. Two bills were introduced early in 1945, and hearings on them before the House Committee on Indian Affairs were reported.[207] A former U.S. senator from Oklahoma appeared as "a Friend of the Indians" and asserted that legislation was needed to provide tribes a forum to adjudicate their rights because there "is no such forum today and there never has been."[208] He quoted the Jaeger dictum as support and concluded, "The courts of this country are not open to these Indians and our civil liberties have never been extended to them."[209]

The hearings led to an amended bill introduced later in 1945, to a Senate hearing report and to House and Senate committee reports.[210] These reports came closer to the actual state of the law. Assertions that Indians lacked any forum were restricted to the Court of Claims, and its treaty exclusion was accurately cited. But the exclusion continued to be rhetorically broadened to include Indian claims of any kind, not limited to those based on treaties.[211] And broader claims reappeared during floor debates in the House. A member averred:

> It is lamentable that the courts of this country are not open to the Indians and our civil liberties have never been given

---

204 Act of 13 August 1946, c. 959 s 24, 60 Stat. 1049 at 1055 (codified as amended and re-enacted at 28 U.S.C. s 1505 (2000)). The prohibition on tribal treaty claims reappeared with foreign treaty claims in the 1948 codification of the U.S. Code and was removed by the Act of 24 May 1949, c. 139 s 88, 63 Stat. 102. See 28 U.S.C.A. s 1502 (2001).

205 Except when a constitutional taking was established, the Commission was limited to awarding actual damages measured by the fair market value at the time of the wrong. Interest from the date of the wrong would have added a considerable amount to the damage awards. See Tee-Hit-Ton Indians v. United States, 348 U.S. 272 at 285 n.17 (1955) (noting that interest on claims pending would bring damages in all pending cases to $9 billion).

206 See text accompanying notes 216-217.

207 See Creation of Indian Claims Commission, supra note 202.

208 Ibid. at 42 (testimony of Hon. Thomas P. Gore).

209 Ibid. at 42-43.

210 See ibid.; U.S., H.R. Rep. No. 1466 (1945); U.S., Indian Claims Commission Act: Hearing on H.R. 4497 Before the Senate Committee on Indian Affairs, 79th Cong. (1946).

211 See H.R. Rep. No. 1466 (1945) at 1-3.

> to them .... At the present time there is no legal forum open to the Indians .... The United States Court of Claims has held in the Jaeger case that the courts of this country are not open to the Indians.[212]

Of course the treaty exclusion was an actual and substantial barrier to Indian claims, and the Indian Claims Act removed it.[213] The Act established the Indian Claims Commission to address the very large number of claims that had accumulated over the past century and a half. Nor did the confusions prevent Congress and the Interior Department from recognizing and attempting to address several other barriers to adjudicating Native American rights. The Indian Claims Commission was to recognize a broad array of wrongs, including claims based on executive orders of the president, or those that would result if Indian treaties and other agreements "were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake," or "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."[214] Neither statute of limitations nor laches was to bar any claim.

As our analysis above shows, the new statute was needed to remove the treaty exclusion from the Tucker Act, not to accord to treaty parties capacity to enforce treaties (or any other cause of action). Recognition in making the treaties did that. However, the statute adopted a broad definition of tribal plaintiffs empowered to bring claims: "Any tribe, band, or other identifiable group of American Indians."[215] This definition encompassed tribal groups whose previous legal status had been uncertain.

In practice, the Act had several shortcomings, most of them limitations on remedies. Judgments for tribes were in 19th century dollars without interest or compounding for changes in the value of the currency.[216] Even this stingy measure was reduced by deducting as offsets federal expenditures for tribes,many of which were of little actual benefit, and all of which were made during the very period when tribes were denied any recompense for the use of their property by others. The Act allowed no remedies other than inadequate damages, though many tribes would have preferred land restoration. And distribution of judgment funds rarely made any investment in a tribe's future, assuring that tribal poverty and related social ills would soon return.[217]

---

212 U.S., Cong. Rec., vol. 92, at 5317-5318 (20 May 1946) (Rep. Robertson).

213 See supra notes 196, 204 and accompanying text.

214 Act of 13 August 1946, c. 959, Pub. L. No. 726 s 2, 60 Stat. 1049 at 1050 (formerly codified at 25 U.S.C. s 70a).

215 Ibid.

216 See Vine Deloria Jr., Of Utmost Good Faith (San Francisco: Straight Arrow Books, 1971) at 142.

217 The claims process has had many critics, often focusing on lack of any remedy to restore land in kind. See e.g. Vine Deloria Jr., Behind the Trail of Broken Treaties (Austin: University of Texas Press, 1985) at 226-227. See also Nell Jessup Newton, "Indian Claims in the Courts of the Conqueror" (1992) 41 Am. U. L. Rev. 753 at 764-

Federal Question Jurisdiction

From the nation's founding, many legal wrongs to tribes violated federal law, or in jurisdictional terms, arose under federal law. These are within the federal judicial power, but Congress did not give federal trial courts original jurisdiction over general federal claims until 1875.[218] Until that time, federal question cases had to be filed in a state trial court or to be based on federal diversity jurisdiction that excluded Indians and tribes.[219] The 1875 statute allowing federal question claims to be filed in federal trial courts was limited, however, by a minimum jurisdictional amount in controversy of $500, raised to $2000 in 1887, to $3000 in 1911, and to $10,000 in 1958.[220] This was an obvious barrier to some tribal and Indian claims.

Tribes gained special access to federal courts when Congress enacted 28 U.S.C. s 1362 in 1966.[221] This statute provides original jurisdiction in federal district courts of federal question claims brought by Indian tribes regardless of the amount in controversy. No other plaintiff (save the United States itself) then had this right; others' general federal question claims not satisfying the jurisdictional amount could be filed only in state courts.[222]

As explained above, this statute was not needed to accord tribes capacity to sue, and its legislative history is consistent with this assertion. The only purpose stated was to give tribes access to federal district courts in federal question cases not meeting the jurisdictional amount; the history assumes that tribes could sue under prior law when their claims met the jurisdictional amount.[223] Like the Indian Claims Act, the 1966 statute has a broad definition of eligible plaintiffs: "Any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior." This definition, coupled with a later statute and regulations,[224] has created greater certainty for tribal plaintiffs that had lacked official recognition in a treaty or prior statute.

---

765 (Sioux Nation's refusal to accept claims judgment as payment for taking of Black Hills).

218 See Fallon, Meltzer & Shapiro, supra note 33 at 33, 36.

219 Ibid. at 36; see text accompanying notes 46-47 and 136-137.

220 Fallon, Meltzer & Shapiro, ibid. at 880-881.

221 Act of 10 October 1966, Pub. L. No. 89-635, 80 Stat. 880 (codified at 28 U.S.C. s 1362 (2000)).

222 See Fallon, Meltzer & Shapiro, supra note 33 at 878-881.

223 See U.S., Indian Tribes,Civil Suits, S. Rep. No. 1507 (1966); U.S., H. Rep. No. 2040 (1966). The Senate Report stated that a purpose of the bill was to overcome the decision in Yoder v. Assiniboine & Sioux Tribes, 339 F.2d 360 (8th Cir. 1964), which denied federal district court jurisdiction for lack of the required amount in controversy but did not question tribal capacity to sue (S. Rep. at 5).

224 See text accompanying notes 169-170.

In 1980, the general federal question statute was amended to remove the jurisdictional amount for all plaintiffs (including individual Native Americans).[225] Thus the 1966 Act is of minimal importance today.[226]

V CONCLUSION

Assertions that Indian tribes, and at times individual Native Americans, lacked capacity to sue in American courts were a frequent part of the long and difficult struggle for Indian causes to have their days in court. We cannot know how many lawsuits were not brought because of this belief, but it was one of the many obstacles tribes faced in their quest for justice. However, unlike barriers such as poverty, lack of federal jurisdiction, racial hostility, and demoralization, the incapacity claim had no basis in fact or law. It arose from a mix of rhetoric by assimilationist do-gooders, a disgraceful attempt by an 1891 Court of Claims judge to justify denying tribal defendants due process of law, and an accidental 1845 dictum by New York's chancellor. Whenever the capacity issue came to the U.S. Supreme Court, the Court rejected the claim without a dissenting vote. While impossible to quantify, the capacity gaffe was part of the complex legal forms used to justify depriving Indians of land, described perceptively and ironically by de Tocqueville: "It is impossible to destroy men with more respect for the laws of humanity."[227]

---

225 See 28 U.S.C.A. 1331 (2001) (text and annotations).

226 Tribes and Indians faced another barrier when they sought to recover land in federal district court based on federal question jurisdiction. The Supreme Court had held that origin of title in a federal statute did not raise a federal question unless the complaint alleged an issue about meaning of the statute. Taylor v. Anderson, 234 U.S. 74 (1914); Shulthis v. McDougal, 225 U.S. 561 (1912). Lower courts applied this rule to deny jurisdiction over tribal claims that land was taken in violation of the federal nonintercourse statutes until the Supreme Court reversed in 1974, holding that tribal ownership under these statutes is a federal question. Oneida Indian Nation of New York v. Oneida (County of), 414 U.S. 661 at 665-667 (1974). However, these decisions raised no issue about capacity to sue.

227 Alexis de Tocqueville, Democracy in America, ed. by Phillips Bradley, trans. by Henry Reeve, rev. by Francis Bowen (New York: Alfred A. Knopf, 1980) vol. 1 at 355.