

INTRODUCTION

This book is about the legal issues that concern Native Americans, as seen from a broad, interdisciplinary perspective. It goes beyond doctrine—the usual concern of judges and lawyers—to focus on the cultural, historical, and social reasons why indigenous and settler groups are so often in conflict.

Many articles in the field of federal Indian law analyze doctrine, or rules; few, however, discuss how the rules affect Native American people. Indeed, many scholars and lawyers write about federal Indian law without ever having visited a tribal community. The premise of this book is that, while knowing the doctrine is important to understanding the field, it is not enough. Local and regional context is also important because *place* matters. From place one gets a better idea of the legal issues that tribal people face on a daily basis. While these issues are often far different for rural and urban tribal people, these groups share the status of comprising part of the growing number of persistently poor people in America.

Legal scholars could address place by incorporating more of a Native American perspective into doctrinal scholarship. There is disagreement, however, on the value of this effort. Some scholars consistently overlook or ignore the issue of place and perspective in their work, even though they may agree about its importance otherwise. Others, especially those who regard judges as their audience, see no clear benefit to incorporating Native American experience or narrative into their work. Instead, they point to the main risk of allowing this *subjective* evidence into the dis-

Throughout the book, numbered notes in the text refer to end-of-chapter notes, which appeared in the original texts; text marked with asterisks, daggers, or double daggers refer to the editor's footnotes at the bottom of the page where the symbols appear.

puting process: namely, the risk of undermining the consistency of the rules themselves. If judges are not interested in subjective information, or alternatively if judges treat Native American experience as largely irrelevant to the disputing process, they argue, then why should legal scholars concern themselves with such information? From this perspective, federal Indian law becomes a conceptual system, self-contained and only vaguely related to actual historical time, community, or geography. The field gets saturated by abstract discussions of doctrinal topics that minimize the steady resistance of Native Americans to U.S. land policy. This doctrine-bound approach presupposes that legal rules are a more powerful force than actual experience when it comes to shaping Native American identity, action, and consciousness.

In a sense, scholarship that does not or will not consider the Native American experience is a gateway to a realm where indigenous interests are sympathized with but not taken seriously in their own right, and indigenous actors are pitied for representing a “dying” way of life, but not listened to as people who may have solutions to contemporary problems. Scholarship from this quarter rarely recognizes or acknowledges what is innovative about Native American approaches to the law. If anything, it obscures the issue.

Yet much of what keeps indigenous communities alive stems from stamina and innovation, some of which, at least historically, was forced by lack of money and opportunity. If, as the old saying goes, necessity is the mother of invention, then Native Americans have led the way, for at least two centuries, in innovating conservationist, community-centered responses to a national land policy: Doctrinal work that overlooks Native American experience tends also to overlook the innovative quality and the spirit of the Native American contribution to American law.

In rural communities, the poverty Native Americans face can be crushing. Sherman Alexie’s stories and novels, one of which is included in Chapter 2, and Mary Brave Bird’s autobiographies, cited in Chapter 5, convey what it means to be excluded from even the most basic opportunities in one’s own country. The urban Native American experience, for its part, has not been fully described, much less understood; hence, it cannot be represented in this format. Nevertheless, as more Native Americans enter the legal profession, as they are doing, then legal scholarship cannot help but be influenced by what Patricia Nelson Limerick calls work that takes where one comes from seriously.¹

Existing Native American scholars already understand that what shapes Native American consciousness is the land. They are willing to explore the complexities of communities under colonialism, specifically how stamina and intelligence intertwine with the despair and hopelessness that undergird poverty. They value personal narrative, understanding that just because they are educated in a formal sense does not mean that they are the only ones in their community with something to say. This means, by corollary, that Native American lawyers are more likely than their nonnative counterparts to seek out tribal historians and leaders, and to qualify them as experts. Native American scholars and lawyers alike show a preference for revisionist work, understanding that it can reveal new sources of evidence. Like new Western historians generally, they focus on symbolic sites, as

well as on empirical or practical sites, coupling questions of symbolic meaning with those of actual meaning.

This book contextualizes some of the most symbolically important, if not contested, areas of federal Indian law, raising selected topics in a way that makes them accessible to people who have little or no prior knowledge of the field. Many topics and issues are not explicitly covered because of a lack of space: hunting and fishing rights, jurisdiction, gaming, to name just a few. These topics are just as important as the topics included here; it is hoped that this book will encourage someone to present them in a similar format. Similarly, issues pertaining specifically to Alaskan Native and Native Hawaiian communities are not covered in this volume, primarily for space reasons. These areas are critically important to the field of Indian law because detailed postcolonial historical accounts and legal challenges are emerging from them. As small consolation, I cite several sources throughout the book that may lead one in the direction of more specialized treatments and bibliographies than I can give here.

The book's organizing focus goes beyond the usual doctrine-driven discussions to include history, anthropology, ethnohistory, biography, sociology, socio-legal studies, feminist studies, and fiction, on the theory that doctrine too often clouds what is really at stake. As a whole, excerpts in this book give a new look at a very old field: Each has explanatory power; each reveals either some aspect of Indian law or some underlying aspect of how Indian law is made, understood, and implemented. All excerpts are taken from an extensively footnoted original text. I urge those of you with a deeper interest in the area to read those original texts, both as source material and bibliography.

As a word of caution, the bibliographical sources I provide here are designed to introduce students to the field. Some of the best sources for this purpose are not necessarily the most recent sources. I make no claims to offer the most up-to-date bibliography in the field, nor do I offer a critical bibliography. If a source within my field of focus was not accessible to a general audience, I tended to omit it rather than to cite it with a critical annotation. Law review articles were the one exception to this practice. Law review articles as a genre are long, dense, and heavily footnoted; there are literally thousands of articles on federal Indian law, and several journals devote themselves exclusively to the subject. So though I can make no promises about the accessibility of the law review articles I chose to cite, I can say that they were selected with both content and style (accessibility) in mind.

Of general importance are works written by leading Native American intellectuals such as Vine Deloria Jr., Dr. Rennard Strickland, Robert A. Williams Jr., John Borrows, and Rayna Green. These writers have extensive, innovative bodies of work. Gloria Valencia-Weber, Christine Zuni, and S. James Anaya, to name just a few, have also made invaluable contributions to the field, and serious students of federal Indian law should follow their work as it appears. Robert Allen Warrior's books, *Tribal Secrets: Recovering American Indian Intellectual Traditions* (1994) and *Like a Hurricane: The Indian Movement from Alcatraz to Wounded Knee* (1996), which he coauthored with Paul Chaat Smith, are well

worth reading. These American Indian scholars bring a perspective to federal Indian law that is shifting it away from its focus on doctrine, and its rule-bound reluctance (almost fear) to take seriously the Native American side of the story, to a new focus on Native American peoples, concerns, ideas, intellectual traditions, criticism, perspectives, hopes, contexts, and strategies for building community and bringing about change.

One trait that links these writers is that they understand, to paraphrase Vine Deloria, that leaving the Indians out of Indian law is a serious flaw in a system of justice, especially one that supposedly exists to recognize indigenous rights and help administer tribal property. Another shared trait is that these writers start from the premise that scholars who think Native American experience ought to shape itself to doctrine and bureaucratic decision making are wrong; it ought to be the other way around.

Although this book is not about doctrine, it refers to many doctrinal areas. There are several useful treatises and casebooks on doctrine, including the *F. Cohen, Handbook of Federal Indian Law* (1982 ed.)—a guide to U.S. legal doctrine and statutory law related to areas such as land title, jurisdictional issues (federal, tribal, and state), hunting and fishing rights, tribal governmental powers, and other legal questions that come up in federal Indian law. *American Indian Law In a Nutshell* (1981), by William C. Canby, Jr., a judge on the U.S. Ninth Circuit Court of Appeals, is an accessible West Nutshell series book well worth consulting. Two casebooks exist in the area: the widely adopted Wilkinson, Getches, and Williams, *Federal Indian Law* (3d ed., 1993), and Clinton, Newton, and Price, *American Indian Law* (3d ed.) (1991). In addition, *Indigenous Peoples in International Law* (1996), by S. James Anaya, provides an important starting point for placing federal Indian law within the broader context of international law.

As a final general note, there are a few classic texts about the legal relationship between Native Americans and the United States. *The American Indian in Western Legal Thought: Discourses of Conquest* (1990), by Robert A. Williams Jr., covers the entire period of conquest, paying particular attention to what Williams calls the “West’s will to empire.” Also on this topic is David E. Stannard’s, *American Holocaust: The Conquest of the New World* (1992). *American Indians, Time, and the Law* (1987), by Charles F. Wilkinson, is about federal Indian law doctrine and the various historical forces that have shaped or scattered it over time. The more compelling *American Indians, American Justice* (1983), by Vine Deloria Jr. and Clifford M. Lytle, covers the same topic. *God Is Red: A Native View of Religion* (2d ed., 1992), by Vine Deloria Jr., takes up the challenge of explaining tribal senses of spirituality to nontribal readers; there is no better, more direct, more insightful book on this topic. The same is true of *Custer Died for Your Sins: An Indian Manifesto* (1988), also by Deloria. These works, especially if read together, are a good starting point for understanding contemporary conflicts between indigenous and nonindigenous settler groups in the United States.

This reader covers six important and far-reaching topics. The first is identity: Who is and who is not a Native American for federal law purposes? The second is reparations: How did the United States try to compensate the indigenous people

of this country for the harms of conquest, and how successful was the attempt? The third is incommensurability, or the question of whether there are some points on which tribal interests and the broader U.S. interests may never easily converge. The fourth is cultural property: How was cultural property lost by Native Americans during the conquest, and how can that property be returned? The fifth chapter is about gender and its relationship to tribal governance. Finally, the sixth chapter discusses litigation strategies in religious freedom cases.

The book opens with excerpts about cultural identity, a hotly contested topic in which point of view is everything. In most instances, the colonization of Native American communities by local and state settler populations was brutal. Native Americans were repeatedly pushed aside to make way for nonnative development and expansion; both state and federal law facilitated this displacement, as did federal military might. In the eyes of the law, Native Americans were noncitizens who could be disregarded by those who made and administered the rules. Indeed, Native Americans were not granted U.S. citizenship by status of birth until the Indian Citizenship Act of 1924, making them the last American-born ethnic/racial group to be formally incorporated into the body politic.²

Because of the utter disregard that U.S. custom and law often had for Native American persons and communities, it is no surprise that tribal groups in disputed areas were collectively and individually discreet about their tribal heritage; or, in some cases even ashamed of it. Things are changing. Some groups and individuals are reclaiming a tribal identity, and that effort is often controversial. This is especially true where emerging tribal groups are biologically multiracial, or religiously and educationally multicultural.

Chapter 1 analyzes tribal reclamation. It looks at a case involving the Mashpee Wampanoags, an eastern Native American group that decided to reassert its tribal identity in order to regain control of what had once been tribal land. Using Mashpee as an example, the chapter considers the ways in which identity, doctrine, and scholarship (particularly anthropology and history) facilitate or hinder discussions of the relationship between political status and cultural identity. While the Mashpee tribe, along with other tribes in the eastern United States, California, and other geographic areas where European/American colonization was especially fast paced, represent one aspect of the Native American experience, there is another facet, which Chapter 2 presents.

Chapter 2 gives an overview of the Indian Claims Commission Act and the Indian Claims Commission (ICC), which was the administrative body set up to implement the ICC Act.³ Passed by Congress in 1946, the ICC Act opened the U.S. to lawsuits by Native American tribal groups for claims arising out of (1) law, (2) equity (which is to say law modified by standard legal notions of fairness), (3) fraudulent dealings, (4) compensation for lost property, and (5) moral claims. Before the ICC Act's passage, Native American tribes could not sue the United States without first getting permission from Congress in the form of a special jurisdictional statute. While it may have been difficult for citizens across the board to sue the United States, the exclusion of Native Americans from the federal courts was particularly repressive, given the United States' colonial and "frontier" history.

But would it have been possible for the U.S. legal system to deliver justice to Native Americans under the ICC Act? If the promise of the ICC Act had been fully realized, would justice have been served? *Could* it have been served? Chapter 3 raises these questions by introducing the idea of constitutive incommensurables, or symbolic property. Symbolic property is property that is not easily comparable with money. Land, friendship, parent-child relations are all examples of constitutive incommensurables in contemporary American society. For some groups, or in some instances, these things go to the heart of cultural identity and so courts predictably refrain from equating them with money. But because law can be obscuring particularly across cultures, the idea of land as a constitutive incommensurable can better help us understand some Native American legal claims. Chapter 3 looks at land as a constitutive incommensurable. It also considers two specific Native American efforts to protect land and participate in land-use planning, despite the challenges of communicating tribal values about land to the dominant society's agents—bureaucrats, judges, lawyers, and the like.

Chapter 4 considers the topic of tribal cultural objects, specifically who owns them, who is legally entitled to them, and how Native Americans lost possession of them. It does this in the context of the Native American Graves Protection and Repatriation Act, or NAGPRA for short.⁴ One result of the conquest was that there was a Native American diaspora; another was that Native Americans lost land, as well as the opportunity to get full return of their land. After the full force of military conquest had come to a close, although Native Americans had the formal opportunity to bring claims for return of land under the ICC Act, they were effectively barred under state property laws from suing for the return of lost or stolen cultural objects. In fact, one often-ignored result of conquest was that Native Americans lost, misplaced, or were dispossessed of vast quantities of personal property. Much of this property had special religious, cultural, tribal, and personal significance to its original tribal owners. Some of this “property” was not ethnically categorizable as property at all, neither then nor now—for example, the human skeletons and remains that were routinely stolen by nonnatives for personal or scientific gain. Chapter 4 discusses the ways in which Native Americans were dispossessed of this tribal personal property, telling the considerably troubling account of how nonnative grave diggers, explorers, physicians, and anthropologists desecrated Native American graves, often in the name of science.

NAGPRA's intent is to redress the loss of tribal personal property. However, whether NAGPRA will be fully implemented will depend upon how tribal governments and courts rise to the challenge of defining and implementing key terms under the Act. Since the integrity and strength of tribal governments will be crucial making NAGPRA work, Chapter 5 takes a look at tribal governance and specific issues related to gender that arise under the Indian Civil Rights Act, or ICRA.⁵

Chapter 5 begins with an overview of the scholarly literature about Native American women—an important perspective because too often, as discussed in earlier chapters, it is *this* literature that law takes as descriptive of Native American reality, and particularly of Native American *women's* reality. In con-

temporary American society, women do not easily assume national political roles except as helpers of their male partners. First ladies in the United States, for example, are increasingly qualified to serve in the presidential role, and yet—for many complicated reasons—they do not. In American tribal societies, by contrast, the evidence shows that women often assume the role of political leadership. Native American feminists explain this by noting that Native American women have a long history of holding the reins of leadership, whether “formally” or “informally,” in tribal societies. Of course, this history is stronger in some tribes than in others, but it is empirically observable nevertheless.

Colonialism has touched every aspect of tribal life, hence Chapter 5 examines political and legal *tribal* regimes that Native American women find themselves living within today. Emphasis is on how particular doctrinal and tribal legislative changes have affected women’s lives and access to resources, power, and avenues of participation in the Diné (Navajo) Nation, one of the largest Native American nations in the United States. Finally, the chapter links questions of perception, leadership, and law to tribal legislative strategies for addressing domestic violence.

The theme of Chapter 6, the final chapter, is the ongoing legal struggle for religious freedom that Native Americans have waged against both the federal and state governments. The chapter takes up two broad forms of contested religious expression: the sacramental use of peyote by Native American Church practitioners, and the use of sacred sites by more “traditionally traditional” religious groups. The American Indian Religious Freedom Act, or AIRFA, which passed in 1978, should have protected these expressions,⁶ and while it did in principle, it offered no protection in fact. AIRFA’s rejection by the U.S. Supreme Court is documented in two cases: *Lyng v. Northwest Indian Cemetery Protective Association*⁷ and *Employment Division, Department of Human Resources of Oregon v. Smith*.⁸ Chapter 6 briefly examines Native American litigation strategies in land/religion cases.

Despite losses in these cases, Native Americans continue to respond to the steady force of law that has been brought against them, especially in relation to the national land policy. Indeed, their responses over the past several hundred years show a consistent pattern of legal innovation that is nothing short of inspirationally astounding, especially when one considers the injustices, the obstacles, the change, the sorrows, the loss, the poverty, the emotional struggles, the anger, the lack of opportunity, and the racism they encountered along the way. Indigenous legal stories are core parts of American history. Much is lost when they are treated as a backwater, or dismissed as “too sad,” “too ethnic,” or “too remote.” Indeed, Native Americans’ legal relationship with the United States has not defined Native American identity so much as it has defined American identity, at its core.

Throughout the book, I primarily use the term “Native American” because it is the term I prefer, though I sometimes use the term “Indian” when referring to statutes, since that is the phrase legislative enactments typically use. Others prefer other terms, such as “American Indian” or “Indian,” a preference I am comfortable with. Some say that anyone born in America is a “native” American.

Fine. But by my use of the word “native” in relation to the word “American,” I mean any indigenous group, or *any* group with a long-standing history vis-à-vis a particular place in the Western hemisphere, any group that self-identifies as indigenous to the Western hemisphere, and any person who has a substantive (and not just blood) connection to such a cultural group. Blood may be thicker than water, but culture is pretty thick too.

Finally, this book is admittedly concerned with broad themes of justice and injustice, since it is, after all, a book about law. Lawyers administer the American system of government in various substantive ways and at all different systemic levels. Lawyers also make up a good percentage of the total pool of legislators, administrators, policy analysts, and the like. While other fields have the privilege of declaring that justice is an outmoded or overdiscussed topic, the field of law does not. In fact, one could argue that justice, and not just rule making and rule applying, ought to be at the heart of any legal endeavor, especially one such as federal Indian law where relative differences in legal power are so noticeable. If this is true, then one of the quandaries of federal Indian law is that so little justice for Native Americans has come from such a long history of treaty making, rule making, and litigating. Students, ironically, start out knowing that justice matters; lawyers and professors, perhaps because they are embroiled in the equities and doctrines of specific cases, too easily forget. Ultimately, the purpose of this book to help you remember.

NOTES

1. Limerick, Patricia Nelson, Clyde A. Milner II, and Charles E. Rankin, eds. *Trails: Toward a New Western History*. Lawrence, Kan.: University of Kansas Press, 1991.

2. *Indian Citizenship Act of 1924, U.S. Statutes at Large* vol. 43 (1924): 253. This principle is currently codified at *U.S. Code* vol. 8, sec. 1401(b) (1994).

3. Former *U.S. Code* vol. 25, secs. 70-70(n). The Indian Claims Commission was terminated on Sept. 30; 1978, pursuant to *U.S. Code* vol. 25, sec. 70(v).

4. *U.S. Code* vol. 18, sec. 1170 (criminal provisions); and vol. 25, secs. 3001 et seq. (repatriation provisions) (1994).

5. *U.S. Code* vol. 25, sees. 1301 et seq. (1994).

6. *American Indian Religious Freedom Act of 1978, U.S. Statutes at Large* vol. 92 (1978): 469-470.

7. *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).

8. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

IDENTITY

The term “political minority” is used to describe the status of Native Americans in the United States, since federal Indian law is based on the political relationship between the United States and the Native American nations. But what is a political minority group? Does or should ethnic, cultural identity define political status? How should the legal system treat cases where cultural and political identity overlap? This chapter explores these questions by looking at the case of *Mashpee v. New Seabury Corp.*¹

Mashpee presents a complicated question about history and law. From 1776 to 1789, between the Declaration of Independence and the convening of the first Congress, each of the thirteen original states managed their Indian affairs separately. In 1789, the original states delegated their exclusive power to deal with Indian tribes to the newly formed federal government via the United States Constitution. In particular, the Constitution granted Congress the authority to regulate Indian commerce, an area that included land sales and transfers. Congress acted on this authority by enacting the first federal Indian Trade and Intercourse Act in 1790.² There were six such acts between 1790 and 1834 for regulating trade between Indians and non-Indians. The first act is significant, however, because it voided transfers of land “from any Indian nation or tribe of Indians” that were not approved by the federal government. Under this void title provision, not even the span of 150 years or more could make bad title good, as the *Oneida*³ and *Passamaquoddy*⁴ cases decided. The 1834 act is the last and enduring one.

In 1832, the first Indian law case of *Johnson v. McIntosh* ratified the authority of the federal government as the source of all land title in the United States.⁵

Johnson held that title to all land within the United States originated with the federal government, not with the states or the Indian tribes. States or settlers could still buy land directly from Native American grantors, but they could no longer legally expect the United States to stand behind such title in case of a dispute. Moreover, since the United States had priority after *Johnson*, if the United States happened to convey the same land, later in time, to a different person, then the legal result would be that the *later* grantee—and not the Native American grantor's grantee—would take good title under a rule known as the “first in time, first in right.” In order for states or settlers to secure their future right to possession and exclusivity then, they had to take from a chain of title that commenced with the United States. Land title that did not originate with the United States was void or voidable, and thus subject to the claims of bona fide purchasers who could trace their title back to a grant from the federal government.

Johnson v. McIntosh is one of the most widely read cases in federal Indian law. It catalogs the sources of legal authority that the federal government originally used to justify its control over Indian land and affairs. The line of authority starts with the Doctrine of Discovery, a doctrine that European discoverers first used among themselves to negotiate jurisdiction rights to the Western hemisphere, and then proceeds through the Constitution and the Trade and Intercourse Act. England's rights to jurisdiction passed to the original thirteen states upon independence and the states subsequently transferred their rights to the federal government through the U.S. Constitution. In later years, the federal government further defined its power over Indian tribes through specific statutes, executive orders, court decisions, and administrative regulations.

Federal authority over Indian land presumes a preliminary finding that the community in question is indeed a tribe. This finding required little analytical nuance at the land cession stage when the presence of a treaty or the setting aside of a reservation was enough to prove that a group was a tribe. But the issue of tribal identity predictably became more complicated at the annuity distribution stage, particularly on the issue of who was an Indian for trade purposes. Today, the issue remains complicated and is often contested. Sometimes the issue is litigated, as in *Mashpee*, but more often it is decided by the federal Bureau of Indian Affairs (BIA), which employs a staff of professional anthropologists, historians, and ethnologists to decide claims of tribal status. This change was made in direct response to the outcome in *Mashpee*.

The Mashpee Wampanoag, of what is now the state of Massachusetts, had early contact with English settlers and, like many other Native American groups, survived disease, decimation, and violence in this period. In the nineteenth century they voted to subject their tribal lands to Massachusetts state law, a vote that opened up their tribal land for private sale. By the turn of the twentieth century, what had once been tribal land was in the hands of non-Mashpee owners. Nevertheless, the Mashpee still controlled the local political process since the new absentee landowners were summer residents who were not registered to vote in the Town of Mashpee. As more and more permanent residents moved into the Mashpee area in the mid-twentieth century, the Mashpee lost political control of

the Town of Mashpee. They responded to this political loss, in part, by making a Non-Intercourse Act claim in federal court. They argued that since they were an Indian tribe for purposes of the Non-Intercourse Act and their land had been conveyed without prior federal approval, the unapproved conveyances were void or voidable. If this were indeed so, then the proper remedy for the tribe's claim was forfeiture, which is to say return to the Mashpee of roughly 11,000 acres of land.

The Defendant Town of Mashpee countered the suit by arguing that the Mashpee were not an Indian tribe for purposes of the Non-Intercourse Act. This defense was sufficient to set aside the Non-Intercourse Act claim so that the merits of the tribal identity issue could be litigated. Because the United States had not formally recognized the tribe's status as a political minority, the Mashpee had either to get BIA recognition as a tribe or else to litigate the issue of their status *before* they could pursue their land claim under the Non-Intercourse Act.

The Non-Intercourse Act of 1790 contemplated clear political divisions between tribal groups and nontribal groups. Even though the Mashpee had accepted federal support for certain benefits, like education, there were no political divisions on record since the federal government had never entered into a treaty with the Mashpee or otherwise formally acknowledged the group's tribal status. Nor had the Mashpee ever acknowledged their own sovereignty in the standard way of reaching out as political entities to England or the United States. To the contrary, it became known at trial that the Mashpee Wampanoags had fought against another Wampanoag, Metacomet (a sachem known as King Philip), in King Philip's War, which was the largest Wampanoag uprising against the English colonizers. Metacomet and his followers were annihilated, a fate the Mashpee Wampanoags would have met too, had they followed Metacomet. Instead, the group survived and 300 years later found itself in a legal catch-22. Had the Mashpee Wampanoags fought with Metacomet they would not have lived to bring their lawsuit, but the evidence that they had not fought with their Wampanoag relations was used at trial to show that the Mashpee had thus taken the first step of what historian Francis G. Hutchins characterized as their slow march toward full participation in U.S. society.⁶ With history against them, the Mashpee needed a judicially crafted definition to prove their political minority status. They chose one first articulated in the 1901 case of *Montoya v. United States*.⁷

The *Montoya* case involved Victorio's Chiricahua and Mescalero Apache band and took place in the nineteenth century. In this period, the United States had used considerable military force against Native Americans in general and the Apache in particular, since they were the last military challengers to settlement policies.⁸ *Montoya* defined an Indian tribe as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." Over time other standards have also determined "Indianness." Many tribal enrollment standards, for example, turn on a federally initiated blood-quantum system, with the minimum quantum eventually set by the tribal government itself. But *Montoya* was a depredations rule, which means that it determined when tribes in amity with the United States were liable for the hostile acts of their members.

The *Montoya* standard fit *Mashpee* badly, to say the least. First, the Mashpee were suing for the return of aboriginal land that had been transferred from the Wampanoags to private Massachusetts citizens in contravention of the federal Non-Intercourse Act; they were not being sued by settlers for depredations. Second, the Mashpee were trying to enforce legal guarantees reserved to tribes under the Non-Intercourse Act, whereas *Montoya* involved Victorio's Band, a band that was systematically excluded from any legal benefits under the American system as further punishment for its military resistance against the United States. Third, the Mashpee were an eastern group, one of the first tribal groups to have contact with the English, whereas the Apache were a western group, one of the last to concede military defeat to the United States. On the surface, the Apache fit stereotypical images of Indianness produced by nineteenth-century Westward expansion. The Mashpee did not.

Indeed the Mashpee fit almost no stereotypical images of Indianness. They were not what historian Robert M. Utley calls "horse and buffalo Indians";⁹ they did not wear their hair in braids; they did not live in tepees or wigwams; they did not engage in armed conflict against colonial forces, despite their disputed claim to having fought with Metacomet against the English. Ironically, *had* the Mashpee met these images, they probably would have prevailed before the jury. But because they didn't—in fact, some of the Mashpee plaintiffs had land development businesses, college degrees, investment strategies—their claim to tribal status was fiercely contested. The Mashpee had to prove they were a tribe under *Montoya*, a difficult task in part because the Mashpee did not clearly meet all elements of the four-part test articulated in *Montoya*.

Montoya turned on four elements of proof. The first element called for a group of the same or similar race. The Mashpee, for their part, had intermarried with other ethnic groups, most notably with African Americans, and as a group they had not retained the Wampanoag language, spiritual customs, or kinship patterns. Second, *Montoya* required a territorial land base. The Mashpee had no such base, since they had voted to assume formal township status under Massachusetts law in 1869 and thus open up their tribal land to sale. Part of this lost tribal land was the very land whose conveyance they now argued was voidable under the Non-Intercourse Act.

Third, *Montoya* required evidence of a political organization or formal leadership of some sort. From 1869 to roughly 1964, the Town of Mashpee had been governed by local officials who happened to be of Mashpee descent, but who had not governed *as an Indian tribe*. Instead, the Mashpee had loose associations that they presented as political institutions for purposes of *Montoya*. Whether these hearth-style associations were sufficient to meet the *Montoya* test was hotly debated at trial. The Mashpee argued that their identity was Wampanoag and hence all their political expressions were by definition tribal. The defendants countered that culture and politics were separate, and they pointed out that while historically Mashpee had been designated an "Indian town," in the twentieth century Mashpee functioned for all intents and purposes like any other Massachusetts town along Cape Cod.

While the Mashpee presented a long history of informally recognizing and following Wampanoag tradition, they also presented a twentieth-century record of adopting pan-Indian traditions. These traditions grew into events such as powwow festivities, and they were vaguely, unself-consciously recorded in local history as conscious points of cultural reinvention. So while the Mashpee could not prove their political status as Indians under *Montoya*, they could prove that they regarded themselves *culturally* as Wampanoags, and also as contemporary Native Americans following pan-Indian traditions.

The *Mashpee* case raises profound and lingering questions about identity, assimilation, American Indian nationhood, and the ethics of making indigenous people prove they are entitled to political minority status. Who is a Native American? What is a “tribe” for purposes of federal law? Who gets to ask these questions and who gets to answer them? If people of tribal ancestry must prove their political, institutional authenticity, what form should the proof take? Is polymorphous evidence of “culture” sufficient to show political status as an inherent tribal sovereign, or does federal law require more? Does it require, for example, proof of institutions that non-Indians can recognize? If so, is this another way of imposing cultural change on Native Americans, this time by requiring that indigenous political institutions take certain forms and follow certain processes?

The readings in this chapter offer illustrative answers to these questions. The first excerpt is from James Clifford’s “Identity in *Mashpee*.” Clifford’s piece places the *Mashpee* litigation in a broad debate about epistemology, or how it is that practitioners of particular disciplines produce scholarship. Using information observed at trial, Clifford identifies the theoretical difficulties inherent in having courts scrutinize political status claims. He also catalogs and analyzes the expert testimonies that were offered at trial.

The next excerpt is by Francis G. Hutchins, a historian who testified on behalf of the defendants in *Mashpee*. For Hutchins, the Mashpee plaintiffs did not meet the *Montoya* standard and hence were not legally entitled to federal protection under the Non-Intercourse Act. Hutchins based his testimony on historical documents, not on fieldwork or other methods of information gathering. From these documents he concluded that the Mashpee had abandoned their tribal status. According to Hutchins’s argument, the abandonment took place over several centuries, provable by documented moments reflecting the Mashpee’s decision to move into the mainstream. Refusing to side with Metacomet was one such historical moment. Another occurred in 1869, when the Mashpee elected by a split vote to assume formal township status under Massachusetts law, and thus open up their tribal land to sale. Encouraging the mid-twentieth-century development of the Town of Mashpee was the third turning point. Hutchins regarded these incidents as proof that the Mashpee did not consider themselves a political minority or a political sovereignty, even though they did identify culturally as Mashpee Wampanoags.

As Hutchins saw it, the issue was not whether the Mashpee plaintiffs were an American Indian tribe in some vague cultural sense, but rather whether they were a tribal unit in a concrete historical sense. If they were, then they must have had

to maintain a government-to-government relationship with the United States according to the terms of *Montoya*, and so would be entitled to Non-Intercourse Act protection. If they were not a tribal unit, then they were politically like any other citizens of the state of Massachusetts, despite their Native American heritage. Finally, Hutchins testified that abstract discussions of culture were irrelevant to the *Montoya* standard, which he thought required documentary proof of a measurable and observable political structure, or system, of self-government. Hutchins noted that documentary proof of this sort was exactly what the Mashpee were missing. He argued that what the historical record showed instead was that the Mashpee had volitionally and intentionally abandoned their tribal status.

Jack Campisi presented the Mashpee's side of the debate. He testified that the Mashpee made their choices—for example the 1869 vote to assume township status—to survive, not to assimilate into a white society that shunned them on ethnic and racial grounds. Based on roughly a month of fieldwork, Campisi concluded that the trial process was not fine tuned enough to assess how choices such as siding with Metacomet or voting for township status related to Mashpee political identity.

On a theoretical level, Campisi's excerpt discusses how anthropology and law parted ways at trial. Anthropologists begin with the methodological premise that categories should be found, not imposed. They regard classifications and categories as socially constructed, and hence "subjective." Lawyers, on the other hand, are trained to objectify problems using prefigured categories. From a legal vantage point, prefigured categories may be socially constructed, but they are still regarded as more "objective" than case-by-case assessments. In law, this reach for objectivity is regarded as fair in typical cases, which Indian law cases are not.

Campisi explains how the parting of ways between anthropology, history, and law played itself out in the *Mashpee* trial. He also describes how it left in its wake anxious, possibly unanswerable questions about the ways in which experts construct knowledge. For instance, was Hutchins's testimony, which came from interpreting documents, *really* more objective than Campisi's fieldwork-inspired testimony, or Clifford's courtroom-inspired essay? Did it matter that the documents Hutchins analyzed had consistently been prepared by non-Indians, for non-Indian institutions? Was the purpose of cross-examination to uncover the truth, or just cast doubt on nuanced, self-reflective testimony by making it seem vulnerable, weak, and inconclusive?

Two waves of legal scholarship about *Mashpee* appeared in the law review literature. The first focused on doctrine.¹⁰ It took federal law as a given, and simply set out to discuss whether the Mashpee had or had not proven their case. The second wave, which appeared almost ten years later, was more concerned with understanding what happened in *Mashpee*.¹¹ It presented and analyzed how theories of identity, ethnicity, and race relate to doctrine. My excerpt—the last one in this chapter—summarizes the second wave of legal scholarship about *Mashpee*. It also points out the importance of using local evidence to help bridge the gap between methodologies that work by finding categories—like anthropology of the sort

Clifford and Campisi describe—and those, like law, that work by applying prefigured categories.

As long as the United States is in the business of using Native American status to distribute benefits and burdens, a new standard must be developed. One Australian writer has suggested that Aboriginal status, under Australian law, be granted to those who: (1) are a distinctive people, (2) have a long sense of history, whether it be their own history, their contact history, or the conflict history, (3) live in a process of changing culture that produces a sense of belonging, and (4) have a feeling of identity that becomes the basis for a philosophy, or an ideology, or a political stance in the world—a philosophy that allows the group to survive, exist, even flourish in the independent state in which it finds itself.¹²

Had this standard been applied in *Mashpee*, the Mashpee plaintiffs would have prevailed at trial. But since the court was both using *Montoya*, with its focus on race and political institutional maintenance, and valuing “contact history” over “conflict history,” the *Mashpee* lost their case. In other words, had the rules for deciding tribal status been explained in slightly broader terms than they were, decisions such as siding against Metacomet in King Philip’s War or voting for township status under Massachusetts law in 1869 could have been presented in fuller, more historically and psychologically contextualized ways, as strategies for survival in a colonial state. Evidence of informal, hearth-style consensus forms of governance might have been given more weight as well.

Identity and its relation to political status continues to be a pressing problem for Native Americans. The Indian Child Welfare Act, or ICWA,¹³ provides one example at the opposite extreme of *Mashpee*. ICWA is not covered in this volume, but it is an important statute that gives tribes authority to prevent non-Native Americans from adopting Native American children; it does this by giving the tribe the option to intervene in proceedings that involve a Native American child and a non-Indian placement.

In its 1978 form, ICWA did not require that states notify tribes in *voluntary* adoption proceedings involving Native American children.¹⁴ Some states—Washington, Minnesota, Oklahoma and Michigan, for example—supplemented ICWA with legislation requiring that tribes be notified in voluntary proceedings; other states—Utah, North Dakota—made it a standard practice to notify tribal authorities in such cases. But states could only disclose a child’s tribal heritage if the parents did so first. In cases where parents failed to disclose their cultural affiliation, bitter conflicts often arose over whether a tribe could intervene late in the adoption process. *In Re Bridget R.* was one such case.¹⁵

In *In Re Bridget R.*, a birth father decided not to reveal his tribal heritage since disclosure would implicate ICWA and slow down the voluntary adoption of his twin daughters by a non-Indian family. The father and his lawyer apparently felt justified in not disclosing the father’s tribal (Pomo) heritage because although the father was culturally recognized as a Pomo, he was not an officially enrolled member of the Pomo tribe. This fine distinction was exploited on the grounds that ICWA defines an “Indian” as “any person who is a *member* of an Indian tribe.”¹⁶

When the father's tribal relatives learned of the adoption proceedings, they notified the tribe, which intervened in the case. By the time the *In re Bridget R.* opinion was issued, the twins were almost three years old. The adoptive parents argued that parent-child bonding had occurred in the twins' early infancy; the tribe just as forcefully argued that the twins were being deprived of a political right—a right secured by principles of tribal sovereignty and ratified by ICWA—to be brought up with tribal birth relatives who, had they received notice of the proceedings from the outset, would have provided the children a home.

This short example is just one of many that illustrate that federal law has not adequately dealt with the issue of Native American identity and how it relates to political status. It is built on the nineteenth-century model that views tribes and tribalism as anathema to the direction that any reasonable, rational person would want to take. Current federal law cannot adequately resolve twentieth-century cases like *Mashpee*. But, as the ICWA example shows, neither can the law simply flip-flop from assuming a tribal identity is something no one in their right mind would claim, to assuming it is something that all who can would openly proclaim, regardless of the consequences. This failure to conceptualize the importance of identity is a central unresolved problem in the field of federal Indian law.

RECOMMENDED READINGS

On the *Mashpee* case, Paul Brodeur's journalistic 'account of the Mashpee as well as of other eastern Indian land claims cases, *Restitution: The Land Claims of the Mashpee, Passamaquoddy, and Penobscot Indians of New England* (1985), is well worth reading, Rona Sue Mazer's Ph.D. dissertation, "Town and Tribe in Conflict: A Study of Local-Level Politics in Mashpee, Massachusetts" (1980), analyzes a wealth of local Mashpee documents, "The Massachusetts Indian Enfranchisement Act: Ethnic Contest in Historical Context, 1849-1869," by Ann Marie Plane and Gregory Button, in *Ethnohistory* 40:4 (Fall 1993), gives a historical analysis of Massachusetts Indians in the colonial period. The Plane and Button article makes the important point that in colonial Massachusetts, policy affecting ethnic boundaries was linked to perceptions of ethnic identity, which is to say that lawmakers dealt with political and ethnic identity in similar ways. Jonathon Harr's *A Civil Action* (1996) gives yet another glimpse of Mashpee judge Walter Jay Skinner in action in a historically complex case.

In the law review literature, two additional studies about *Mashpee* are of interest. They are Gerald Torres and Kathryn Milun's "Translating *Yonnonidio* by Precedent and Evidence: The Mashpee Indian' Case," *Duke Law Journal* 625 (1990), and Martha Minow, "Identities," 3 *Yale Journal of Law & Humanities* 97 (1991). For relevant works that cite or briefly discuss Torres and Milun's article, see Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 *New York University Law Review* 1635 (1991); Cheryl I. Harris, "Whiteness as Property," 106 *Harvard Law Review* 1707,

1761-66 (1993); and Jane S. Schacter, "Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation," 108 *Harvard Law Review* 593, 624-26 (1995). Finally, Martha Minow discusses *Mashpee* in a civil rights context in her book *Making All the Difference: Inclusion, Exclusion, and American Law* (1990).

For general-interest books and articles about Native American identity, see "Place, Race, and Names: Layered Identities in *United States v. Oregon*, Confederated Tribes of the Colville Reservation, Plaintiff-Intervenor," by Susan Staiger Gooding. Gooding's article appears in 28 *Law & Society Review* 1181 (1994), in a Symposium issue titled "Community and Identity in Sociolegal Studies." For a related article that discusses Hispanic/Native American identity, see Luis Angel Toro's "'A People Distinct from Others': Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15," in 26 *Texas Tech Law Review* 1219 (1995).

More and more Native American autobiographies are being published, and many explicitly discuss the issue of identity and mixed ancestry. The references that follow are just a starting point for these contemporary works. Mi'kmaq poet Rita Joe has published *Song of Rita Joe: Autobiography of a Mi'kmaq Poet* (1996). Vincent L. Mendoza has a book titled *Son of Two Bloods* (1996); it depicts Mendoza's experiences as a Mexican American/Creek. Fiction writer Janet Campbell Hale's autobiography is *Bloodlines: Odyssey of a Native Daughter* (1993). Janet Campbell Hale's *The Jailing of Cecelia Capture* (1985) is a novel about a Native American law student. Activist Russell Means has a biography titled *Where White Men Fear to Tread* (1995). For accounts from social science interviews see *Messengers of the Wind: Native American Women Tell Their Life Stories* (1995), and Ward Churchill's *From a Native Son: Selected Essays on Indigenism, 1985-1995* (1997).

For a discussion about the vagaries of assessing tribal identity in the nineteenth century, especially in relation to prohibited activities under the federal Indian Trade and Intercourse Acts, see William E. Utau, *White Man's Wicked Water: The Alcohol Trade and Prohibition in Indian Country, 1802-1892* (1996). Utau's analysis is important because it provides evidence counter to the sometimes expressed contention that tribal status designations have become difficult only in the twentieth century. Mary Louise Pratt's *Imperial Eyes: Travel Writing and Transculturation* (1992) is a strong compliment to Utau's work. Pratt explores how travel writing gave rise to imperial stylistics that then themselves contributed to the colonial view of North and South America as vast unsettled places. These ways of seeing, says Pratt, gave way to an intellectual process whereby diverse life forms were drawn out of what to imperial eyes was the chaos of their American surroundings and rewoven into a European order, one that held as its central discourse the systematizing of nature in both name and practice.

Finally, *Indigenous Peoples in International Law*, by S. James Anaya (1996), discusses international standards for determining political minority status. *The American Indian in Western Legal Thought: Discourses of Conquest* (1990), by Robert A. Williams, covers the early colonial period, as does his most recent book, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (1997).

NOTES

1. 592 F.2d 575 (1st Cir. 1979), cert. Denied 444 U.S. 866 (1979). See also *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480 (1st Cir. 1987).
2. *Trade and Intercourse Act of 1790, U.S. Statutes at Large I (1790)* 137-138.
3. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).
4. *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).
5. 21 U.S. (8 Wheat) 543 (1823).
6. Francis G. Hutchins, *Mashpee: The Story of Cape Cod's Indian Town*, West Franklin, N.H.: Amarta Press, 1979.
7. 180 U.S. 261 (1901).
8. See generally Larry C. Skogen, *Indian Depredation Claims, 1796-1920*, Norman, Okla.: University of Oklahoma Press, 1996; and Thomas E. Mails, *The People Called Apache*, New York, N.Y.: Prentice-Hall, 1974.
9. Robert M. Utley, *The Lance and the Shield: The Life and Times of Sitting Bull*, New York, N.Y.: Ballantine Books, a Division of Random House, 1993, p. 4.
10. See generally "Symposium on Eastern Land Claims," 31 *Maine Law Review* 1 (1979).
11. See, e.g., Gerald Torres and Kathryn Milun, "Translating *Yonnonidio* by Precedent and Evidence: The Mashpee Indian Case," *Duke Law Journal* 625 (1990); Martha Minow, "Identities," 3 *Yale Journal of Law & Humanities* 97 (1991); Jo Carrillo, Identity as Idiom: *Mashpee* Reconsidered, 28 *Indiana Law Review* 511 (1995).
12. Colin Tatz, "Aboriginality as Civilisation," *The Australian Quarterly* 52:3, pp. 252-262 (1980).
13. *Indian Child Welfare Act of 1978, U.S. Statutes at Large* 92 (1978): 3069-3078. Currently codified at *Indian Child Welfare Act, U.S. Code*, vol. 25, secs. 1901-1963 (1995).
14. *Indian Child Welfare Act, U.S. Code*, vol. 25, sec. 1913 (1995).
15. *In re Bridget R.*, 41 Cal. App. 4th 1483 (1996), *review denied*.
16. *Indian Child Welfare Act, U.S. Code*, vol. 25, sec. 1903(3) (1995).