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WHAT THEN REMAINS OF THE SOVEREIGNTY OF THE INDIANS?

The Significance of Social Closure and Ambivalence in *Dollar General v. Mississippi Choctaw*

Theresa Rocha Beardall* & Raquel Escobar**

Abstract

The United States was erected on the lands of Native peoples. This fact has bedeviled American law courts since the nation's founding. Native peoples have never abandoned their desire to exercise sovereign authority over those lands and the United States has never recognized the full extent of the tribes' desires. For two centuries, the resolution of that conflict has been the American nation's acceptance of Indian communities as distinctive, federally protected "domestic dependent nations."[1]

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Despite treaties and congressional action establishing this important political relationship, tribal nations face persistent challenges in administering internal affairs, particularly when non-Indians and tribal courts are involved.

This article argues that contemporary federal Indian law questions the quality and neutrality of tribal courts in order to foreclose upon competing economic and legal interests in Indian land. The historic struggle to maintain legal authority is apparent in the treatment of tribal civil adjudicatory authority in *Dollar General Corporation v. Mississippi Band of Choctaw Indians* and key moments in federal Indian policy. The theoretical framework of social closure provides a critical lens by which to examine persistent Indian exclusion and competition over profitable resources. Paired with the notion of colonial ambivalence, which articulates the shifting logics of settler states to accept or reject indigenous sovereignty, the exclusionary language in *Dollar General* reveals the nation's firm investment in limiting access to resources at the expense of tribal self-determination.

I. Introduction

> *"What then remains of the sovereignty of the Indians?"*
>
> – Justice Sonia Sotomayor[2]

> *"A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens."*
>
> – Duro v. Reina[3]

The United States was erected on the lands of Native peoples.[4] This fact has bedeviled American law courts since the nation's founding. Native peoples have never abandoned their desire to exercise sovereign authority over those lands and the United States has never recognized the full extent of their desires. For two centuries, the resolution of that conflict has been the American nation's acceptance of Indian communities as distinctive, federally protected "domestic dependent nations." That status, established by treaty and congressional action, recognizes that tribes

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[1] Cherokee Nation v. Georgia, 30 U.S. 1, 10 (1831) (holding tribes are constructed as "domestic dependent nations" whose relationship with the United States government is akin to a "ward to his guardian.").

[2] Transcript of Oral Argument at 62, Dollar General Corporation, et al. v. Mississippi Band of Choctaw Indians et al, No. 13-1496 (argued December 7, 2015).

[3] Duro v. Reina, 495 U.S. 676, 685 (1990).

[4] In line with standard terminology of law scholarship and federal policy, we use the terms "Indian" and "American Indian" as opposed to "Native American" when discussing a distinct legal position. *See* COHEN'S HANDBOOK §§ 3.01–.04 (Nell Jessup Newton ed., 2012) (providing a detailed discussion of the nuanced definition, meaning, and significance of the terms Indian tribe, Indian, and Indian Country). Otherwise, throughout this article we use the terms "Native" and "Indigenous" interchangeably to refer to first peoples of a land that predate settler states. *See also* S. James Anaya, Indigenous Peoples in International Law (2d ed. 2004).

retain "their original natural rights, as the undisputed possessors of the soil, from time immemorial."[5] And yet, when tribal nations administer internal affairs, they have historically been subject to unique challenges,[6] notably in legal issues concerning non-Indians and tribal management of reservation activities. In such cases, American Indians are politically, legally, and socially separated from a society composed of a non-Indian majority. This deliberate separation constructs Indians as culturally different in ways that are perceived as dangerous and unequal for non-Indians. The assumption that follows labels tribal courts as sufficient justice systems for Indians and simultaneously inappropriate for non-Indians—requiring jurisdictional limitations to protect non-Indians from "unwarranted intrusions on their personal liberty."[7] This disastrous conclusion is detrimental to the inherent sovereignty of American Indians and the safety of tribal communities.

Federal Indian law continues to wrestle with the political question of the status of Indian territories, impeding a reliance on legal doctrine that looks to common law precedent for an established set of rules or procedures to determine future cases. Conflict arises for tribal nations and Indian law practitioners alike, as both must mitigate the harmful effects of inconsistencies in the case law. Moreover, when the political treatment of Indian land is irreconcilable by doctrine, then the authority of tribal courts is similarly irreconcilable;[8] all of which negatively impacts

[5] Worcester v. Georgia, 31 U.S. 515, 560-62 (1832). (finding the Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others").

[6] Some early legal moments, however, indicate clear affirmation that tribal authority retains all "inherent powers of a limited sovereignty which has never been extinguished." *See* Felix S. Cohen, Handbook of Federal Indian Law 122 (1941). Two such examples include the 1786 treaties with the Five Civilized Tribes permitting tribal criminal jurisdiction over non-Indians settling on treaty lands without tribal permission (Treaty with the Chickasaws, art. 4., January 10, 1786, 7 Stat. 24.) and an 1855 statement by the United States Attorney General regarding a Choctaw property claim with a non-Indian noting that "justice and policy alike demand that, so long as [the Choctaw] are allowed to remain a separate people, they should be protected and encouraged by us in their laudable attempts to maintain local order." (Jurisdiction of the Courts of the Choctaw Nation, 7 Op. Att'y Gen. 174, 180-81, 185 (1855)).

[7] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978) (reasoning that from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress).

[8] *See* Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law,* 31 Ariz. L. Rev. 203, 215 (1989)

the daily lives of Indian people. Two landmark decisions that demonstrate adverse socio-legal consequences locate their authority within the unsettled political status of Indian land: the first is *Oliphant v. Suquamish Indian Tribe*[9] (1978), finding that tribes have no criminal jurisdiction over non-Indians, and the second is the Violence Against Women Reauthorization Act[10] ("VAWA"), or *Oliphant* fix,[11] granting special criminal jurisdiction over non-Indians for crimes related to domestic and dating violence occurring in Indian Country.[12] As recent as December 2015, during oral arguments for *Dollar General Corporation v. Mississippi Band of Choctaw Indians*[13] ("Dollar General"), tribal courts were once again presented as separate and inherently unequal in order to establish a bright line rule excluding tribal jurisdiction over civil matters involving non-Indians. The continued use of this argument in the nation's highest court reveals deep flaws in the framework of federal Indian law and any reliance on legal doctrine it might imply. Viewed historically, however, the persistent treatment of tribal courts as insufficient for non-Indians is evidence of colonial ambivalence and begs the question, are Natives "subject to legal principles that are untenable in the light of modern commitments to equality and the principles of human rights?"[14]

Drawing from interdisciplinary literature, this article demonstrates that federal Indian law and policy broadly constructs American Indians as politically separate and unequal[15] in order to systematically devalue Indian people and their inherent tribal sovereignty. Specifically, this article argues that *Dollar General* seeks to uphold a non-Indian monopoly over legitimate legal authority by directly questioning the quality

(analyzing the demographic facts of Oliphant, noting that there were far more non-Indians living on the Suquamish Indian Reservation than Indians at the time of the case. Thus, "the facts. . .make the Indian argument not only moot but demonstrate that it was based on an idea of sovereignty having little relation to actual reality. . .When attorneys and scholars come to believe that doctrines have a great have a greater reality than the data from which they are derived, all aspects of the judicial process suffer accordingly.").

9 Oliphant, 435 U.S. 191.

10 25 U.S.C. § 1304 (2013).

11 *See* Stacy L. Leeds & Erin S. Shirl, *Whose Sovereignty? Tribal Citizenship, Federal Indian Law, and Globalization*, 46 Ariz. St. L.J. 89, 100 (2014) (describing how negative perceptions of tribal courts informed the House of Representatives' unwillingness to support tribal court jurisdiction).

12 25 U.S.C. § 1304(c).

13 Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 732 F.3d 409 (5th Cir. 2013) (Hereinafter Dollar General) (considering whether tribal courts have jurisdiction in civil tort claims involving nonmembers when the tort claim arises on reservation land).

14 Jill Norgren, The Cherokee Cases: Two Landmark Federal Decisions in the Fight for Sovereignty (2004).

15 Aileen Moreton-Robinson, *The Good Indigenous Citizen: Race, War, and the Pathology of Patriarchal White Society*, *in* History, Power, Text: Cultural Studies and Indigenous Studies 310 (CSR Books 2014). ("Australia, New Zealand, Canada and the United States have a long history of detaining Indigenous people, denying their rights and controlling behaviour through and beyond the law.").

and neutrality of tribal courts. Maintaining legal authority is possible by social closure, a process that excludes social outsiders with different values or status from enjoying the benefits and resources reserved solely for in-group members. Colonial ambivalence describes the apparent inconsistencies found in federal Indian law and constructs a strategy to maintain the likelihood of future non-Indian advantages. This argument is supported by (1) examining Max Weber's theory of social closure,[16] which describes the process of social, economic, and legal competition over profitable resources; (2) discussing Kevin Bruyneel's concept of colonial ambivalence[17] to show the shifting logics of settler states to accept or reject Indigenous sovereignty; (3) applying these critical theories to an analysis of *Dollar General*; and (4) outlining key moments in Indian policy that demonstrate the historical legal differences constructed for Indians and non-Indians.[18] Expecting a 2016 decision from the Supreme Court of the United States, ("SCOTUS"), the *Dollar General* case highlights the ongoing struggles tribal nations encounter when seeking federal protections[19] from a sovereign that is ambivalent about sharing legitimate legal authority with tribal nations.

II. Social Mechanism and Rationale for American Indian Exclusion

Careful analysis of the historical relationship between American Indians and the United States reveals the federal government's desire to maintain a financial, political, and social monopoly over Native land and its subsequent resources. Initially, this monopoly was possible because Indians were excluded from equal membership in American society and seen as unequal and undeserving of such membership.[20] Non-Indian group dominance has historically been exerted over various resources, including U.S. citizenship, reservation boundaries, and the Indian family

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[16] 1 Max Weber, Economy and Society: An Outline of Interpretive Sociology 43 (1978).

[17] Kevin Bruyneel, The Third Space of Sovereignty: The Postcolonial Politics of U.S.-Indigenous Relations 10 (2007).

[18] *See* James Smith, Cong. Research Serv., R43324, Tribal Jurisdiction over Nonmembers: A Legal Overview (2013).

[19] Worcester v. Georgia, 31 U.S. 515, 561 (1832) (finding ". . .a weaker power does not surrender its independence - its right to self government, by associating with a stronger, and taking its protection.").

[20] Although some Indians had access to citizenship through the Dawes Act of 1887 and through military service in WWI, citizenship was not granted to American Indians as a whole until the Indian Citizenship Act of 1924 (also known as the Snyder Act). Despite being granted U.S. citizenship, American Indians' right to vote was not guaranteed as voting rights are governed by state law. For more on the Indian franchise *see* Frederick E. Hoxie, A Final Promise: The Campaign to Assimilate the Indian 1880-1920 (1984); Kevin Bruyneel, *Challenging American Boundaries: Indigenous People and the "Gift" of U.S. Citizenship*, 18 Studies in American Political Development 30-43 (2004).

unit[21] by "extraordinary forces of assimilation."[22] Despite continued nation-to-nation dealings between tribes and the federal government,[23] various legal restrictions on tribal sovereignty and administration of justice exist and threaten the political stability of Indian nations.[24]

A. *Social Closure*

Why do American Indians continue to experience sharp social exclusion and direct interference when governing important internal matters? Social closure theory[25] provides one possible explanation by suggesting that exclusionary practices appear where one social group restricts others from accessing particular resources, rewards and benefits.[26] Sociologist Max Weber describes all social relationships as either open or closed, highlighting unique advantages that arise in both. He writes:

> A social relationship. . .will be spoken of as "open" to outsiders if and insofar as its system of order does not deny participation to anyone who wishes to join and is actually in a position to do so. A relationship will, on the other hand, be called "closed" against outsiders so far as, according to its subjective meaning and its binding rules, participation of certain persons is excluded, limited, or subjected to conditions. . .If the participants expect that the admission of others will lead to an improvement of their situation, an improvement in degree, in kind, in the security or the value of the satisfaction, their interest will be in keeping the relationship open. If, on the other hand, their expectations are of improving their position by monopolistic tactics, their interest is in a closed relationship.[27]

Thus, open social relationships are accessible to all interested in membership and its benefits. In contrast, closed relationships exclude or limit membership in an effort to maintain a set of resources for the enjoyment of a select few.

This article focuses on how the mechanism of social exclusion creates unreasonable limitations for tribal self-determination, specifically tribal adjudicatory jurisdiction over non-Indians. This process is both destructive and cyclical when closure undermines the promise of democracy as a solution to the conflict between tribal and federal interests and perpetuates intergenerational inequality. Closure reproduces opportunities for each new generation of non-Indians to enjoy those resources, while ensuring that each new generation of Indians will not. The exclusion of tribal courts functions to curb competition over desirable economic rewards over land, people, and justice. Contemporary concerns

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[21] The Indian Child Welfare Act, 25 USC § 1901 (2012).

[22] Robert B. Porter, *Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples*, 5 Yale Hum. Rts. and Dev. J. 123, 130 (2002).

[23] Angela R. Riley, *Good (Native) Governance*, 107 Colum. L. Rev. 1049, 1054 (2007).

[24] *Id*. at 1063.

[25] *See* Weber, *supra* note 16, at 43.

[26] *Id.* at 43-46.

[27] *Id.* at 43.

about fairness or due process in tribal courts, however true or untrue, are a convenient smokescreen to obscure the intentional protection of economic, social, and political benefits for a privileged class.

1. Constructing a Social Outgroup and "Negative Credential"

To borrow thematically from Weber's social closure theory to support the claim that non-Indians monopolize legitimate legal authority by directly questioning the quality and neutrality of tribal courts, one must understand two key processes: (1) the construction of an excluded group, and (2) marking the group with a distinctly "negative credential." Specific to the American Indian experience, the legal construction of tribal nations as domestic dependents is a mark of social stratification. Domestic dependency denies Indian nations full sovereignty over their lands and implies a reliance on the federal government to act as a legal guardian.[28] First, closure is often constructed and justified by group otherness. This othering includes markers such as race, ethnicity, gender, religion, and place of residence or language.[29] Some ingroup members may begin to see themselves as a socially similar group in a way that is homophilous[30] or limits them from interacting altogether with members of the excluded class of persons. What might have originated as an assortment of individual competitors over desired resources may begin to act in concert to form an interest group, giving rise to special regulations and legal influence.[31] A new "legally privileged group" is formed that protects the group's economic interests by force if and when needed. The "purpose is always the closure of social and economic opportunities to outsiders."[32]

Second, the legal construction of the American Indian by the federal government illustrates social closure in the Weberian sense by signifying a "negative credential." This credential focuses on "ethnic othering" to exclude a class of persons from equal status among a non-Indian majority population. The "negative Indian credential" extends to all aspects of social, cultural, and political life readily identifiable as Indian, and is not limited to the construction of Indian identity in the case law. For example, a legally privileged class of non-Indians has marked contemporary tribal courts with a "negative credential." Doing so supports the

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[28] Cherokee Nation v. Georgia, 20 U.S. 1 (1831) (Tribes are constructed as "domestic dependent nations" whose relationship with the United States government is akin to a "ward to his guardian.").

[29] Weber, *supra* note 16, at 342.

[30] Miller McPherson, Lynn Smith-Lovin & James M. Cook, *Birds of a Feather: Homophily in Social Networks*, 27 Annual Review of Sociology, 415–44, 415 (2001) (The homophily principle suggests that social similarity, not difference, binds connections among actors in a social network that is largely homogenous and localized. Of specific importance here is that "homophily limits people's social worlds in a way that has powerful implications for the information they receive, the attitudes they form, and the interactions they experience. [Furthermore,] homophily in race and ethnicity creates the strongest divides in our personal environments. . .").

[31] Weber, *supra* note 16, at 342.

[32] *Id.*

notion that tribal courts are social spaces for a distinct ethnic group only, and thus cannot be an appropriate legal forum for the legally privileged non-Indian. Under this framework, sharing in either the economic or legal resources with the excluded class appears logically incompatible. The scarce resource[33] is legitimate legal authority, which improves and maintains non-Indians' monopolistic power over the law. Furthermore, the dual processes of constructing an excluded class and negatively marking them, reveals how "colonial ambivalence" operates as a continued justification of Indian exclusion.

2. Social Closure Creates Obstacles To Self-Determination

The United States created legal boundaries that instituted two separate tracks of legal authority: one tribal and specific to tribal members and the other federal, which oversees all peoples and lands, and exclusively reaps social and economic benefits. Social closure negatively shapes national discourse to systematically delegitimize American Indian tribal courts by focusing on tribal poverty, disorganization, and the most unusual aspects of tribal courts.[34] In addition, federal courts promote the cultural interests of a non-Indian majority by binding their decisions to the Marshall Trilogy and doctrine of discovery.[35] Discovery doctrine, and the subsequent social stratification that follows, allows elite group domination to shape sociolegal ideas of justice. Meanwhile, stratification and exclusion permit non-Indian privilege and access to socioeconomic rewards. It does so by cordoning off legal matters that are "traditionally Indian" and denying tribes a dynamic, adaptive, and strikingly interconnected place within contemporary U.S. society.[36] This approach de-emphasizes the community-building role of tribal courts, which is to forge "distinctly tribal solutions to modern problems,"[37] and discourages the use of tribal courts.

Indian law scholar Bethany Berger conducts empirical work that examines presumed legal inequalities between Indians and non-Indians.[38] Specifically, Berger tests the hypothesis that tribal courts lack fairness and neutrality by analyzing non-Indian experiences in the Navajo Nation Appellate Court. With thirty-five years of data, Berger found the Court is balanced, finding in favor of non-Navajos in 47.4 percent of the cases across a range of legal matters.[39] Berger found two jurisdiction tracks emerge from various cases concerning jurisdiction in

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[33] *Id.*

[34] Loïc J. D. Wacquant, *Three Pernicious Premises in the Study of the American Ghetto*, 21 International Journal of Urban and Regional Research, 341–53 (1997).

[35] Special Message to Congress on the Problems of the American Indian: "The Forgotten American." 113 Pub. Papers 335, 336-37 (March 6, 1968).

[36] Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, Arizona State L.J. 1047, 1051-58.

[37] *Id*. at 1052.

[38] *Id.* at 1067.

[39] *Id*. at 1047.

the 1970s.[40] Track one asserts, "Where such [tribal] jurisdiction touched non-Indians, it threatened personal liberty and was not essential to tribal self-government."[41] The second track, however, asserts when tribal jurisdiction "touched tribal members, only, explicit federal action was sufficient to overcome the invasion of tribal sovereignty."[42] Her analysis acquiesces to construct an "ethnic Indian other" in order to validate whether such a credential can accurately affirm fairness and due process concerns. Berger finds balance between Navajo and non-Navajo parties "whether the court is deciding on procedural or substantive grounds, whether the decision affirms or reverses the district court, even whether the opposing party is the Navajo Nation or not."[43] Both Berger's findings and the law's intense regulation of adjudicatory authority question fairness on behalf of American Indians. Specifically, the findings reveal that diminished jurisdiction is unwarranted and severely jeopardizes a tribe's ability to promote the health, safety, and wellness of the community. Moreover, Berger's research encourages us to wonder what constitutes a justice system? Can it function to protect tribal communities, literally or symbolically, without the authority to hold an individual accountable for wrongdoing?

Of course, such questions about Indian fairness are not confined to Berger's 2006 published study. First, the Court of Indian Offenses ("CIO"), established nearly 140 years ago, provides an example of exclusionary practices that separate Indian people from sharing in the rich resources of their homelands. Reservation CIOs[44] were concerned with regulating Indian behavior and constructing Indian "otherness." The goal in creating CIOs, presumably, was to support social closure by strengthening the federal government's exclusive sovereignty[45] after treaty making formally ended in 1871.[46]

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[40] *See* United States v. Wheeler, 435 U.S. 313 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[41] Berger, *supra* note 36, at 1058.

[42] *Id*.

[43] *Id*. at 1076.

[44] *See generally* 1882-83 Secretary Interior Ann. Rep. at xii (Then Secretary of the Interior Henry M. Teller "believed that such a tribunal, composed as it is of Indians, will not be objectionable to the Indians and will be a step in the direction of bringing the Indians under the *civilizing influence of the law*.") (emphasis added). *See also* 1892 Indian Affairs Ann. Rep. 25-31.

[45] *See generally* United States v. Kagama, 118 U.S. 375, 380 (1886) (The "power of congress to organize territorial governments, and make laws for their inhabitants, arises, not so much from the clause in the constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country in which the territories are, and the right of *exclusive sovereignty* which must exist in the national government, and can be found nowhere else.") (emphasis added) (citing Murphy v. Ramsey, 114 U.S. 15 (1885)).

[46] 25 U.S.C. § 71 (2012). *See also* Charles F. Wilkinson, American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy, 8, 101-02 (1987) (describing the "treaty substitutes" that would follow the formal end to

Another historical example of social closure is the deployment of the negative Indian credential to target Indian communities for assimilation.[47] The 1880 minority report of the House Indian Affairs Committee explicitly states that Indian assimilation was not a humanitarian effort. Instead, the report found this federal policy was motivated by desires to remove Indians from their land[48] and to extract rich economic benefits held within their ancestral homeland. Historically and contemporarily, U.S. legal systems actively work against individual Indian people and tribal sovereignty. Presently, U.S. law continues to stifle self-determination by limiting tribes' ability to regulate and adjudicate matters that take place on tribal land. Social closure distinguishes tribal courts as separate from a non-Indian majority and unequal because of concerns that tribal courts are incapable of providing a fair and neutral forum for non-Indians. As such, tribal court authority is severely limited by the "legally privileged group," making both literal and symbolic protection of Indian communities through the law arduous at best.

B. *Colonial Ambivalence: Unequal by Design?*

The separate and unequal status of American Indians in U.S. law and policy has shaped the everyday lives of tribal communities in many ways. Turning now to the field of Native Studies, we look to Kevin Bruyneel's concept of colonial ambivalence to analyze the shifting logics of the U.S. settler state toward Indian tribes and individuals.[49] Bruyneel's work focuses on the multiple boundaries--political, cultural, and spatial--that undergird governmental vacillation between categorizing tribes as domestic and foreign, as well as the repercussions of such categorization and recognition of Indian polities. In *The Third Space of Sovereignty,* Bruyneel defines colonial ambivalence as "the inconsistencies in the application of colonial rule," which is "a product of both institutional and cultural dynamics."[50] The complicated nature of Indian citizenship is an example of how such dynamics work together to produce colonial ambivalence. In this example, the institutional dynamic is the law that confers or denies citizenship, while the "American nation's 'love-hate' relationship with indigenous people" acts as the cultural dynamic.[51] Together they create ambivalence about the Indian's legal position within the U.S., and also work in tandem with social closure to produce anxieties and stereotypes about the Indian's ability to exist as a full member of the dominant society, both legally and socially.

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treaty-making).

47 *See generally* General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C. §§ 331-333 (1887)) (repealed 2000).

48 H.R. Rep. No. 1576-46, at 10 (1880) ("The real aim of this bill is to get at the Indian lands and open them up to settlement. The provisions for the apparent benefit of the Indian are but the pretext to get at his lands and occupy them.").

49 Bruyneel, *supra* note 17.

50 *Id.* at 10.

51 *Id.* at 13.

The concept of colonial ambivalence allows one to better understand the central role that colonial management of American Indians plays in the construction of tribal justice systems as separate and unequal. To begin, Bruyneel identifies federal Indian policy as one of the "most recognizable consequences of colonial ambivalence."[52] Persistent shifts within Indian policy, including the social status of tribal communities within the nation and the struggles they endure to maintain adjudicatory authority over their reservations, are a direct product of this ambivalence. According to Bruyneel, "ambivalence in policymaking is colonial because it stems from the privileged position of the United States, from which it can unilaterally shift the terms of its relationship to Indigenous people."[53] As will be demonstrated later in this article, federal Indian policy reflects what Thomas Biolsi refers to as the "imaginary Indian policy pendulum."[54] It swings at the will of the federal government and white bureaucrats between intense efforts to assimilate Native peoples and then back toward tribal recognition and support of Indian self-determination—though always at the will of, and through terms dictated by, the federal government. Due to the extreme unpredictability of Indian policy, Bruyneel links colonial ambivalence with "'a form of American uncertainty.'"[55] The inconsistency and uncertainty that is key to Bruyneel's concept of colonial ambivalence often stems from the multiple voices, interests, and institutions that make up the American state. As such, Bruyneel positions colonial ambivalence as part of a larger American uncertainty about the United States' relationship to indigenous people.

Colonial ambivalence applies to a broad span of Indian policy including moments of policy change, as well as eras of assimilation and self-determination. The 1884 case *Elk v. Wilkins,56* is an example of Bruyneel's "American uncertainty" because it demonstrates the conflicting and inconsistent interpretation and application of Indian policy that is key to colonial ambivalence. In April of 1880, John Elk attempted to register to vote and subsequently attempted to cast a ballot in a local election in Omaha, Nebraska. Elk was denied both times on the basis that he was an Indian and not a citizen.[57] At the heart of this case was whether an Indian was eligible for citizenship "merely by reason of his birth within the United States, and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white

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[52] *Id.* at 10.

[53] *Id.*

[54] Thomas Biolsi, Deadliest enemies: law and the making of race relations on and off Rosebud Reservation, 14 (2001).

[55] Bruyneel, *supra* note 17, at 10.

[56] Elk v. Wilkins, 112 U.S. 94 (1884).

[57] U.S. Const. amend. XIV, § 1. (John Elk argued that he was eligible for citizenship because he renounced his tribal ties to claim U.S. citizenship under the citizenship clause of the 14th amendment which states: all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.").

citizens."[58] The Court ruled Elk was ineligible to claim citizenship because he owed allegiance to his tribe, even though he had renounced those ties to the registrar in 1880 and again in court.[59]

The *Elk* case is an example of colonial ambivalence because it demonstrates both the unilateral power of the federal government over Indians, as well as an inconsistency in the implementation of federal Indian policy. Indian policy at this time focused on the complete assimilation of Indians into the mainstream, a policy that was created without the consultation or consent of Native peoples. Indians were subjected to forced assimilation with the promise of future citizenship, but with no guarantee because the federal government has the unilateral power to decide who can and cannot be a citizen. The colonial ambivalence entangled in such policies forced many Indians, including Elk, into a state of legal and social limbo. The Court stated, "The national legislation has tended more and more toward the education and civilization of the Indians, and fitting them to be citizens."[60] As such, John Elk was what reformers and bureaucrats at the time called a "good Indian": he left the reservation, resided among whites, made every attempt to assimilate to white middle-class sensibilities, and saw himself as an enfranchised U.S. citizen. However, the Court also stated:

> The question whether any Indian tribes, or any members thereof, have become so far advanced in civilization that they should be let out of the state of pupilage, and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself.[61]

In other words, despite forcing Indians into social, cultural, and political assimilation with the end goal being citizenship, one's access to that legal status was not guaranteed. In fact, the entire process created and reinforced a hierarchy in which Indians' legal and social positions were always inferior to that of the non-Indian majority. In the context of a federal agenda to eliminate and fully assimilate tribal nations, this decision left Indians that opted into assimilation in a legal limbo. Without guaranteed access to citizenship, Indians who assimilated into the mainstream existed as neither U.S. citizens nor as full members of their tribal nation, because such cultural connections were deemed severed during the assimilation process. This case demonstrates that even when Indian people act within the boundaries determined by the federal government—in this case actively seeking citizenship and assimilation into non-Indian society—colonial ambivalence remains in play. Thus, more than an uncertainty and inconsistency in colonial rule, this case demonstrates that

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[58] *Elk*, 112 U.S. at 99 (1884).
[59] *Id*.
[60] *Id.* at 106.
[61] *Id.* at 106-107.

colonial ambivalence also acts as a mechanism to maintain dominance through the law.

Colonial ambivalence and American uncertainly affect not only tribal courts, but also individual tribal members, and the complicated system of jurisdiction that tribes must navigate today--a system that actively works to maintain non-Indian dominance even within tribal affairs. The *Elk v. Wilkins* case, however, also demonstrates the extent such ambivalence has in shaping the image of the Indian in the U.S. popular imagination. Reflecting back on the work of Max Weber, the continued survival of American Indians evokes a strong colonial ambivalence that reinforces the idea of the Indian as "other" in contemporary society. Positioning the Indian as "other" reinforces stereotypical notions of Indians as static, non-modern, uneducated, and ultimately inferior. The penetrating effects of colonial ambivalence and American uncertainty are amplified by the fact that Indian people exist in a margin of social invisibility within dominant society. As a result, social closure and colonial ambivalence function together to maintain and reinforce uneven power structures that ensure Indian people and their systems of justice remain at the bottom of both social and legal hierarchies. Moreover, this intense stratification of the Indian as the subordinate class ensures that tribal sovereignty and adjudicatory authority are only recognized when they benefit the legally privileged non-Indian class, and justifies Indian exclusion by applying the "negative Indian credential" to all Indian people, institutions, and efforts to realize self-determination.

III. Evidence of Social Closure in Contemporary Case Law

Tribal courts, in the Western legal sense of courts, emerged from the Indian Reorganization Act of 1934 ("IRA").[62] During this period, the BIA was under the leadership of Commissioner John Collier. The IRA homogenized radically diverse Indian tribes for the purpose of constructing tribal legal systems recognizable to Western law. Tribal legal systems have since undergone incredible transformation. Most recently in 2010, the Tribal Law and Order Act[63] ("TLOA") increased sentencing options for tribal courts from one to three years. In order to exercise these new rights, tribal courts are also required to offer specific defendant protections, such as counsel for indigent defendants.[64] Additional

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[62] Indian Reorganization Act of 1934, ch. 576, § 1, 48 Stat. 984 (1934) (codified at 25 U.S.C. §§ 461-479 (2012)).

[63] Tribal Law and Order Act, Pub. L. No. 111-211, Title II § 234, 124 Stat. 2258 (codified at 25 U.S.C. § 1302 (2010)) (ICRA limited tribal courts to levy sentences up to 1 year and fines up to $3000, effectively limiting tribal courts to prosecution of misdemeanor cases. Section 234 of the Tribal Law and Order Act, outlining Tribal Court Sentencing Authority, enhanced tribal sentencing to 1-3 years imprisonment, $15,000 fine, or both, and a 9 year cap on stacking sentences.).

[64] *Id.*

sentencing provisions, however, can prove costly and may limit "cultural distinctiveness."[65]

This article does not offer an analysis of the possible limitations or historical difficulties of maintaining tribal courts, but instead analyzes the shifting logic of settler states to accept or reject Indigenous sovereignty by investigating Indian law, especially in cases governing tribal court jurisdiction. This article proceeds with the most recent treatment of tribal courts, the oral arguments in *Dollar General v. Mississippi Band of Choctaw Indians,* and by identifying and analyzing evidence of social closure. Then this article will incorporate social closure analysis with a historical review of exclusionary Indian policy to support the claim that the closure identified so clearly in *Dollar General* is in fact centuries in the making. Specifically, this section examines how deeply Dollar General believes that western notions of legal fairness must be upheld, including due process and rights to a neutral forum, while at the same time similar deference must be undermined in respect to tribal legal traditions.

A. *Dollar General Corporation v. Mississippi Band of Choctaw Indians* Case Facts

On December 7, 2015, the United States Supreme Court heard oral arguments from the legal parties in *Dollar General Corporation v. Mississippi Band of Choctaw Indians*. Dollar General leases commercial space from the Mississippi Choctaw ("the Tribe") and operates a retail store on the Tribe's reservation.[66] In 2003, the Tribe requested this store participate in a Youth Opportunity Program ("YOP"), which provides job training for students on the reservation.[67] The store manager, Dale Townsend ("Townsend"),[68] and the corporate petitioner agreed to participate in the program. Several Choctaw students were accepted as interns, and worked at the store without cost to Dollar General because the Tribe provided the associated wages.[69]

One student, Respondent Doe ("Doe"), alleged Townsend sexually assaulted him at the store during his internship.[70] According to the Tribe, Doe's parents "sued Petitioners in the tribal court on the basis of various state law tort theories borrowed as tribal law, including vicarious liability and/or negligence in hiring, training and supervising the store manager"

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[65] See Seth J. Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. Rev. 88, 91 (2013) (an excellent analysis of tribal courts arguing that funding and cultural character may create two tiers of tribal courts - (1) wealthy or assimilated tribes and (2) less financially or culturally flexible tribes.).

[66] Petition for Writ of Certiorari at 3, Dollar General Corp. v. Miss. Band of Choctaw Indians, No. 13-1496 (5th Cir. 2013) (Hereinafter Dollar General (petition for cert.)).

[67] Brief of Respondents Mississippi Band of Choctaw Indians, et al. in Opposition, at 4, Dollar General Corp. v. Miss. Band of Choctaw Indians, No. 13-1496 (5th Cir. 2013) (Hereinafter Dollar General (brief in opposition)).

[68] Dollar General (petition for cert.), *supra* note 64 at 5.

[69] *Id*. at 6.

[70] Dollar General (brief in opposition), *supra* note 65 at 4.

and then "sought compensatory and punitive damages."[71] Doe's family requested a minimum of $2.5 million in damages.[72] Dollar General responded with a request to dismiss the case, arguing the Mississippi Choctaw lacked jurisdiction, which the tribal court denied.[73] Dollar General appealed to the Supreme Court of the Choctaw Tribal Court in August 2005. That Court affirmed tribal jurisdiction in February 2008.[74]

Townsend and Dollar General filed suit in the District Court for the Southern District of Mississippi to enjoin[75] the ongoing tribal court proceedings.[76] The district court held the tribal court did not have jurisdiction over Townsend, but did have jurisdiction over Dollar General.[77] The court held that the corporation gave implicit consent to tribal jurisdiction when it agreed to place Doe and other Choctaw students into positions at their reservation store.[78] The Fifth Circuit Court of Appeals affirmed,[79] finding the corporation participated in a consensual relationship with the Tribe[80] when it agreed to be involved in the tribal YOP. Dollar General filed a petition for a writ of certiorari on June 12, 2014.

B. *Locating Social Closure and Colonial Ambivalence in Dollar General*

Dollar General argues that tribal regulatory authority specifically in tort law is too broad, because it can apply widely to non-Indians, specifically asking whether or not tribal courts have authority in civil tort claims against non-Indians who enter consensual tribal relationships.[81] Dollar General argues tribes do not have legislative authority in tort claims, and, even if such authority could be located, then tribes do not have civil adjudicatory authority because they fail to provide Constitutional protections

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[71] *Id.*

[72] Dollar General (petition for cert.), *supra* note 64 at 6.

[73] *Id.*

[74] *Id.*

[75] For challenges to tribal court proceedings or requests to enjoin litigation where tribal courts lacks jurisdiction, see Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 850-53 (1985).

[76] Dollar General (petition for cert.), *supra* note 64 at 7.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*; See Montana v. United States, 450 U.S. 544, 565-566 (1981) where the Supreme Court outlines two "Montana exceptions" to the rule that tribes may not exercise jurisdiction over non-Indians on non-Indian reservation fee land: "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers (1) who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over (2) the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security or the health and welfare of the tribe." The Fifth Circuit affirmed under the first Montana exception. See also Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645, 656 (2001) (held that the use of Montana's first exception requires that tribal authority "have a nexus to the consensual relationship").

[81] Dollar General (petition for cert.), *supra* note 64, at i.

such as the right to a neutral forum[82] provided to non-Indian citizens of the U.S. This bold uncoupling of tribal adjudicatory and regulatory authority creates enormous obstacles for tribal self-determination. Any tribal nation hoping to protect the health and safety of their community may regulate the activity of non-Indians on tribal reservations with written law that cannot be enforced in a tribal judiciary. The uncoupling of written law from enforceable jurisdiction renders the Tribe nearly powerless over the actions of non-Indians, while maintaining a legal and political monopoly over Indian land and its resources.

Dollar General's petitions, briefs, and amici curiae filed with the United States Supreme Court provide an opportunity to explore the function of social closure and colonial ambivalence from a variety of perspectives. Social closure seeks to legitimize legal outcomes and maintain authority over scarce resources, while colonial ambivalence appropriately describes the shifting logics of settler states regarding tribal jurisdiction. Closure reinforces the rhetoric of separate and unequal with persuasive evidence that tribal courts are subordinate or inherently unjust in procedure and legal culture. This article argues social closure and colonial ambivalence are most salient in the dispute over the retail store lease, the petitioners' language regarding the inferiority of the tribal courts in its writ to the Supreme Court, and the discussion of tribal legal systems by the petitioners during oral arguments.

1. *The Language of the Reservation Store Lease*

The language of the lease between Dollar General and the Tribe indicate that the corporation was made fully aware that the Choctaw Tribal Court and Choctaw Tribal Code governed the contractual relationship. The oral arguments indicate that the lease specifically states: "Dollar General shall comply with all codes and requirements of all Tribal and Federal Rules and regulations now enforced or which may hereafter be enforced that are applicable and pertain to Dollar General's specific use of the demised premises."[83] Dollar General repudiates the presumption that the corporation should have anticipated being subject to tribal tort law, despite their business operations on the reservation for a number years.[84] Further, the corporation denies any consent to a tribal forum.[85] Dollar General asserts that the Tribe does not have civil jurisdiction without a compelling indication of the corporation's consent or specific congressional language indicating the presence of civil jurisdiction over non-Indians for tort claims.[86]

After Dollar General filed for cert in June 2014, the Tribe responded in opposition in August 2014. This brief indicates that the Tribe and

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[82] *Id.* at 9.
[83] Dollar General (petition for cert.), *supra* note 64, at 38-39.
[84] *Id.* at 18.
[85] *Id.*
[86] *Id.* at 18, 20.

corporation began a long-term lease in 2000,[87] which includes a provision that outlines governing tribal law. The lease provision stipulates, "exclusive venue and jurisdiction shall be in the Tribal Court of the Mississippi Band of Choctaw Indians. . .and subject to the Choctaw Tribal Tort Claims Act."[88] In addition to the clarity of the lease language and the venue provision, the Choctaw Tribal Code is conveniently accessible on the Internet.[89] With these two key points, Dollar General's claim that they could not have anticipated being subject to tribal court authority and Tribal Code continues to fail. The issue of express versus implied consent, however, plays a central role in the oral arguments. The Supreme Court previously held that tribes might regulate non-Indians "who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[90] Dollar General fixates on the Court's use of the word "consent" by arguing in favor of express consent, whereas the Tribe focuses on the power of "commercial dealings" to reinforce the point that one can consent by words *and* actions.[91] The debate regarding whether express or implied consent best describes the applicability of the lease, is currently unsettled by the Supreme Court.

The dialogue between Dollar General and the Mississippi Choctaw to either reject or accept tribal civil jurisdiction does, however, expose social closure at work. According to sociologist Max Weber, open social relationships do not deny membership or the sharing of group benefits, while closed relationships limit membership and excludes outsiders from benefits and resources.[92] In *Dollar General*, social closure predicts group exclusion of those marked with a "negative credential" when resource competition arises. The corporation's petition for cert indicates a desire to apply the Indian "negative credential" in order to evade the language of the lease. Dollar General does so by delegitimizing tribal courts and relying "on unfounded fears"[93] among non-Indians to limit their obligation to the civil authority of the Mississippi Choctaw. Specially, Dollar General is fueled by their own economic interests so they refuse to pay punitive damages, while rallying non-Indian fears of further financial

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87 Dollar General (brief in opposition) *supra* note 65 at 2.

88 Dollar General (brief in opposition) *supra* note 65 at 3-4; Vol. 1 USCA5, p.417 and n.6.

89 Choctaw Tribal Code, *available at* http://www.choctaw.org/government/court/code.html.

90 Montana v. United States, 450 U.S. 544, 566 (1981).

91 Transcript of Oral Argument at 39, Dollar General Corp. v. Miss. Band of Choctaw Indians (No. 13-1496); see Plains Commerce Bank v. Long Family Land & Cattle Co. 554 U.S. 316, 319 (2008) ("Because the Bill of Rights does not apply to tribes and because nonmembers have no say in the laws and regulations governing tribal territory, tribal laws and regulations may be applied only to nonmembers who have consented to tribal authority, expressly or by action.").

92 *See* Weber, *supra* note 16, at 43.

93 Brief for the National Congress of American Indians, et al. as Amici Curiae Supporting Respondents, Dollar General Corp. v. Miss. Band of Choctaw Indians, No. 13-1496 (5th Cir. 2013) (Hereinafter NCAI Amici).

liability for corporations operating on tribal land.[94] In the process, the notion of express consent justifies any ambivalence in the applicability of tribal adjudicatory authority.

Dollar General also questions the legitimacy of the lease language by comparing the legal expectations of state, and what are now tribal, courts during the signing of the Judiciary Acts of 1789 establishing the nation's federal court system.[95] Dollar General argues that Congress held state courts to a full faith and credit standard, yet made no mention of tribal courts. Dollar General suggests that surely Congress could not have "thought the tribal courts were better than the State courts."[96] This historical grasp, however, cannot hide the fact that the economic motivation of the corporation is to limit any payment on damages. Similarly, Dollar General's own economic interests motivate a complete disregard for traditional tribal justice systems. To agree with this broad rule, the Court in turn would devastate the notion that authority over non-Indian activity on reservations is in fact essential to tribal sovereignty.[97] Furthermore, such a position wholly denies a tribe the opportunity and responsibility to protect the safety and wellness of tribal communities, particularly women and children.[98]

The clarity of the lease provisions stipulating exclusive tribal venue and jurisdiction is compelling in itself because it indicates the presumption of tribal court civil jurisdiction, arising from Supreme Court decisions requiring the exhaustion of tribal court remedies set out in *Iowa Mutual* and *National Farmers Union*.[99] Additionally, the Mississippi Choctaw find support for tribal courts and tribal civil jurisdiction in tort law matters involving non-Indians.[100] Several tribes, including the Puyallup Tribe

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[94] Dollar General (petition for cert.) *supra* note 64 at 12 ("The facts of this case – in which respondent seeks millions of dollars in damages, including punitive damages, against a nonmember employer on a theory of vicarious liability – illustrate what is at stake for tens of thousands of nonmember corporations and individuals who do business on tribal reservations.").

[95] Judiciary Act of 1789, ch. 20, 1 Stat. 73.

[96] Oral Arguments, *supra* note 2 at 61.

[97] Strate v. A-1 Contractors, 520 U.S. 438, 451 (1997). ("[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty."); Williams v. Lee, 358 U.S. 217, 223 (1959) (state jurisdiction in some situations can "undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.").

[98] See Brief for the National Indigenous Women's Resource Center, et al. as Amici Curiae Supporting Respondents, Dollar General Corp., et al. v. Mississippi Band of Choctaw Indians, No. 13-1496 at 3 (October 22, 2015) ("When a Tribal Government cannot protect its women, the entire nation is in jeopardy.).

[99] See Nat'l Farmers Union Ins. Cos v. Crow Tribe of Indians *supra* note 73 (requires an exhaustion of tribal court remedies, where tribal appellate courts must review the lower court's determination before appeal to federal court); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987) (even in cases where diversity jurisdiction exists, the National Farmer's Union requirement for tribal court exhaustion applies.).

[100] *Id.*

of Indians,[101] the Navajo Nation, and the Rincon Band of Luiseno Indians, among others, directly express their support to the Supreme Court of the United States ("SCOTUS") in amici curiae. The brief describes "a strong and direct interest in seeing that companies that choose to do business within their reservations obey tribal laws and are susceptible to suit in tribal courts if they harm tribal members."[102] The National Congress of American Indians worked alongside several more tribes to file an amici curiae regarding the connection between jurisdiction and tribal self-government. It describes the severe impact a ruling in favor of Dollar General, which could strip tribes of civil jurisdiction over non-Indians, would have on a larger scope of civil cases in Indian Country.[103]

In addition to the jurisdictional support for the Mississippi Choctaw, some tribal leaders including Tulalip Tribal Chairman Mel Sheldon Jr., question the shifting settler state logics to accept or reject Indigenous sovereignty present in the case. In sorting through the colonial ambivalence, Chairman Sheldon asserts that self-governance and inherent sovereignty are

> "The heart of this case. . .the Dollar General Corporation seeks to evade tribal civil jurisdiction after the fact. We find it surprising the case has made it to the Supreme Court given federal policy and precedents in case law that have clearly sought to promote tribal self-governance and economic development."[104]

Sheldon identifies Dollar General's colonial ambivalence and holds it accountable. In this case, Dollar General "unilaterally shifts the terms of its relationship"[105] with the Tribe by changing a previously agreed upon set of relationship terms to impose one-sided expectations on the tribe. In doing so, the corporation's claim mirrors American uncertainty about the recognition of tribal self-determination.[106] In this case, both the political uncertainty and legal dominance of colonial ambivalence is maintained because the social relationship between the United States and an Indian tribe closes "after the fact." Bruyneel describes colonial ambivalence as a "product of both institutional and cultural dynamics" that represent

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[101] Chris Winters, *Supreme Court Case Draws Tulalip's Attention*, The Daily Herald, Dec. 4, 2015, http://www.heraldnet.com/article/20151204/NEWS01/151209639/Supreme-Court-case-draws- Tulalip's-attention (last visited Dec 31, 2015) ("The Tulalip Tribes have joined the National Congress of American Indians and 55 other tribes and tribal organization asking the court to rule in the Choctaws' favor.").

[102] Brief for Puyallup Tribe of Indians et al. as Amici Curiae Supporting Respondents, Dollar General Corp. v. Miss. Band of Choctaw Indians, No. 13-1496 (October 22, 2015) at 1.

[103] *Id.* at 3-4.

[104] Chris Winters, *Supreme Court Case Draws Tulalip's Attention*, The Daily Herald, Dec. 4, 2015, http://www.heraldnet.com/article/20151204/NEWS01/151209639/Supreme-Court-case-draws- Tulalip's-attention (last visited Dec 31, 2015) ("The Tulalip Tribes have joined the National Congress of American Indians and 55 other tribes and tribal organization asking the court to rule in the Choctaws' favor.").

[105] Bruyneel, *supra* note 17 at 10.

[106] *Id.*

"a complex set of interests and institutions that are often at odds" with one another.[107] Thus, the theater of colonial ambivalence may showcase multiple actors and interests that do not engage with American Indians in a uniform way. These actors may simultaneously exert a privileged position over American Indian communities, highlighting the intertwining political relationship between corporations and the modern political state. When Dollar General benefits from the Tribe, the relationship remains open and recognizes one end of the ambivalence spectrum - acknowledging the unique political state of tribal governments. However, when the corporation's benefits are threatened, the relationship closes to curb competition for resources by pushing toward the opposite end of the spectrum as a reason for the Court to decide in favor of the corporation - an emphasis on tribal uniformity and assimilation of Native peoples that requires strict jurisdictional limits on a tribe's ability to adjudicate civil matters with a non-Indian corporation.

2. *Establishing Tribal Courts as Separate and Unequal in the Petition for Certiorari*

In order to distract from Dollar General's economic motivations, the corporation attempts to undo tribal civil adjudicatory authority over non-Indians, a crucial exercise of inherent sovereignty.[108] To accomplish this task, Dollar General constructs American Indians as "ethnic others" and applies a "negative credential" to tribal courts as severely lacking in due process, notions of fairness, and neutrality. The corporation builds the argument that tribal civil jurisdiction over non-Indians is an open question under *Nevada v. Hicks*,[109] yet it is crucial to point out that the Fifth Circuit found in favor of Mississippi Choctaw Tribal Court jurisdiction under the particular facts available in the tort case.[110]

To support a broad rejection of tribal jurisdiction over non-Indians, Dollar General announces several key moments from Supreme Court cases[111] favorable to their position, arguing that even if such jurisdiction is broadly considered, it is "only in limited circumstances."[112] For example, the corporation points to *Oliphant v. Suquamish Indian Tribe*,[113] to discred-

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[107] *Id.*

[108] See Transcript of Oral Argument at 55, Dollar General Corp. v. Miss. Band of Choctaw Indians (No. 13-1496); National Farmers Union Insurance Cos. v. Crow Tribe of Indians 471 U.S. 845 (1985) ("Thus, we conclude that the answer to the question whether a tribal court has the power to exercise civil subject matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require.").

[109] Nevada v. Hicks, 533 U.S. 353, 358 (2001).

[110] Brief for Petitioner at 2, Dollar General Corp. v. Mississippi Band of Choctaw Indians (No. 13-1496), 2015 WL 5169095.

[111] *Id.* at 3.

[112] See, e.g., Strate v. A-1 Contractors, 520 U.S. 438, 439 (1997) ("Absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.").

[113] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

it tribal jurisdiction over non-Indians as impermissible, unless Congress passes specific statutory language delegating such authority. They also point to *Duro v. Reina*[114] to support the position that tribes relinquished their power to legally govern and punish non-Indians when they engaged in treaty making with the United States government. By establishing concern about tribal jurisdiction over criminal matters, Dollar General seeks to extend this uncertainty to tribal authority over civil matters. Specifically, Dollar General relies on the language of *Montana v. United States*, which distinguishes recognition of tribal legislative authority from an ability to exercise regulatory authority over non-Indians, to do so.[115]

As the Petitioner charts out the limits of tribal sovereignty and jurisdiction, it becomes clear that some "negative credential" is working to exclude access to what the Court considers legitimate law. American Indians are being excluded from enjoying what would seem like a basic assumption of legal equality among a non-Indian majority population—the ability to regulate and enforce rules on one's sovereign land. Instead, Dollar General claims to be the excluded class of persons. The corporation describes themselves as "strangers" to the Mississippi Choctaw Tribal Court,[116] where non-Indians lack U.S. Constitutional provisions afforded to them such as due process.[117] Dollar General also highlights the potential fear of incredibly high legal transaction costs for non-Indians in tribal courts.[118] Dollar General emphasizes that non-Indians can find themselves "subject to an unwritten set of laws and customs to be determined and applied by the Tribe"[119] for a tort claim stemming from an afternoon spent playing golf at a casino.

However deceptive or untrue, *Dollar General* foreshadows a grave future for non-Indians who are not represented in law-making arenas of tribal government, and in the same stroke suggests that a vote in favor of the Tribe would severely threaten tribal communities. They explain, "some businesses may simply withdraw from communities in which unemployment is already high and access to commercial services (like low-cost merchandise stores) is low."[120] In contrast to such claims, the Tribe is one of the state's largest employers, with a $100 million payroll of nearly 6,000 employees both Indian and non-Indian.[121] Dollar General attempts to appear concerned for tribal families who are in great need of employment and local shopping centers. Although a laudable

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[114] Duro v. Reina, 495 U.S. 676, 693 (1990).
[115] Brief for Petitioner at i, Dollar General Corp. v. Mississippi Band of Choctaw Indians (No. 13-1496), 2015 WL 5169095.
[116] *Id.* at 11.
[117] *Id.* at 17.
[118] *Id.* at 18.
[119] *Id.* at 17.
[120] *Id.* at 17.
[121] *See* Mississippi Band of Choctaw Indians – Business, http://www.choctaw.org/businesses/ (accessed March 1, 2016). (The site indicates that more than 50 percent of the tribe's total workforce is non-Indian.).

position, one wonders how the acknowledgment of the Tribe's economic success would render the tone of such an argument disingenuous. Moreover, does such an argument rely in part on the social distance between Indians and a non-Indian national majority to impress upon the reader worrisome differences between the two communities?

Dollar General proceeds from a discussion of specific threats to Indian and non-Indian livelihood should tribes be found to exercise civil adjudicatory authority in tort law cases back to their central focus: tribal courts are separate and unequal, sufficient for Indians and simultaneously deficient for non-Indians. First, Dollar General homogenizes tribal courts and then argues that the "special nature"[122] of tribal courts differ in enough "significant respects"[123] such as court structure, laws applied, and judicial freedom. Dollar General further argues that the Indian Civil Rights Act of 1968 cannot satisfy such differences because it does not provide sufficient guarantees of fairness,[124] including tribal court review or the option to remove cases to state or federal courts.[125] Second, the petition for cert points to *Duro v. Reina* and remarks that "[t]ribal courts are often subordinate to the political branches of tribal governments, and their legal methods may depend on unspoken practices and norms," perhaps in an effort to reinforce a "negative credential" to that which is distinctly Indian.[126] However, despite Dollar General's intent to discredit tribal courts, it should be noted that in 2005 the Harvard Project on American Indian Economic Development honored the Choctaw's tribal court system, praising it for being "organized independently of elected leadership [with] an arena for the fair, reliable resolution of disputes."[127] If the assessment of tribal courts employed in the petition for cert is in fact unfounded within the case facts, the intent in reaching beyond the Choctaw courts to find some measure of tribal deficiency is questionable. With this assessment, one wonders whether Dollar General is attempting to guide the Court through fear of the "Indian other" by relying on historical stereotypes of tribal legal systems as politically, culturally, or legally unfit?

3. Emphasis on "*Western Fairness" in the Dollar General Oral Arguments*

Dollar General's attorney, Thomas C. Goldstein, begins his oral arguments with an assertion that tribes did not retain civil adjudicatory jurisdiction over non-Indians as part of their sovereignty.[128] As described in

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[122] Duro v. Reina, 495 U.S. 676, 693 (1990).
[123] *Hicks*, 533 U.S. at 383.
[124] *Duro*, 495 U.S. at 693.
[125] *Hicks*, 533 U.S. at 385.
[126] Brief for Petitioner at 19, Dollar General Corp. v. Mississippi Band of Choctaw Indians (No. 13-1496), 2015 WL 5169095; *see Duro*, 495 U.S. at 693.
[127] *Honoring Nations: 2005 Honoree*, The Harvard Project on American Indian Development https://nnidatabase.org/db/attachments/text/honoring_nations/2005_HN_Choctaw_tribal_court_system.pdf. (last visited Dec 21, 2015).
[128] Transcript of Oral Argument at 3, Dollar General Corp. v. Miss. Band of Choctaw

the previous section, Goldstein shifts gears from this discussion of tribal civil authority to advance claims regarding the subordinate status of tribal courts. In this move, Dollar General's economic motivation denies tribes any notion of legal legitimacy and subsequently jeopardizes tribal sovereignty. Meanwhile, two important concerns arise amid the many voices heard in the oral arguments. First, the arguments reveal somewhat unreasonable expectations that tribal courts and their respective governments must provide replica protections for non-Indians or run the risk of losing their civil jurisdiction over non-Indians altogether. Second, and equally worrisome, is an apparent disinterest from some Justices regarding the broader negative impacts for tribes. Justice Alito focuses on the limits of tort liability so intently that one might easily forget that tribal nations and federal Indian law constitute the crux of the case. For example, Alito poses a hypothetical involving a disgruntled casino visitor fearing defamation charges in tribal court for expressing opinions online that perhaps the Blackjack dealer was a cheat.[129] He continues with remarks on the limits of product liability for non-Indian businesses[130] that send their defective products onto tribal land,[131] appearing unwaveringly bound to the non-Indian position. One would hope that the health and safety of tribal communities might feature more prominently, yet the separate and unequal status of American Indians is quite explicit in Alito's line of questioning.

Beginning first by examining the unreasonable belief that tribal courts must provide mirror protections to non-Indians, Constitutional expectations on extra-constitutional entities of this scope seem poorly matched to the reality of many tribal communities in terms of size, availability of resources, and location. For example, forum neutrality is a key issue highlighted during oral arguments. Given the extreme disproportion in population,[132] the tribal court comparison to all other U.S. courts on the issue of jury composition appears odd. Yet, Chief Justice Roberts asks the question three times: "is it consistent with your concept of due process, as a general matter, to have a nonmember tried by a jury consisting solely of tribal members?"[133] To Chief Justice Roberts' point that there should be concern for the non-Indian who finds him or

Indians (No. 13-1496).

[129] *Id.* at 36.

[130] *Id.* at 32.

[131] *Id.* at 33-34.

[132] *See* U.S. Census Bureau, The American Indian and Alaska Native Population: 2010 Census Briefs *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf. ("According to the 2010 Census, 5.2 million people in the United States identified as American Indian and Alaska Native, either alone or in combination with one or more other races. Out of this total, 2.9 million people identified as American Indian and Alaska Native alone." In relationship to the approximate United States population in 2010 of 309 million, approximately 3 million of the population self-identified as American Indian and Alaska Natives alone. Roughly 1.7% of the total population.).

[133] Transcript of Oral Argument at 21, Dollar General Corp. v. Mississippi (No. 13-1496).

herself in tribal court, Justice Breyer draws a comparison between parties who each are fans of rival baseball teams.[134] Breyer suggests that a New York resident and Yankee fan would not receive a fair jury trial in Massachusetts where it is likely that Red Sox team allegiance is strong. Mississippi Choctaw Attorney Katyal is quick to point out that consent to a tribal forum and full Congressional control to regulate tribal juries makes such a comparison impossible.[135] Furthermore, Dollar General entered the Choctaw Reservation voluntarily with the express purpose to engage in commercial dealings with the tribe[136] and has done so for 16 years, therefore these tribal jurisdiction and forum requirements should come as no surprise.

Further analysis raises important concerns about why the oral arguments discussed Congressional authority and tribal sovereignty when the case concerns tribal court jurisdiction over non-Indians in civil tort claims. While the central question in the petition for cert is linked to both Congressional authority and tribal sovereignty, some Justices, including Breyer and Scalia, read their authority in this case as an obligation to critique established adjudicatory powers in tribal courts. Justice Breyer asked Dollar General Attorney Goldstein directly, "What's wrong with the tribal courts?"[137] Goldstein acknowledged the legitimacy of the Mississippi Choctaw Tribal Court, but then pointed broadly to other tribal courts he assumes lack neutrality, an argument that the Justices seem content to pursue.[138] In addition, the Court considered the possibility of removal from a tribal court[139] and then quickly clarified that federal court removal is provided by the Constitution, either from state or federal courts, should an individual believe they were subject to unfair proceedings.[140] The discussion of removal squarely supported Dollar General's argument that U.S. "legal tradition understands that there will be certain basic protections,"[141] which appear absolutely unreachable to non-Indians in tribal court. Furthermore, the discussion reveals that the two Justices may support Dollar General's evasion of deliberate consent to civil jurisdiction as it is outlined in the store lease. By not focusing enough on the question of nexus, the Court fails to successfully link Dollar General's knowledge of Mississippi Choctaw jurisdiction to their previous appearance in tribal court on this same matter as well. Instead, the notion of a representative jury in a juryless legal matter continues to swallow the oral arguments. The Justices are fully aware, however, that Congress retains plenary power in such matters and could enact specific provisions to ease anxieties over fairness in a manner that would not

134 *Id.* at 43.
135 *Id.* at 44.
136 *Id.*
137 *Id.* at 11.
138 *Id.*
139 *Id.*
140 *Id.* at 13.
141 *Id.*

strip tribes of civil adjudicatory authority wholesale. For instance, jury provisions for tribal courts that resolve the concerns for composition and representativeness are surely feasible.

Throughout oral arguments, Dollar General continued to promote their argument in favor of the supremacy of basic legal protections afforded by the United States. Simultaneously, they argued that removal and review of tribal court decisions would deny tribes due recognition as sovereigns.[142] What appears to be counter-productive argumentation is actually the mapping of broad constitutional concerns in search of a ruling against tribal civil tort jurisdiction as a bright line rule. In order to reach this rule, Dollar General explained that historically federal courts have extended "enormous respect and only overturned rulings of tribal courts or foreign courts that are way out of bounds."[143] Such a process by the federal courts, however, does not satisfy constitutional protections to due process even within "the best-managed, most modern courts."[144] Dollar General wants the Supreme Court to believe that tribal courts wholesale cannot protect the interests of non-Indians, despite counsel's previously documented recognition and respect for tribal court authority by federal courts. Within Dollar General's framework, tribal courts are fundamentally unfair and inappropriate for non-Indians so long as the Supreme Court and Constitution are not supreme at the tribal level. Furthermore, they argue that Congress could never have thought tribal courts would be superior to state courts[145] because "the United States obviously did not regard the Tribes' judiciary as something that is purely a part of their government, because time and again, it has micromanaged them."[146] Thus, Dollar General suggests that tribal courts are separate and distinct from other courts because they cannot provide constitutional protections to non-Indians, and remain inherently unequal to both federal and state courts due to the history of federal presence in tribal courts.

Working backward from Dollar General's statements, and the unreasonable expectations they wish to impose on tribal courts, the presence of American Indians themselves mark their courts with a "negative credential" that is incongruent with westerns notions of legal fairness and due process. Dollar General again relies on social closure to exclude Indian people from a realm of legal competency available only to those who affirm the U.S. Constitution as the supreme source of fairness. Taking this position in light of the clear and continuous business relationship between Dollar General and Mississippi Choctaw for the past 16 years, it appears that on the one hand Indian tribes are sufficiently sophisticated in law and business. For example, tribes can own and operate commercial plazas within which companies like Dollar General can contract for retail

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[142] *Id.* at 14.
[143] *Id.* at 15.
[144] *Id.*
[145] *Id.* at 13-14.
[146] *Id.* at 16.

opportunities. Yet on the other hand, Dollar General's framework of legal legitimacy claims that the tribe is not legally sophisticated enough to manage disputes arising from such dealings.

Why have such inconsistencies persisted in this case? Such a contradictory position requires incredible imagination to most readers of the case. Dollar General's argument, however, aligns with persistent social closure and colonial ambivalence found in federal Indian policy where policy seems to swing in favor of self-determination in one era and then swings back to an era of assimilation in another. Another potential explanation is that this contradictory argument is crafted intentionally for the Supreme Court, for whom "Indian law disputes often are mere vessels for the Court to tackle larger questions."[147] This method for deciding Indian law cases is possible when the Court can identify an important constitutional concern. In this case, Dollar General provides a constitutional concern in their claims for due process, so that the Supreme Court can then decide the constitutional concern according to its own discretion.[148] And "once that portion of the Indian law case is decided, the Court decides any remaining federal Indian law questions in order to reach a result consistent with its decision on the important constitutional concern,"[149] largely neglecting Indian nations and communities whose concerns are at stake.

4. *Judicial Disinterest in the Dollar General Oral Arguments*

Understanding that Indian law cases may serve as little more than a "vessel" for other judicial concerns, one can shift from the contradictory and unreasonable expectations for tribal courts to our second concern regarding Justices that take a somewhat disinterested position on the broad diminishment of tribal sovereignty. We again turn to Justice Breyer, who provides evidence in favor of judicial disinterest on behalf of tribal nations. He asks Attorney Katyal, counsel for the Mississippi Choctaw, to remind him what term the law uses to refer to tribal nation: "what is the word in Cherokee? I forget. It's 'something dependent nation.'"[150] Breyer asks in an effort to explore both the enforceability of court orders decided outside of the U.S. legal system[151] and to revisit the possibility of fairness in tribal courts.[152] The answer is domestic dependent nation,[153] a term arising from what is generally known as the Marshall Trilogy or the foundational cases

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[147] Matthew L. M. Fletcher, *The Supreme Court's Indian Problem*, 59 Hastings Law Journal 579, 580 (2008).
[148] *Id.*
[149] *Id.*
[150] *Id.* at 40.
[151] Transcript of Oral Argument at 40, Dollar General Corp. v. Mississippi (No. 13-1496). (Breyer uses Tasmania, a remote island off the Australian cost, to buttress his concern about the enforceability of judicial decisions that originate external to U.S. courts).
[152] *Id.* at 41.
[153] *Id.*

of Federal Indian law. If there were one term any Indian law advocate would be embarrassed to forget because of its incredible impact on the social and legal subordination of American Indian communities, "domestic dependent" would be such a term. Granted, Justices are subject to moments of forgetfulness that are routine within our daily lives. This particular moment, however, might not ring so loudly had the health and safety of tribal communities been more central to the oral arguments.

Judicial disinterest in diminished tribal sovereignty is also present when Edwin Kneedler, a Deputy United States Solicitor General and amicus curiae supporting the Mississippi Choctaw, emphasizes the importance of tribal justice systems to the Court. Kneedler explains tribal courts are essential "forums for ensuring public health and safety and political integrity of the Tribe."[154] To which Justice Scalia responds by attaching a "negative credential" to tribal courts, and arguably Indian people, by stating however essential tribal courts may be, they are essential "for disputes *between* tribal members" and as such are insufficient for non-Indians.[155] The explicit signaling of a separate and unequal status among American Indians is in plain sight. Kneedler, however, is prompt in addressing previous due process concerns by reminding the Court that "tribal members are the citizens of the jurisdiction [within which the] courts are being held"[156] much like "when someone goes from Alabama to Mississippi, they may be tried before a jury of Mississippians."[157] In short, when jury members are citizens of the forum then any concerns over neutrality must attend to those citizens' rights to ensure the health and safety of their own community. This civic engagement on behalf of the tribal community is necessary, particularly in light of persistent judicial disinterest in diminished tribal sovereignty.

Justice Sotomayor acknowledged the necessity of civic participation and continued to push the dialogue toward the interest of tribal communities. For example, Sotomayor concluded the oral arguments by asking Dollar General's counsel directly, "What then remains of the sovereignty of the Indians?"[158] She is concerned the arguments presented by Dollar General serve to "cherry pick what 'sovereignty' means."[159] Sotomayor explained that, where the U.S. may reserve the sovereign authority to dictate to tribal governments what their justice systems must include, the U.S. need not exercise that authority given the unique treaty relationship between the federal government and Indian nations.[160] Her comments indicate the kind of broad respect for tribal sovereignty one might expect from the Justices that are tasked with the trust responsibility described

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154 *Id.* at 50.
155 *Id.* (emphasis added)
156 *See* Transcript of Oral Arguments, *supra* note 2, at 56.
157 *Id.*
158 *Id.* at 62.
159 *Id.* at 63.
160 *Id.*

in *Seminole Nation v. United States*.[161] As Vine Deloria, Jr. and Clifford M. Lytle explain in *The Nations Within: The Past and Future of American Indian Sovereignty*, Federal Indian law is a complicated body of law upon which "over six hundred separate Indian communities are dependent in some manner on the vagaries of interpretation of federal Indian law, and literally billions of dollars and the lives of over a million people are at stake in Indian cases."[162] Deloria, Lytle, and Justice Sotomayor's questions all indicate how the decisions of this Court have far-reaching impacts. As follows, this case represents much more than a mere vessel to promote judicial interests. Instead, it is a reminder of the critical function that tribal civil adjudicatory authority serves in the administration of life on contemporary tribal reservations.

IV. Evidence of Social Closure From Indian Policy: From "Civilizing" the Indian to Tribal Self-Determination Policy

Dollar General provides the most recent application of social closure and colonial ambivalence against American Indian people and tribal courts in the law. Closure intentionally excludes the American Indian, while ambivalence provides a convenient tactic to maintain the non-Indian advantages. In tandem, these social processes produce legal domination and allow it to persist in the relationship between the U.S. federal government and tribal sovereigns. The following historical overview explores key moments in the development of tribal courts and federal Indian policy that highlight the centrality of legal domination in the U.S./Indian relationship. Legal domination, as described by Max Weber, is

> The belief in the validity of legal statute and functional 'competence' based on rationally created rules. In this case, obedience is expected in discharging statutory obligations. This is domination as exercised by the modern 'servant of the state' and by all those bearers of power who in this respect resemble him.[163]

This specific type of domination recognizes the power of hope and fear in legitimizing the law of the land, while also acknowledging that it is a means by which the state justifies and legitimizes violence.[164] Regarding the American Indian, this hope is associated with Indian assimilation into dominant society to absolve the federal government of the "Indian Problem."[165] This hope is simultaneously tempered with the fear that

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[161] Seminole Nation v. United States, 316 U.S. 286, 297 (1941). ("[The Government] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealing with the Indians, should therefore be judged by the most exacting fiduciary standards").

[162] Vine Deloria, Jr. & Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* 265 (1984).

[163] Max Weber, *Politics as a Vocation, in* From Max Weber: Essays in Sociology 77, 79 (H. H. Gerth & C. Wright Mills eds., Routledge 2009) (1958).

[164] *Id*.

[165] *See generally* Stephen Cornell, The Return of the Native: American Indian political Resurgence 6-7 (1988) (arguing that the "Indian Problem" in the United

American Indian tribes will simply refuse to be dissolved into a cultural and political majority. Thus, the historical legacy that has led to tribal courts being viewed as insufficient for non-Indians dates as far back as colonization. This article, however, will focus on key moments in U.S. Indian policy that took place after the treaty process ended in the late nineteenth century in order to best emphasize the historical longevity of social closure and colonial ambivalence within Indian policy.

A. *"Civilizing the Indian"*

The end of the nineteenth century was a turbulent period for the Office of Indian Affairs ("OIA")[166] with the attempt to contain Indians on reservations, followed by intense efforts to assimilate them into dominant society. Although the Indian Wars continued into the early twentieth century, most Indians classified as "hostile" by the federal government were contained on reservations by the 1890s.[167] The turn of the twentieth century marked American Indians as safe, authentic, and no longer viewed as a disappearing race.[168] Historian Philip J. Deloria argues that, rather than being seen as disappearing, pacification put Indian people into a new margin of invisibility in which the hope to integrate and assimilate Indian people into white society—though not in an equal fashion—became the primary goal.[169] As part of the renewed mission to "civilize the Indians," bureaucrats and reformers saw the law as a necessity to control

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States is a construction of white settlers in which indigenous people were casted as opponents of settlement projects and later to national development and modernity and describing the "Indian Problem" as having three main facets: an economic problem, a problem of cultural transformation, and a political problem. . . . these three facets translate to issues over settlers securing land, assimilating Natives into the dominant society, and lastly maintain control over Natives "so that problems one and two could be satisfactorily resolved.").

[166] The Office of Indian Affairs changed its name to the Bureau of Indian Affairs in 1947. Before this change the BIA was referred to as the Office of Indian Affairs, the Indian Office, the Indian bureau, the Indian department, and the Indian Service. *See* Bureau of Indian Affairs, *Who We Are http://www.bia.gov/WhoWeAre/BIA/* (last visited April 14, 2016).

[167] William T. Hagan, Indian Police and Judges: Experiments in Acculturation and Control 1 (1966). *See also* Philip J. Deloria, Indians in unexpected places 15 (2004) (discussing white anxieties over Indian containment and pacification).

[168] See Deloria, Indians in unexpected places at 16-51 (2004) (discussing the trope of the vanishing Indian began to gain popularity in the eighteenth century and peaked in the nineteenth century. The vanishing Indian concept which promoted the idea that Indians would inevitable disappear (i.e., die off) penetrated literary, historical, legal, and cultural understanding of the Indian well into the late nineteenth century. However, as Philip Deloria points out in *Indians in Unexpected Places*, pacification of the Indian shifted this concept. Although at the turn of the twentieth century the idea of vanishing Indians still remained, this trope was now related to Indians through assimilation and/or being permanently positioned in a margin of invisibility within the dominant. In short, from the nineteenth to the twentieth century there was a shift from the vanishing Indian being about the literal disappearance to one about the disappearance of the "authentic" Indian).

[169] *Id.* at 50.

unwanted Indian behavior.[170] In 1883, the Court of Indian Offenses[171] was established, and by 1900, nearly two thirds of federal Indian agencies had their own courts.[172] Rather than provide an outlet for justice within Native communities, these courts were predominantly used to regulate behavior that was seen as threatening to the civilizing mission, such as: participating in traditional ceremonies, spiritual dances, engaging in plural marriage, drunkenness, or even being a practicing medicine man.[173]

Despite the bureaucratic policy of assimilating American Indians, the unique legal position Indians occupied caused confusion within the OIA and Department of the Interior ("DOI") about the appropriateness and permissibility of Indian courts, particularly because the allotment process would grant many Indians U.S. citizenship. Congress passed the Dawes Act, also known as the General Allotment Act, in 1897. The Dawes Act attempted to hasten Indian assimilation by breaking up reservations into individual allotments--simultaneously ending communal property holding and encouraging the separation of Indians from their community--while also offering an entry point for Indian citizenship.[174] By 1892, the Commissioner of Indian Affairs, T.J. Morgan, argued that the necessity of Indian courts would diminish as the U.S. granted citizenship to Indians through the allotment process, thereby transferring criminal and civil jurisdiction to state and local courts.[175] In other words, the Dawes Act and subsequent amendments[176] divided tribal land into individual allotments and sought to reconcile American Indians into the body politic of the nation through citizenship and the nullification of tribal jurisdiction.

Both the OIA and Congress saw the Court of Indian Offenses, tribal courts, and tribal police through a provisional lens. That is to say, these agencies were created and structured as temporary, conditional, and in service of the mission to assimilate Indians. Thus, the foundation of tribal legal systems in the late nineteenth century until the Indian Reorganization Act in 1934 was not formed with the intention to protect tribal

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[170] *See* Hagan, *supra* note 162, at 4.

[171] The Court of Indian Offenses were not established where tribes had governments that were recognized by the U.S. federal government, such as the Five Civilized Tribes, the Indian of New York, the Osage, the Pueblos, and the Eastern Cherokees. For more information on the establishment of early tribal courts and their evolution *see* William T. Hagan, Indian Police and Judges: Experiments in Acculturation and Control (1966).; Samuel J. Brakel, American Indian tribal courts: The costs of separate justice (1983); Vine Deloria Jr. & Clifford M. Lytle, American Indians, American Justice (1983); Jeffery Burton, Indian Territory and the United States (1866): Courts, Government, and the Movement for Oklahoma Statehood (1997).

[172] *See* Hagan, *supra* note 162, at 109.

[173] *Id.* at 109–110.

[174] *See generally* General Allotment Act (Dawes Act), ch. 119, 24 Stat. 388 (1887) (repealed 2000) (codified at 25 U.S.C. §§ 331-333 (1887)).

[175] 2 Report of the Secretary of the Interior: Beginning of the Second Session of the Fifty-Second Congress, Address of Commissioner Morgan (1892).

[176] *See* Curtis Act, ch. 517, 30 Stat. 495, 507 (1898) (extended the allotment process to the Five Civilized Tribes whom were previously exempt from the 1887 General Allotment Act).

nations. Instead, such legal systems actively worked to undermine tribal sovereignty through a mission that sought to discipline and control Indians by ending the existence of separate and distinct legal and social polities for Indians. For non-Indian parties, the vision was simple: as Indians gained U.S. citizenship, their "Indianness" would diminish, and with the absence of "real" Indians, the issue of tribal courts and jurisdiction would be resolved. In spite of the commissioner's proclamation that "there can be no system of Indian courts where Indians have become citizens of the United States,"[177] at the turn of the twentieth century, additional tribal courts were created and "defunct ones revived."[178] In the next few decades, it became apparent to government officials that absorption of Indians into a non-Indian mainstream was not immediately on the horizon. Instead, during this time, tribal systems of governance became an essential part of tribal communities, and would later become a focus for Indian reformers.

B. *John Collier and Indian Reform*

The Dawes Act "remained the keystone of federal action until 1934, when the Indian Reorganization Act replaced it."[179] Leading up to the creation and passage of the Indian Reorganization Act ("IRA"),[180] Indian advocacy became a focus for many middle-class, white reformers during the early twentieth century. One such reformer, John Collier, went from being a policy reformer for various Indian advocacy organizations in the 1920s, to Commissioner of the Office of Indian Affairs from 1933-1945.[181] Collier publicly advocated to special interest groups, the DOI, and Congress for the end of forced assimilation policies, and advocated for tribal self-government and increased autonomy. Collier attempted to "reorient the whole of Indian policy" towards those goals, and the IRA was supposed to lead the way.[182] The Wheeler-Howard Bill Act of 1934, also known as the Indian Reorganization Act, repealed allotment laws, sought to provide economic rehabilitation, and provided a model for tribal self-government.[183] This act moved the U.S. away from a policy of assimilation towards one of tribal self-determination. Although the IRA attempted to increase tribal self-determination and push the U.S. government towards an equal relationship with Indians, when one looks beyond its seemingly benevolent intentions, a continuous pattern

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[177] *See* REPORT OF THE SECRETARY OF THE INTERIOR: BEGINNING OF THE SECOND SESSION OF THE FIFTY-SECOND CONGRESS, *supra* note 175, at 1303.

[178] *See* HAGAN, *supra* note 162, *at* 144.

[179] FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 70 (1984).

[180] Indian Reorganization (Wheeler-Howard) Act, Pub. L. No. 73-383, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479 (2000)).

[181] For more information on John Collier's career as a reformer and later as Commissioner of Indian Affairs *see* KENNETH R. PHILIP, JOHN COLLIER'S CRUSADE FOR INDIAN REFORM, 1920-1954 (1977); JOHN COLLIER, FROM EVERY ZENITH: A MEMOIR (1963).

[182] *See* CORNELL, *supra* note 160, at 91.

[183] Indian Reorganization (Wheeler-Howard) Act, Pub. L. No. 73-383, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479 (2000)).

of white paternalism and inconsistent federal policy towards Indians is apparent.[184]

John Collier's vision for U.S. Indian policy was heavily influenced by his interest in the British colonial administration. As such, he sought to shift U.S. official Indian policy from *direct rule* to *indirect rule.* Collier classified the federal government's relationships towards Indians in the U.S. from 1820 to 1930 as a direct rule relationship. He defined this relationship by both "the enforcement of the sovereign's ethnocentricity upon the subject people," as well as an "economic exploitative motive."[185] Influenced by the British Empire's colonial relationship with Africa, Collier sought to achieve an indirect rule relationship between Indians and the federal government. Collier recognized indirect rule as a method that would allow the gradual molding of colonial subjects through the use of their own cultures and infrastructures.[186] He also believed that for indirect rule to work correctly, it must be an "evocation, the opposite of imposition. . . Ultimately, it means a genuine and ever-deepening, ever more precise democracy, within a total field of forces in which the alien ruler is a minor and, ideally, a disappearing part."[187] Collier believed that this change would result in a less paternalistic relationship between the U.S. government and Indians; however, beyond his definition of indirect rule, there is no evidence that he sought to eradicate this power dynamic all together.[188].

Despite Collier's seemingly benevolent intentions to shift U.S. Indian policy, he and other government officials demonstrated a propensity to homogenize all Indigenous people into one group, which led to the creation of a one-size-fits-all policy that neither effectively created tribal self-determination nor reconciled Indigenous groups into the nation state. Rather than acting as an "evocation" for a "genuine partnership" between Indians and the federal government, the IRA sought to restructure tribal legal systems to make them compatible with Western institutions of law.[189] Embedded within this shift is also a legislative and governmental turn from viewing tribal legal systems through a provisional lens. Although the IRA is the legislation on which contemporary tribal legal systems are built, this shift did not remove the colonial mentality that shaped early tribal courts. The IRA "proposed to manipulate Indian behavior in ways which their white 'guardians' thought best for them," and also sought to determine both the range of authority to be granted

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[184] For more information on the Indian Reorganization Act *see generally Id.*; Donald L. Parman, The Navajos and the New Deal (1976); Elmer R. Rusco, A Fateful Time: The Background and Legislative History of the Indian Reorganization Act (2000); Graham D. Taylor, The New Deal and American Indian Tribalism: The Administration of the Indian Reorganization Act, 1934-45 (1980).

[185] *See* John Collier, From Every Zenith: A Memoir 346 (1963).

[186] *Id.* at 347-349.

[187] *Id.* at 346.

[188] *Id.* at 340-355.

[189] *Id.* at 346.

and at which time Indians were "prepared" to take on such responsibility.[190] Even with the imposition of Western modes of governance, federal support for the growth of tribal governments and increased tribal self-determination was fleeting. Within a decade, the pendulum of Indian policy quickly swung from one of government supported tribal self-determination to a policy of termination, demonstrating both a measure of colonial ambivalence and American uncertainty.

In June of 1953, House Concurrent Resolution 108 articulated this shift in Indian policy and set the stage for terminating federal supervision of Indians.[191] Beginning in 1954, several bills were passed that sought to terminate federal supervision and recognition of tribal groups, as well as disband reservation communities through relocation.[192] As legal scholars Charles F. Wilkinson and Eric R. Biggs have argued, termination effectively sought to assimilate Indigenous peoples and end tribal sovereignty.[193] Termination did not solve the elusive "Indian Problem" and instead proved to be a detrimental policy. It changed patterns of land ownership and community formation, and altered jurisdiction and authority. Nevertheless, the termination era did not absolve the U.S. government of its responsibilities to Indian tribes and failed to assimilate Indians into dominant society.

C. *Indian Self-Determination and the Tribal Law and Order Act of 2010*

An era of espoused Indian self-determination has existed since the late 1960's. In 1958, the Secretary of Interior, Fred Seaton, announced tribes would no longer be terminated without their consent. Termination, however, was not formally renounced until 1968 when President Lyndon B. Johnson called for an Indian policy that "stresses self-determination." [194] Moving again to an era of self-determination, the federal

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[190] Graham D. Taylor, The New Deal and American Indian Tribalism: The Administration of the Indian Reorganization Act, 1934-45 32 (1980).

[191] In 1953, the same year HCR-108 was passed, Public Law 280 (PL 280) was also passed. PL 280 shifted federal jurisdiction within certain tribal nations to state governments. This law extended concurrent jurisdiction to California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska (upon its statehood). Examined within the context of termination legislation, PL 280 can be seen as a step toward termination of Native systems of governance as this law was passed without the consent of tribal nations and gives PL 280 states shared jurisdiction over both civil and criminal matters within Indian Territory. *See generally* Carole Goldberg, Duane Champagne & Heather Valdez Singleton, Law Enforcement and Criminal Justice Under Public Law 280 (2007).

[192] For a more in depth look at early twentieth century Indian policy *see generally* Hoxie, *supra* note 174, at 70. *For* mid twentieth century Indian policy *see generally* Paul C. Rosier, Serving Their Country: American Indian Politics and Patriotism in the Twentieth Century (2009); Charles F Wilkinson, Blood struggle: the rise of modern Indian nations (2006).

[193] *See* Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 Am. Indian Law Rev. 139–184 (1977).

[194] *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1968-69*,

government sought to ensure American Indians' constitutional rights were guaranteed in tribal courts by passing the 1968 Indian Civil Rights Act ("ICRA").[195] ICRA extends many of the Bill of Rights to tribal legal systems in an effort to protect "the rights and freedoms of people under tribal jurisdiction without any remedy."[196] However, this policy also placed limitations on the duration and intensity of punishments tribal courts could render. These limitations, paired with the 1885 Major Crimes Act[197] that extended federal jurisdiction to several major crimes (primarily felonies) committed on tribal land, drastically reduced adjudicatory sovereignty for tribes even in the era of self-determination.[198]

Following President Johnson's policy shift towards Indian self-determination, President Richard Nixon took further steps to move away from a policy of assimilation. In a message to Congress in July of 1970, Nixon stated, "the time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."[199] Afterwards, the Indian Self-Determination and Education Assistance Act ("ISDEAA") of 1975 allowed governmental agencies to contract directly with and make grants directly to federally recognized tribes.[200] Although this act increased funding for tribes and allowed tribes to control the funds, these changes were certainly a far cry from the message of self-determination Nixon advocated in 1970.

The Tribal Law and Order Act ("TLOA"), passed in 2010, is a notable example of self-determination policy. TLOA increase the duration of prison sentences given by tribal courts in exchange for a host of defendant specific provisions.[201] TLOA expands tribal self-government, but

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Digital History, http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtid=3&psid=718 (last visited Dec. 17, 2015).

[195] *See* Indian Civil Rights Act of 1968 §202, 25 U.S.C. § 1302 (2006).

[196] Justin Blake Richland & Sarah Deer, Introduction to Tribal Legal Studies 254 (2010) (describing at least two separate groups of concerned parties: members of Congress concerned that individuals could be held in a jail indefinitely, among other procedural worries, and groups such as the American Indian Movement who articulated their legal struggles with tribal government "puppets" as the result of federal and state overreach and abuse).

[197] *See* Major Crimes Act, 18 U.S.C. § 1153 (2006) (extending federal jurisdiction over seven crimes: murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny).

[198] Samuel J. Brakel, American Indian Tribal Courts: The Costs of Separate Justice 8 (1978).

[199] *See Richard Nixon: "Special Message to the Congress on Indian Affairs, July, 8 1970,"* The America Presidency Project, http://www.presidency.ucsb.edu/ws/?pid=2573 (last visited Dec. 17, 2015).

[200] Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §450f (2012)).

[201] *See* Indian Arts and Crafts Amendment of 2010, H.R. 725-22, 111th Cong. §§ 234 (2010) Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261 (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., 25 U.S.C., 28 U.S.C., and 42 U.S.C.) (outlining enhanced tribal sentencing to 1-3 years imprisonment, $15,000 fine,

it does not fully resolve the need for tribal courts to have authority over their communities or the lack of recognition of full sovereignty by the federal government. TLOA acknowledges "the complicated jurisdictional scheme that exists in Indian country. . . . has a significant negative impact on" tribal communities, specifically on crime, public safety, and health.[202] However, it fails to acknowledge that these "complications" substantially limit tribes' ability to act as sovereign governments through the law. This failure is not surprising when considering the colonial entanglements that created the legal system tribal courts are forced to work within.

Although this history of federal Indian policy and the U.S. government's attitude towards Indian self-determination is not exhaustive, the major policy changes outlined here demonstrate the ambivalent and often hostile processes that continue to shape Indian courts and the parameters of tribal sovereignty today. The vacillation between Indian policies of assimilation and self-determination has aided in the creation of stereotypes that mark tribal courts and governments as less efficient, less sophisticated, and more corrupt than federal and state courts. This stereotype is also connected to colonial anxieties that reproduce a view of the inferiority of Indian cultures, communities, and institutions of law. Anxieties regarding obedience and legitimate legal authority are amplified when the prospect that Indians *might* have jurisdiction over non-Indians is introduced, as is evident in the *Dollar General* case.

V. Conclusion

The Supreme Court has intentionally constructed a body of case law where questions concerning tribal court and tribal government competency is both permitted and expected. Historical and sociological analyses demonstrate that such exclusion positions Western law as inherently superior in matters of fairness and due process. Federal Indian law scholar Bethany Berger argues that tribal jurisdictional limits, like Indian law, do not arise neatly from established legal doctrine; instead, they emerge from assumptions that tribal courts are unfair to non-Indians and jurisdiction over non-Indians generally is not integral to tribal self-government.[203] Such assumptions are inextricably tied to colonial sentiments in which the Indian must occupy the inferior position to white settlers, and tribal legal institutions are seen as subordinate to settler legal institutions. As such, Federal Indian law is an example of the gaps and inconsistencies created when legal domination is constructed to legitimize state violence.

This article demonstrates the devaluation of tribal courts and Indian people is a result of the continued existence of colonial structures. As

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or both, and a 9 year cap on stacking sentences in comparison to the the previous limits on tribal courts to only levy sentences up to 1 year and fines up to $3000, effectively limiting tribal courts to prosecution of misdemeanor cases, based on the Indian Civil Rights Act of 1968 §202, 25 U.S.C. § 1302 (2006)).

[202] *Id.*

[203] *See* Berger, *supra* note 36.

a settler state, the U.S. is dependent on ensuring non-Indian dominance. Multiple forces, including social closure and colonial ambivalence, work simultaneously to create and maintain social and legal domination. Such forces not only shape the historic relationship between tribal sovereigns and the U.S. government, but also continue to influence contemporary Indian law in favor of the non-Indian. As this article exhibits, Dollar General's oral arguments are consistent with previous colonial logics that seek to maintain the "negative credential" that marks tribal courts as insufficient legal forums for non-Indians. The logics and colonial anxiety that drive the *Dollar General* case work to maintain social closure and protect the benefits that the U.S. government and non-Indian parties gain when Indians and tribal legal authority are subordinated.

The 2016 decision in *Dollar General Corporation v. Mississippi Band of Choctaw Indians* will impact the future of tribal jurisdiction over civil matters and the ability for tribal nations to protect the health, safety, and welfare of its community members. A decision in favor of Dollar General will negatively affect not only the Mississippi Choctaw, but also all tribal nations' seeking to enforce business contracts, severely limiting tribal civil jurisdiction much like *Oliphant v. Suquamish Indian Tribe* limited tribal criminal jurisdiction. Due to existing jurisdictional restrictions on tribal courts to prosecute major crimes and non-Indians, a decision in favor of Dollar General would severely hinder American Indian crime victims' ability to seek "redress through civil courts."[204] Moreover, taking the historic record into account, a decision in favor of Dollar General has the potential to reactivate the Indian policy pendulum; moving it away from tribal self-determination to an era in which the federal government works to foreclose upon the remaining legitimate legal authority tribal governments currently possess.

[204] *See* Chris Winters, *Supreme Court Case Draws Tulalip's Attention*, The Herald of Everett, Wash. (Dec. 4, 2015, 12:01 AM), http://www.heraldnet.com/article/20151204/NEWS01/151209639/Supreme-Court-case-draws- Tulalip's-attention.