



1-1-2006

## Critique by Comparison in Federal Indian Law

Carole Goldberg

Follow this and additional works at: <https://commons.und.edu/ndlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Goldberg, Carole (2006) "Critique by Comparison in Federal Indian Law," *North Dakota Law Review*: Vol. 82 : No. 3 , Article 4.

Available at: <https://commons.und.edu/ndlr/vol82/iss3/4>

This Article is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact [zeineb.yousif@library.und.edu](mailto:zeineb.yousif@library.und.edu).

# CRITIQUE BY COMPARISON IN FEDERAL INDIAN LAW

CAROLE GOLDBERG\*

## “A Slippery Slope: Are Tribes Governments or Businesses?”<sup>1</sup>

As teachers of federal Indian law, we have an obligation to provide critical perspectives on the law, not merely to teach the statutes and doctrine. Happily, scholarship in the field affords us a variety of critical frameworks. For example, recent Supreme Court decisions have been attacked for their unexplained or unjustified departures from basic principles in the field.<sup>2</sup> Other lines of criticism take more of a legal process approach, challenging the propriety of policy-making by courts rather than the Congress.<sup>3</sup> Still other strains of critique focus on the tainted origins of doctrine in the field, steeped in racism and colonialism.<sup>4</sup> And other scholars, drawing on moral and political philosophy, emphasize the divergence of doctrine from basic principles of social justice.<sup>5</sup>

My focus will be on a different type of criticism that appears regularly in the casebook I have co-authored, as well as in the scholarly literature—criticism that challenges internal inconsistency in the law. This genre of criticism typically looks at the way federal Indian law treats Indian nations, and compares that treatment with the way the law treats some other entity, one that supposedly shares key characteristics with the tribes. This critique

---

\*Carol Goldberg, Professor of Law and Director, Joint Degree Program in Law and American Indian Studies, UCLA School of Law.

1. Dan Walters, Op-Ed, *A Slippery Slope: Are Tribes Governments or Businesses?*, SACRAMENTO BEE, Aug. 15, 2006, at A3.

2. See, e.g., David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1995); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

3. See, e.g., Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641 (2003) [hereinafter Singer, *Canons of Conquest*] (challenging the substance of the Court's policy-making); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind-Justice, and Mainstream Values*, 86 MINN. L. REV. 267 (2001).

4. See, e.g., ROBERT WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005); ROBERT A. WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1989).

5. See, e.g., Rebecca Tsosie, *Tribalism, Constitutionalism, and Cultural Pluralism: Where do Indigenous Peoples Fit Within Civil Society?*, 5 U. PENN. J. CONST. L. 357 (2003); Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615 (2000).

has natural appeal for law students. They are taught that the Anglo-American legal system is based on precedent, striving for consistency and predictability, and deploying reasoning by analogy. Like individuals and entities should be treated alike. If you can find a relevant difference, you can argue for different treatment. The challenge, of course, is to determine which differences of fact should justify different treatment in law.

From the earliest days of federal Indian law until the present, the struggle to situate tribal polities, lands, and individuals within the Anglo-American legal system has been a struggle over comparisons and analogies. As teachers of the subject, we cannot escape the demands and temptations that such comparisons present. As scholars, we have been treated to some serious reflection on the whole subject of comparison-making over the past year, focused by Professor Philip Frickey's penetrating article on (*Native American Exceptionalism in Federal Public Law*) in the *Harvard Law Review*,<sup>6</sup> and various responses to it posted in the *Harvard Law Review Forum*.<sup>7</sup> Professor Frickey challenges the Justices and scholars who want to import general constitutional doctrines and values into federal Indian law, ending distinctive treatment of tribes where such matters as federal preemption, equal protection, and inherent sovereignty are involved. Federal Indian law is different for good reasons, he asserts, reasons grounded in the uneasy coexistence of American constitutionalism and colonialism. What some of the ensuing commentaries on his article suggest, however, is that federal Indian law cannot always be viewed as *sui generis* within the Anglo-American legal system. According to this view, continuities with non-Indian law are sometimes justified—indeed desired—in order to achieve justice for Native nations and their peoples and to steer clear of racism.

But when? Identifying the circumstances where such continuities may be appropriate is no small task, as Professor Joseph Singer has noted.<sup>8</sup> In this article, I want to begin examining, systematically, some of the more prominent types of comparisons that arise in federal Indian law, specifically as they affect treatment of tribes, and to suggest some criteria for sorting the more helpful from the less helpful. Because our<sup>9</sup> classroom critiques of

---

6. Philip Frickey, (*Native American Exceptionalism in Federal Public Law*), 119 HARV. L. REV. 431 (2005).

7. See, e.g., Sarah Krakoff, *The Renaissance of Tribal Sovereignty, the Negative Doctrinal Feedback Loop, and the Rise of a New Exceptionalism*, 119 HARV. L. REV. F. 47 (2006); Joseph William Singer, "Double Bind:" *Indian Nations v. The Supreme Court*, 119 HARV. L. REV. 1 (2005) [hereinafter Singer, *Double Blind*].

8. Singer, *Double Blind*, *supra* note 7, at 9.

9. In the remainder of this article, the words "we" and "our" refer to teachers of federal Indian law, unless the text indicates otherwise.

federal Indian law decisions and statutes so often rest on implicit or explicit comparisons or the denial of such comparisons, I have constructed this exercise with teaching strategies as well as scholarly discourse in mind.

To frame the question most directly, how should Anglo-American law conceive of the Native Nation or Indian tribe in relation to other, more familiar legal constructs? Should it be treated the same as a foreign nation? As a state of the Union? As a municipal entity? As a private property owner? As a government property owner? As a corporate business? As an ethnic group? As none of the above, because its position is too distinct? One could answer that courts should simply rely on characterizations offered by the political branches, following or rejecting comparisons as Congress and the Executive Branch have dictated in treaties, statutes, and regulations. That would be fine if the positive law afforded a crisp and comprehensive characterization. Alas, it does not. The Constitution addresses the character of Indian tribes in relation to other entities only obliquely.<sup>10</sup> And statutory law offers no consistent treatment, as a look at the federal environmental laws reveals. In some statutes, such as the Clean Air Act<sup>11</sup> and the Clean Water Act,<sup>12</sup> Native Nations are clearly classified the same as states of the Union. Yet, in the Resource Conservation and Recovery Act, Native Nations are treated the same as municipalities.<sup>13</sup> Similarly, in the Nonintercourse Acts,<sup>14</sup> Native Nations are framed as property owners. Yet in other federal statutes, where Native Nations could conceivably hold rights as property owners, such as the basic civil rights act,<sup>15</sup> their status is not mentioned at all. For the tribes that have treaties, those documents were almost never intended to clarify the comparisons between tribes and other legal entities, leaving one to develop a theory of appropriate comparison.

## II. TRIBES COMPARED WITH FOREIGN NATIONS

In the early nineteenth century, when the Supreme Court decided its first major Indian law case, *Johnson v. M'Intosh*,<sup>16</sup> the prevailing natural law philosophy demanded “reasoned” comparisons in order to establish

---

10. See discussion of *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), *infra* at notes 24-32.

11. 42 U.S.C. § 7601(d)(2000).

12. 33 U.S.C. § 1377(e) (2000).

13. 42 U.S.C. § 6903(13) (2000).

14. Now codified at 25 U.S.C. § 177 (2000).

15. 42 U.S.C. § 1983 (2000). *But see* *Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 711-12 (2003) (finding that tribes may not use § 1983 to vindicate sovereign rights).

16. 21 U.S. 543 (1823).

appropriate legal rules. Courts felt obliged to consider the requirements of “natural justice,” which were thought to be accessible to “natural reason;” and natural reason presupposed logical consistency. In *Johnson*, the question was whether a Native nation could hold and convey full fee simple title to the property within its territory, with those property rights surviving cession of that territory to another sovereign, Chief Justice Marshall looked to Europe for a familiar analogy. He framed the inquiry as whether private property owners in one European country would retain full title even after their country came under the political domination of another European country. Since the Napoleonic and Austro-Hungarian Empires were known phenomena around that time, this was not an entirely speculative project. Marshall’s conclusion was that private property rights would be retained in the European context in order to foster the integration of the dominated peoples into the new political arrangement. Then, having asserted this comparison, Chief Justice Marshall rejected it on the basis of differences between indigenous North Americans and Europeans, which made such integration impossible, as well as on the basis of positive law to the contrary. Instead, Chief Justice Marshall set forth what has become known as the “doctrine of discovery,” which limited the rights of Native nations in their territory by inserting an ownership interest in the “discovering sovereign” or its successor, which in *Johnson v. M’Intosh* was the United States.

As a teacher of federal Indian law, my first impulse has been to accept the comparison as valid, and then to challenge Marshall’s bases for rejecting it. The characterization of Native peoples as savage hunters was erroneous and racist,<sup>17</sup> and scholars such as Stuart Banner have exposed the characterization of positive law as partial and historically inaccurate.<sup>18</sup> Questioning Chief Justice Marshall’s failure to follow the European comparison is also the approach that Professor Kip Bobroff advocates in his article about how to teach *Johnson v. M’Intosh* in a first-year course on property.<sup>19</sup> Professor Bobroff presents us with a little-studied Supreme Court decision that appears to set up the exact comparison that Chief Justice Marshall addressed hypothetically in *Johnson*. The case, *United States v. Percheman*,<sup>20</sup> came ten years after *Johnson*, and considered whether an

---

17. See ROBERT N. CLINTON, CAROLE E. GOLDBERG, & REBECCA TSOSIE, *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 61-63 (Rev. 4th ed. 2005).

18. See STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2005).

19. Kenneth H. Bobroff, *Indian Law in Property: Johnson v. M’Intosh and Beyond*, 37 *TULSA L. REV.* 521 (2001).

20. 32 U.S. 51 (1833).

individual who had received a Spanish grant of land in what is now Florida would retain his property rights after Spain ceded the entire Florida territory to the United States. Bobroff points out that in the course of a decision that favored the private property claimant, the same Chief Justice Marshall who decided *Johnson v. M'Intosh* wrote:

The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? . . . A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him; lands he previously granted, were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals condemned by the practice of the whole civilized world.<sup>21</sup>

Nowhere in this passage or anywhere else in the opinion does *Johnson v. M'Intosh* even merit a mention. Bobroff's point is that considerations of "race and culture" determined the different outcomes in *Johnson v. M'Intosh* and *United States v. Percheman*; and implicit in his claim is that such considerations are inappropriate. The tribe that granted the land in *Johnson* was just as much a nation as Spain, and therefore its grant of land should have been respected in the same way after a cession of territory to the United States. The appropriate analogy, then, was between a Native nation and a foreign, European state.

Such a comparison between the land grant of the Illinois and Piankeshaw Indians on the one hand and the land grant of Spain on the other has strong appeal. The cases also present interesting differences, however. First, at the level of positive law, the land cession from the Tribe to the United States and the cession from Spain addressed private property rights differently. The Tribes' treaty with the United States included no terms protecting existing private property rights. Spain, in contrast, had included specific terms in its treaty of February 22, 1819, which protected

---

21. *Percheman*, 32 U.S. at 86-87.

the rights of preexisting private property owners.<sup>22</sup> This difference in the treaties should perhaps come as no surprise, as the private property holders in Illinois and Piankeshaw territory were not people toward whom the Tribe felt any allegiance. Thus, *Johnson v. M'Intosh* could merely reflect the Court's deference to a different positive law as the context for its "natural law" analysis.

Second, as the Court noted in *Johnson v. M'Intosh* itself, it was not at all clear that the original grant made by the Illinois and Piankeshaw was designed to convey a full ownership interest to the grantees. In contrast, Spain, which was in the business of rewarding its influential and loyal citizens with land grants, intended that its grants convey full private property rights.<sup>23</sup> Indeed, the value of those rights probably depended on individuals' expectations that Spain would look out for them in negotiations with other countries. A different characterization for the tribal grant to Johnson's predecessor can be inferred from the Tribe's later cession of the same land to the United States without any protection for existing private property rights. It is also suggested by the nature of most tribes' legal systems, which did not generally acknowledge property rights beyond revocable use rights. In other words, as Professor Milner Ball has pointed out,<sup>24</sup> the underlying assumption of natural law in the international realm was that the granting sovereign intended a full private property grant. If that condition was not met, then the natural law requirement did not apply.

When considering the comparison between Native nations and European states, the problem with *Johnson v. M'Intosh* is not its unwillingness to draw an appropriate analogy, but its elaboration of doctrines of discovery and aboriginal title that were not necessary to the decision in the case. The Court would have done better, according to this view, to stick to the analogy to foreign nations, and then explain why the different treaty language and national (tribal) property law dictated a different decision than if the granting sovereign had been Spain or another European nation.

Of course, not long after *Johnson v. M'Intosh*, the Court again confronted the comparison between Native nations and foreign nations in

---

22. Treaty with Spain, February 22, 1819, art. VIII:

All the grants of land made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful authorities, in the said territories ceded by His Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty.

23. See Elizabeth Nelson Patrick, *Land Grants During the Administration of Spanish Colonial Governor Pedro Fermin de Mendinueta*, 51 N.M. HIST. REV. 5, 6 (1976).

24. Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 3.

*Cherokee Nation v. Georgia*.<sup>25</sup> *Cherokee Nation* posed the question squarely in relation to positive law, specifically Article III of the Constitution. The Cherokee wanted to invoke the Supreme Court's original jurisdiction for its suit against the state of Georgia, arguing that it presented a controversy "between a state . . . and foreign states," within the meaning of Article III, section 2.<sup>26</sup> The Court rejected the characterization of the Cherokee Nation as a "foreign state," relying in part on the distinction drawn in the Indian commerce clause between "commerce . . . with the Indian tribes" and "commerce with foreign nations." Had the framers of the Constitution believed Indian tribes were the same as foreign nations, the Court observed, they would not have referred to them in separate and distinct phrases.

In *Cherokee Nation*, the Court also offers some natural law-inspired discussion of the nature of Indian tribes, considering whether they match the characteristics of foreign nations in relation to the United States. This discussion, which gives rise to the oft-quoted and obscure characterization of tribes as "domestic dependent nations," first considers whether the Cherokee Nation is properly deemed a "state," and then focuses on what it means for one state to be "foreign" to another state. Can a state be foreign at the same time it acknowledges itself to be "dependent" and under the "protection" of another? As Justice Thompson noted in dissent, "A weak state, in order to provide for its safety, may place itself under the protection of one or more powerful, without stripping itself of the right of government, and ceasing to be a state."<sup>27</sup> Yet, Chief Justice Marshall, writing for the majority, used that very dependent position of the Cherokee Nation as a reason to deny it the status of a "foreign" state. Not surprisingly, as teachers of federal Indian law, we criticize that denial of the comparison to foreign states. In our casebook, for example, Professors Clinton, Tsosie, and I note that international status is given today to at least two "feudatory" states that depend for protection and defense on other nations—Monaco, which relies on France, and the Vatican, which relies on Italy.<sup>28</sup> Both are

---

25. 30 U.S. (5 Pet.) 1 (1831).

26. An interesting question is why the case did not qualify for original jurisdiction based on the fact that a state was a party and a federal question was involved. Apparently, the possibility of federal question jurisdiction was not raised, and the litigants may have assumed that unless the tribe fit into one of the categories of parties included in Article III, it lacked capacity to sue.

27. 30 U.S. (5 Pet.) at 54.

28. See CLINTON ET AL., *supra* note 18, at 75. For a similar critique of the *Cherokee Nation* holding, see Vine Deloria, Jr., *The Size and Status of Nations*, in NATIVE AMERICAN VOICES: A READER 457-65 (Susan Lobo & Steve Talbot, eds., 1998). Deloria argues that in terms of geographic size, population, location in relation to other countries, and degree of economic dependence, many Native nations are quite similar to countries maintaining independent sovereign status as foreign nations. *Id.*



represented in some way in the United Nations. Monaco is a member of the General Assembly, and the Vatican has a permanent observer status. While the positive law argument may have some force, the argument from essential difference between foreign states and Native nations is one we challenge.

But if, as teachers of Indian law, we are drawn to the international comparison in *Johnson v. M'Intosh* and *Cherokee Nation v. Georgia*, we often recoil from it in addressing a case decided in the opening years of the twentieth century, *Lone Wolf v. Hitchcock*.<sup>29</sup> *Lone Wolf* considers whether the United States may abrogate treaties with Indian nations through subsequently enacted legislation. After rejecting the comparison between tribes and foreign states in *Cherokee Nation*, the Court embraces it in *Lone Wolf*, pointing out that since federal law affirms the power of the Congress to pass laws that conflict with international treaties, it follows that Congress can pass laws that abrogate Indian treaties.<sup>30</sup> Is that a sound analogy? Our casebook offers reasons to doubt that it is, questioning whether the consequences of unilaterally abrogating a foreign treaty are the same as the consequences of unilaterally abrogating an Indian treaty.<sup>31</sup> We ask,

Does it make any difference that Indian tribes are geographically within exterior boundaries of the United States and foreign nations are not? Does unilateral abrogation of a foreign treaty enlarge United States sovereignty over the foreign government, its lands, or people? Did abrogation of the Medicine Lodge Treaty do so in *Lone Wolf* to the Kiowa, Comanche, and Apache? Is this difference a sufficient reason to formulate a different rule for Indian treaties?<sup>32</sup>

Interestingly, at least one of the grounds we suggest for distinguishing Indian treaties from foreign treaties, namely the presence of Indian nations within the geographical boundaries of the United States, is one of the very reasons Chief Justice Marshall gave for distinguishing Indian nations from foreign states in *Cherokee Nation v. Georgia*.<sup>33</sup>

As teachers, are we merely picking and choosing among the comparisons between Native nations and foreign states to argue for results favoring tribal parties? Is there perhaps some principled basis for favoring the comparison in the case of *Johnson v. M'Intosh* and *Cherokee Nation v.*

---

29. 187 U.S. 553 (1903).

30. *Id.* at 566.

31. See CLINTON ET AL., *supra* note 17, at 452-53.

32. *Id.*

33. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 15, 18 (1831).

*Georgia* and then opposing it in *Lone Wolf v. Hitchcock*? Would changes in the circumstances of Indian nations between the early nineteenth and early twentieth centuries justify dropping a once-valid comparison? Or should we be avoiding all these arguments from comparison altogether as hopelessly inadequate to the normative work of federal Indian law? Although in recent years many proponents of indigenous rights have concluded that indigenous autonomy need not be equated with full rights of self-determination as a nation-state,<sup>34</sup> the question of comparison of tribes with foreign nations lingers for teachers of federal Indian law. What is interesting to me about our pedagogy is that we often invoke these comparisons or challenge them without engaging the appropriateness of the endeavor at some broader level.

### III. TRIBES COMPARED WITH STATES OF THE UNION

Some Native nations that entered into early treaties with the United States were offered a form of representation in the American government;<sup>35</sup> and the possibility of turning the Indian Territory (later Oklahoma) into a multi-tribal state of the Union attracted some interest in the late nineteenth century.<sup>36</sup> Still, nothing in American constitutional law or treaties posits that Native nations are the equivalent of the states. And only recently have some federal environmental statutes<sup>37</sup> and locally-administered federal benefit programs<sup>38</sup> put Indian nations on par with states.

Nonetheless, opportunities to analogize Native nations to states arise regularly in the teaching of federal Indian law, and a frequently heard critique of the Court's contemporary Indian law decisions is that the Court denies Native nations the same kinds of governmental powers typically exercised by states. Illustrations abound. In discussions of federal "plenary" power over Indian affairs, the ebbs and flows of congressional power under the Indian Commerce Clause are often compared with similar movements in judicial interpretation of the interstate Commerce Clause. Specifically, as Supreme Court decisions of the past decade have contained

---

34. See, e.g., S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 103-10 (2d ed. 2004).

35. See Treaty of Fort Pitt with the Delaware Nation, art. 6, Sept. 17, 1778, 7 Stat. 13; Treaty of Hopewell with the Cherokee Nation, art. 12, Nov. 28, 1785, 7 Stat. 18.

36. See ANNIE H. ABEL, *PROPOSALS FOR AN INDIAN STATE 1778-1878*, ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION 89, 94-102 (1907).

37. See *supra* notes 11-13 and accompanying text.

38. For example, tribes and intertribal groups are included in the definition of "state agencies" that can receive direct federal funding under the federal Special Supplemental Nutrition Program for Women, Infants, and Children program. 42 U.S.C. § 1786(b)(13) (2000). See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton et al. eds., 2005).

the reach of federal power over interstate commerce,<sup>39</sup> we have questioned the Court's consistency in continuing to uphold robust federal power over Indian affairs. As Professors Clinton, Tsosie, and I noted in our casebook,

In the arena of federal-state relations, the United States Supreme Court recently has been quite active in limiting the scope of power of Congress in order to protect state sovereignty on the ostensible ground that the states and their people never consented to or delegated broad, plenary commerce powers to the federal government. . . . At core, these cases are quite inconsistent with the idea that Congress has broad authority to curtail or eliminate the sovereign power of states as *Martinez* [*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978)] and *Yankton Sioux* [*South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998)] suggest it can do for tribes. Why should such differences exist? Given the nature of the treaty relationship, would not an even-handed application to Indian tribes of the same legal principles the Court applies to states suggest a total lack of federal authority over the tribes and their members without their consent reflected in a treaty or treaty-substitute? . . . Why has the Supreme Court not applied the same principles even-handedly between protecting state sovereignty through the New Federalism cases and protecting tribal sovereignty from the excesses of the exercise of congressional power?<sup>40</sup>

If we are not arguing that Native nations are generally the equivalent of states, at least we are suggesting that in certain relevant respects, Native nations and states share certain attributes, particularly lack of consent to the extension of federal power.

In other situations, teachers and scholars of federal Indian law raise concerns about the Court's consistency in denying jurisdiction to tribes under circumstances where state jurisdiction is clearly recognized. For example, as Sarah Krakoff points out,<sup>41</sup> the Supreme Court has denied tribes authority, exclusive of the states, to impose sales taxes on non-Indian purchasers buying goods on reservations, purportedly because it is wrong for tribes to "market a tax exemption."<sup>42</sup> Yet states are allowed to do this

---

39. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Printz v. United States*, 521 U.S. 898 (1997).

40. CLINTON ET AL., *supra* note 17, at 466.

41. Krakoff, *supra* note 7, at 51.

42. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

all the time, competing for customers by marketing their lower taxes.<sup>43</sup> Likewise, one of the reasons the Court has given for denying tribal criminal jurisdiction over non-Indians is that non-Indians are ineligible to become tribal citizens.<sup>44</sup> Yet states regularly exercise jurisdiction over non-citizens. It is true that some of these non-citizens subject to state jurisdiction may be eligible to become state citizens if they change their residence, at least those who are American citizens. However, at the time the state jurisdiction is exercised over them, that eligibility does them no good. Non-citizens are still unable to exercise any political influence over the state government that is attempting to regulate their conduct or their property. And the foreigners subjected to state jurisdiction may never be able to become state citizens. Interestingly, even Professor Frickey, who articulates a view of federal Indian law as “exceptional,” complains that Native nations are not acknowledged to have the same sovereign powers over non-citizens as states of the Union.<sup>45</sup> As we ask in our casebook,

Can New Mexico exercise criminal jurisdiction over an Arizona citizen for a murder committed in New Mexico even though the Arizona citizen could not vote for the legislators who enacted the murder statute? Is the federal government [or any state] prevented from charging Manuel Noriega or other foreign nationals allegedly engaged in drug trafficking merely because they are foreign nationals who are ineligible for United States citizenship?<sup>46</sup>

Likewise, our casebook criticizes the refusal to analogize tribal courts to state courts in *Nevada v. Hicks*,<sup>47</sup> where the Court denied tribal civil jurisdiction over state officers who executed a search on reservation trust land. In the course of his opinion, Justice Scalia asserted that tribal courts are not courts of general jurisdiction.<sup>48</sup> But if state courts can be courts of general jurisdiction, we ask, exercising jurisdiction over claims arising under any body of law unless expressly prohibited from doing so, why shouldn't tribal courts have the same status?<sup>49</sup> Don't both tribal and state court systems derive their authority from internal sources,<sup>50</sup> unlike the

---

43. Krakoff, *supra* note 7, at 51 n.22. Krakoff gives the example of the tri-state area, where New Yorkers often travel to New Jersey to purchase consumer goods in order to avoid higher New York sales taxes. *Id.*

44. *Duro v. Reina*, 495 U.S. 676, 688 (1990).

45. See Frickey, *supra* note 6, at 477-479. See also Singer, *Double Blind*, *supra* note 6, at 7-8.

46. CLINTON ET AL., *supra* note 17, at 566.

47. 533 U.S. 353 (2001).

48. *Nevada*, 533 U.S. at 367.

49. CLINTON ET AL., *supra* note 17, at 854-55.

50. *United States v. Wheeler*, 435 U.S. 313 (1978); *Talton v. Mayes*, 163 U.S. 376 (1896).

federal courts which are courts of limited jurisdiction because they have been granted limited powers by the states that formed the Union? As Acting Chief Justice Robert Clinton wrote in his opinion for the Las Vegas Paiute Court of Appeal, an opinion excerpted in our casebook, “federal preemption of tribal jurisdiction [through the implicit divestiture doctrine] no more makes a tribal court a court of limited jurisdiction than the federal preemption of state jurisdiction over antitrust, federal securities regulation, or federal copyright or patent cases makes the state courts into courts of limited jurisdiction.”<sup>51</sup>

Indian law teachers’ comparisons between Native nations and states has extended to the statutory realm as well. Often this comparison of statutory treatment of tribes and states produces a criticism, usually taking the form that Congress or the courts have improperly failed to accord tribes the same status as states with respect to benefit programs, exemptions from federal taxation, regulation, or other federal measures. For example, as federal benefit programs increasingly entail state administration of block grants, tribes have complained that the different circumstances existing within Indian country require separate allocations to tribes rather than dependence on negotiations with states. A clear illustration is the difficulty many tribes have encountered in obtaining a proportionate amount of funds allocated to states under Title IV-E of the Social Security Act<sup>52</sup> to cover the costs of food, shelter, clothing, and other supplies for eligible children placed in foster care or for adoption. Under the Act, funds are available only if the child’s placement and care are the responsibility of the state or some agency that has an agreement with the state.<sup>53</sup> Yet for most on-reservation children, the only entity with jurisdiction to make a foster care placement is a tribal agency.<sup>54</sup> Thus, if the state refuses to enter into an agreement with the tribe, Title IV-E funding cannot flow to the foster parents of children subject to tribal placements. Indian child welfare advocates have certainly pressed the equivalence of Native nations and states for this purpose, as have Indian law teachers and scholars who pay attention to the Indian Child Welfare Act.<sup>55</sup>

---

51. *Terry-Carpenter v. Las Vegas Paiute Tribal Council*, No. CA-01-01 at n.2 (Las Vegas Paiute Ct. App. 2002), excerpted in CLINTON ET AL., *supra* note 17, at 356.

52. 42 U.S.C. § 672 (2000).

53. See 42 U.S.C. § 672(a)(2); *Native Vill. of Stevens v. Smith*, 770 F.2d 1486, 1488-89 (9th Cir. 1985); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 38, at 1405.

54. See 25 U.S.C. § 1911(a) (2000) (stating that tribal courts have exclusive jurisdiction over child welfare matters affecting Indian children who live on reservations, absent federal law granting jurisdiction to the state).

55. See, e.g., B.J. Jones, *In Their Native Lands: The Status of American Indian Children in North Dakota*, 75 N.D. L. REV. 241, 255-59 (1999).

Where federal law is silent with respect to tribes but mentions states, Indian law teachers often must ask their students whether any special treatment or exemptions accorded to states should be extended to tribes as well. The issue arises in numerous contexts, including interpreting the “full faith and credit” provisions of the Constitution and its implementing federal statute,<sup>56</sup> determining the proper scope of federal tax laws concerned with issuance of tax exempt government bonds,<sup>57</sup> and deciding whether the National Labor Relations Act applies to tribal casinos.<sup>58</sup>

In the full faith and credit context, the legal question is whether tribal courts are included in the obligations of mutual enforcement of orders and judgments imposed upon the states and territories of the United States. With respect to some kinds of orders and judgments, Congress has clearly included tribes among the governments entitled to respect and mutual enforcement.<sup>59</sup> Sharply different answers to this question have emerged among Indian law scholars as well as among state and federal courts, leaving Indian law teachers with a topic ripe for interesting discussion.<sup>60</sup> Do Native nations benefit from the comparison with states and territories, especially since the obligations are reciprocal, and tribes would have to enforce state judgments as well as having their own judgments enforced in state courts? How could we go about assessing their interests in inclusion or exclusion? For example, would we have to know whether it was more likely that tribes would want to be able to have their judgments enforced in state courts, as opposed to states wanting to have their judgments enforced in tribal courts? How, exactly, would tribes be integrated into the federal system if they were to be treated like states and territories under these provisions?

In the tax-exempt bond and labor law contexts, the analysis of tribal-state comparisons is different, because the tribes largely benefit from treatment as states under these legal regimes, and do not assume reciprocal burdens. Nonetheless, challenging questions emerge because of agencies’ and courts’ concern that Native nations sometimes function more like business entities than like state governments, and therefore do not deserve treatment as states. Although federal laws dealing with tax treatment of

---

56. *See, e.g.*, *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) (finding that the federal obligation of full faith and credit does not extend to tribal judgments).

57. *See* Ellen P. Aprill, *Tribal Bonds: Indian Sovereignty and the Tax Legislative Process*, 46 ADMIN. L. REV. 333 (1994).

58. *See* *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1005 (2004), 2005 NLRB LEXIS 286 (holding that the National Labor Relations Act applies to tribal operations).

59. *See, e.g.*, 28 U.S.C. § 1738B (2000) (Full Faith and Credit for Child Support Orders Act).

60. For a list of articles on this subject, see CLINTON ET AL., *supra* note 17, at 293.

tribes rarely receive much attention in Indian law casebooks,<sup>61</sup> the general view put forward there, as in scholarly work in the field, is that tribal commercial development is the object of improper discrimination if it is treated differently for tax purposes from the many commercial development projects initiated by state and municipal governments.<sup>62</sup> Emphasis is placed on the fact that tribes, like states, have obligations to provide their citizens with public services, infrastructure development, and economic opportunities. One commentator has even argued that it is racist for the federal government to deny tribes the same tax treatment as states.<sup>63</sup>

Critiques have also been leveled at the National Labor Relations Board's recent decision applying the National Labor Relations Act to tribal commercial activities employing large numbers of non-Indians,<sup>64</sup> even though the Act specifically excludes state governments without reference to the type of employment offered by the state.<sup>65</sup> Some of the court decisions addressing federal laws of general applicability suggest that a court deciding whether a tribe is exempted from a general federal law may take into account whether the tribal activity in question has a commercial as well as a conventionally governmental dimension.<sup>66</sup> As one commentator has suggested,

This rule demonstrates how courts are forced to distinguish tribal activities, but not state activities, regardless of whether the employment offered by the state is governmental in nature or solely commercial. This difference in treatment between states and tribes is incorrect logic. Both states and tribes are sovereigns in their own right, and there is no plausible reason for differentiating between them.<sup>67</sup>

This commentator points to the taxing, law-making, and judicial powers of Native nations, among other governmental powers that they share with states. She also notes that tribes enjoy more power than states, by virtue of

---

61. *See id.* at 748-49 (providing a small exception and discussing whether tribal casino revenues should have the same exemption from federal taxation as state lottery revenues).

62. *Id.*; *see also* Gavin Clarkson, *Tribal Bondage: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, Michigan Legal Studies Research Paper No. 06-006, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=931486](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=931486).

63. *Id.*

64. *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1005 (2004); 2004 NLRB LEXIS 286.

65. 29 U.S.C. § 152(2) (2000).

66. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (quoting *United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980)).

67. Ann Richards, *Application of the National Labor Relations Act and the Fair Labor Standards Act to Indian Tribes: Thwarting the Economic Self-Determination of Tribes*, 30 AM. INDIAN L. REV. 203, 217-18 (2005/2006).

their inherent sovereignty as nations predating the United States. States, by contrast, “were never independent nations.”<sup>68</sup> With even greater power than states, tribes should always be treated as governments, and their employment always interpreted as governmental in nature. Even when their businesses make money, those businesses are “imperative to tribal self-determination,” and that money is “predominantly for the benefit of the tribal government and members.”<sup>69</sup>

As teachers of federal Indian law, should we be devoting time and energy to arguments about the “illogic” of treating tribes differently than states for such purposes? Certainly we need to consider whether there are differences between Native nations and states that warrant differences in treatment.<sup>70</sup> Both states and tribes are subject to federal law. A crucial difference between them, however, is that states consented to this arrangement in the Constitution, and Native nations did not.<sup>71</sup> Furthermore, as Professor Clinton has noted, these two sets of governmental entities may not be similarly situated with respect to the Supremacy Clause of the Constitution, with only states subject to direct federal review of their decisions regarding federal law.<sup>72</sup> Native nations are also not subject to the limiting force of the Fourteenth Amendment,<sup>73</sup> although the Indian Civil Rights Act of 1968<sup>74</sup> has extended many of those individual rights protections to persons affected by tribal action. Furthermore, when we compare state jurisdiction over non-citizens with tribal jurisdiction, as Professors Frickey and Singer do, we must keep in mind that an American residing in a state is eligible to become a voter after a very short period of

---

68. *Id.* at 218.

69. *Id.* at 219.

70. For example, the United States Supreme Court has justified its special federal preemption doctrine for Indian law by contrasting Indian nations with states of the Union:

The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980).

71. See Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989).

72. See Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002). *But see* Richards, *supra* note 67, at 218 (asserting that tribes and states are “extremely similar” in their relationship to federal law).

73. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Talton v. Mayes*, 163 U.S. 376 (1896).

74. 25 U.S.C. § 1302 (2000).



time,<sup>75</sup> while an American non-tribal member who has lived on a reservation for decades is not and will never become eligible for citizenship. Furthermore, a state of the Union never has to be concerned about another state having sovereignty within its boundaries, while a Native nation must, at least under federal Indian law doctrine dating from the late nineteenth century.<sup>76</sup> In this litany of arguable differences between states and tribes, we should also note that implicit in the way United States law deals with states is an assumption of basic normative regularity among them, despite local differences. That assumption does not hold for many Native nations. Indeed, one of the mainstays of normative appeals for tribal sovereignty is that Native nations need autonomy in order to maintain alternative normative orders.

We also find some anomalous ways in which Native nations act in ways that states do not—ways that may make them appear to be more like private entities than like governments. The most noteworthy of these is the financial participation of tribes in state and federal elections,<sup>77</sup> something that states appear not to be able to do. Indeed, it was tribal claims that tribes are entitled to make state campaign contributions that provoked the headline quoted at the outset of this article. Interestingly, one research paper that appeared to approve of tribal involvement in state and federal elections skirted the question of tribes' similarity to states, asserting that "Indian tribes occupy a unique legal status: not of a corporation, municipal government, association, cooperative or any other familiar legal entity, but rather distinct communities that represent the interests of Indian people."<sup>78</sup> Indeed, one could argue that Native nations should be allowed to participate in state elections, even though states themselves may not, because only Native nations are subject to the exercise of state power directly over their people, via statutes such as Public Law 280 that were passed without their consent.<sup>79</sup> This, of course, is an argument from difference, not from similarity with states, a difference that alludes to the history of colonialism.

---

75. *Dunn v. Blumstein*, 405 U.S. 330 (1972) (striking down one-year state durational residency requirement for voting as violation of equal protection clause).

76. *See, e.g., United States v. McBratney*, 104 U.S. 621 (1881).

77. *See* Cameron A. Reese, *Tribal Immunity from California's Campaign Contribution Disclosure Requirements*, 2004 *BYU L. Rev.* 793, 823-24; Russ Lehman, *The Emerging Role of Native Americans in the American Electoral Process*, First American Education Project, Evergreen State College (Jan. 1, 2003), available at <http://www.first-americans.net/electoral.pdf>.

78. Lehman, *supra* note 77.

79. Public Law 280 is a federal statute authorizing certain state criminal and civil jurisdiction within Indian country in certain states. For an explanation of Public Law 280, see COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 38, at § 6.04[3]. For an early and spirited debate over the propriety of tribes and their members participating in state and federal politics, see John LaVelle, *Strengthening Tribal Sovereignty Through Indian Participation in American*

Are we left with Native nations as appropriately equated with states, so that as teachers of federal Indian law we can train our students to look for illogical or unfair instances of disparate treatment? As is probably clear by now, my pitch is for more sustained attention to the validity of the comparison at a deeper level, so that when we arrive at specific instances of potential comparison, we have an effective theory of the similarities and differences between the two polities within the United States system. Any such comparisons need to take account of the history of colonialism and meaning of the federal trust responsibility to Native nations. In fact, the “gotcha” claim of hypocrisy and/or racism within United States law may be deflated and turned back on the tribes if tribal opponents are able to seize upon inconsistencies in the use of the tribal-state comparison.

#### IV. TRIBES COMPARED WITH PROPERTY OWNERS

Except where reservations have been wholly allotted or land bases entirely lost, Native nations are property owners as well as governments, holding land in common for the members of the tribe and often assigning it to individuals or families for residential, commercial, or other uses. Tribal property rights are a central topic in federal Indian law classes, and we are invariably confronted with comparisons between Native nations as property owners and other holders of property rights, with Native nations frequently receiving less protection. Professor Joseph Williams Singer, a nationally known expert in the field of American property law as well as an esteemed federal Indian law scholar, has presented these disparities with particular force.<sup>80</sup> In his articles on Indian law, we are required to confront the unexplained and unjustified differences between the treatment of tribal property and the treatment of all other property.

The Court’s refusal to grant compensation for the taking of Native nations’ aboriginal title in their lands is a particularly striking instance of such disparity,<sup>81</sup> especially after the Court had earlier described aboriginal title as being “as sacred as the fee simple of the Whites.”<sup>82</sup> The Court’s

---

*Politics: A Reply to Professor Porter*, 10 KAN. J.L. & PUB. POL’Y 533 (2001); Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107 (1999).

80. See Singer, *Double Blind*, *supra* note 7, at 4-6; Joseph Williams Singer, *Lone Wolf or How to Take Property by Calling It a “Mere Change in the Form of Investment,”* 38 TULSA L. REV. 37, 44 (2002) [hereinafter Singer, *Lone Wolf*]; Joseph Williams Singer, *Well-Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481 (1994).

81. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955); Singer, *Double Blind*, *supra* note 6, at 4-6.

82. *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835).

reasons for denying compensation to aboriginal title simply do not stand up if we compare the nature of the Indians' property claims to those of non-Indians.<sup>83</sup> Another noteworthy instance of this differential treatment is the Court's allowance of forced allotment, redistributing tribal property to individual tribal members without the tribe's consent. As Professor Singer has taught us, the forced distribution of tribal lands to individual tribal citizens looks like just as much of an unconstitutional "taking" as the forced distribution of corporate assets to the corporation's shareholders.<sup>84</sup> Another striking illustration that has received somewhat less attention is the Supreme Court's treatment of tribal water rights in the case of *Nevada v. United States*.<sup>85</sup> There, the Court refused to allow litigation of the Pyramid Lake Paiute Tribe's claims because those claims had already been adjudicated in an earlier proceeding in which the United States represented the Tribe as trustee. The Tribe responded that the United States had simultaneously represented conflicting interests in the earlier proceeding, a fact that would have triggered a violation of the due process rights of any private property owner.<sup>86</sup> The Court dismissed that concern, however, based on its view that Congress had directed the trustee to split its loyalties.<sup>87</sup>

The disparate treatment of tribal and other property rights seems to have carried over to the property rights of Indian trust allottees. Known as the *Cobell* litigation,<sup>88</sup> this case has provided ample ammunition for those who want to argue that Indian property is not respected as much as non-Indian property. Now in its eleventh year, the lawsuit claims that the Department of the Interior has mismanaged trust assets, by, among other things, failure to maintain adequate records, failure to collect revenue due, and failure to provide accurate accountings to the beneficiaries. These would all be clear violations by a private trustee, and would require prompt remediation. Yet the United States government, through its attorneys, has staunchly resisted compliance with its obligations. Indeed, the possibly excessive reaction of Judge Lamberth, who was removed from his presiding

---

83. Singer, *Canons of Conquest*, *supra* note 2, at 4-6.

84. Singer, Lone Wolf, *supra* note 80, at 43-45.

85. 463 U.S. 110 (1983).

86. *See* *Hansberry v. Lee*, 311 U.S. 32 (1940).

87. *Nevada*, 463 U.S. at 135-36 n.15.

88. There have been numerous court decisions in this litigation. *See* [www.indiantrust.com](http://www.indiantrust.com) (last visited Dec. 26, 2006). The most important substantive ruling occurred in *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001), where the D.C. Circuit found that general trust principles and federal legislation imposed judicially enforceable trust obligations on the United States in the management of the individual allottees' individual accounts, and that the Departments of Interior and Treasury have breached those legal obligations.

role in that case,<sup>89</sup> seems to have been prompted by his outrage that private property of individual Indians was being treated so shabbily by the supposed federal trustees, something that would not be tolerated as to non-Indian trust beneficiaries.<sup>90</sup>

As casebook authors in federal Indian law, my colleagues and I have been quick to incorporate such critiques based on inconsistent treatment of Indian and other property owners.<sup>91</sup> What we have not done is to examine how such arguments from comparison with private property owners (or for that matter, other governmental entities that may own property) fit into the larger discussion of the exceptional nature of federal Indian law within the American constitutional scheme. Professor Singer has launched us on that journey in his response to Professor Frickey,<sup>92</sup> but we have some distance to go.

We know, for example, that in the international context, it is not uncommon for countries that overtake others to claim the “sovereign” lands of the subordinated government, leaving individual property rights protected. Professor Stuart Banner has suggested that this concern led Hawaiian monarchs in the pre-American period to privatize collectively held lands in anticipation of a likely American seizure of the islands.<sup>93</sup> But for Native nations that had no notion of privately owned property (as opposed to privately used property) before contact with the United States, the status of their lands was difficult to incorporate into this dichotomy.<sup>94</sup> Non-Indian governmental entities may be property owners, but except under socialism, they are rarely the owners of their entire territory. Their

---

89. See *Cobell v. Kempthorne*, 455 F.3d 317 (D.C. Cir. 2006).

90. See *Cobell v. Norton*, 229 F.R.D. 5, 7 (D.D.C. 2005). “[O]ur ‘modern’ Interior department,” United States District Court Judge Lamberth declared, is “a dinosaur—the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought we had left behind.” *Id.* Judge Lamberth also stated, “our government still treats Native American Indians as if they were somehow less than deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal.” *Id.* What seems to have exercised the D.C. Circuit panel was their perception that Judge Lamberth viewed this disparate treatment as evidence of current “racism” by the Department of the Interior, an inference we have seen drawn in other instances where tribes are treated differently from other entities. See *Cobell v. Kempthorne*, 455 F.3d 317, 333 (D.C. Cir. 2006); see also *supra* note 61 and accompanying text.

91. See CLINTON ET AL., *supra* note 17, at 1019-23, 1031-39, 1124.

92. Singer, *Double Blind*, *supra* note 7.

93. See, e.g., Stuart Banner, *Preparing to Be Colonized: Land Tenure and Legal Strategy in Nineteenth-Century Hawaii*, 39 L. & SOC’Y REV. 273 (2005).

94. For in-depth analysis of the clash of property regimes that affected indigenous land rights after the coming of the British to New Zealand, see Stuart Banner, *Conquest by Contract: Wealth Transfer and Land Market Structure in Colonial New Zealand*, 34 L. & SOC’Y REV. 47 (2000); Stuart Banner, *Two Properties, One Land: Law and Space in Nineteenth-Century New Zealand*, 24 L. & SOC. INQUIRY 807 (1999).

claims to sovereignty are not founded in treaties that reserved or set aside lands for their collective use under the protection of another government. In other words, the connections between property and sovereignty are not nearly so intimate. These differences may not be sufficient to warrant disparate treatment of tribal property claims. But until we confront them, particularly as they relate to claims of the special status of Native nations, we will not be fully serving the aims of Indian law pedagogy as well as scholarship.

## V. TRIBES COMPARED WITH PRIVATE BUSINESSES

The comparison of Indian nations with private businesses is a relatively recent phenomenon, nourished by the spectacular growth, for some Indian nations, of tribal gaming and the economic development that it facilitates. Unlike comparisons with foreign nations, states, and property owners, this one is invoked far more often by opponents of tribes than the tribes themselves. They invoke it, among other reasons, to argue against tribal sovereign immunity<sup>95</sup> and to argue that tribes should be subjected to federal laws of general application, such as labor laws, that apply to businesses and do not expressly exempt Indian nations.<sup>96</sup> Tribes have succeeded in repelling the comparison for purposes of sovereign immunity,<sup>97</sup> based on longstanding congressional practice and the constitutional recognition of Indian nations as governments in the Indian commerce clause.<sup>98</sup> Their record has been more mixed with respect to laws of general application, especially where those other laws refer specifically to other governmental entities and neglect to address the treatment of tribes.<sup>99</sup>

The growing inclination of the non-Indian public to equate Indian nations with casinos, since those are the entities receiving greatest publicity, is something I, as a teacher of Indian law, find disturbing. In California, for example, this simple equation led the Governor to demand that tribes pay their “fair share” of gaming proceeds to the state, the share defined according to tax obligations of private businesses.<sup>100</sup> Although the effort failed to pass, it should not have been necessary to explain that Indian nations, unlike businesses, have governmental responsibilities to their citizens and

---

95. See, e.g., *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998).

96. See, e.g., *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 138 (2004). See generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 38, at § 2.03.

97. *Kiowa Tribe*, 523 U.S. 751.

98. U.S. CONST., art. I, sec. 8, cl. 3.

99. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 38, at § 2.03.

100. See Carole Goldberg, *Governor Is Double-Dealing on Indian Gaming; California Has Already Broken Too Many Promises to Its Native Tribes*, L.A. TIMES, Jan. 20, 2004, at B13.

territorial inhabitants, including utilities, public safety, and fire protection. Furthermore, under the Indian Gaming Regulatory Act, Indian nations do not have the same freedom as private businesses to allocate their earnings as they wish, being limited to funding tribal government operations or programs, providing for the general welfare of the tribe and its members, promoting tribal economic development, donating to charitable organizations, and helping to fund operations of local government agencies.<sup>101</sup>

What confuses the non-Indian public, I believe, are instances where tribes claim the right to conduct themselves in a capacity more closely associated with private businesses, especially contributing to state and federal elections. As I have indicated earlier, a case can be made for Indian nations' participation in such political activity, even where state, local, and international governments may not.<sup>102</sup> But it is a case resting on unique characteristics of Indian nations in relation to the United States and the states.

## VI. CONCLUSION

As teachers of federal Indian law, we commonly resort to comparisons with non-Indian law in order to craft critiques of judicial doctrine and positive law in the field. I count myself as one of the regular practitioners of this approach. It is a powerful way to turn the legal and moral norms of the dominant society against its own practices, a hallowed American tradition.<sup>103</sup>

However, the Supreme Court has been remarkably resistant to such comparison-based arguments, which do not seem to have prevented it from denying jurisdiction and property rights to Indian nations. Does that mean Indian law scholars and teachers should be employing this type of critique more effectively, more selectively, or not at all? Should we be concerned that if we cannot insist on comparisons, the courts will operate unconstrained, with even more harmful effects for Indian nations' sovereignty and property?

Within the field of Indian law, comparison-making is rarely addressed at a meta-level, and there is little consideration of whether comparisons in one realm may undermine comparisons in another or even the entire enterprise of comparison-drawing. This article has attempted to draw together

---

101. *See* 25 U.S.C. § 2710(b)(2)(B) (2000).

102. *See supra* text accompanying note 77.

103. Civil rights claims, including recent claims by proponents of same-sex marriage, typically draw upon fundamental American values of equal dignity of all persons, affirmed at the outset of the nation in the Declaration of Independence.

many instances of this enterprise so we can begin to view the process more holistically, recognizing that the comparisons are in service of a larger vision of justice for Native nations in an American system tainted by colonialism. Most of them, I fear, are vulnerable to countercharges of inconsistency. Furthermore, they may distract us from the tougher job handed to us by Professor Frickey, which is to explain how much colonialism a constitutional system such as the United States can and should tolerate.