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Editor-in-Chief's Note

The University of Chicago Undergraduate Law Review (UCULR) is a student-run publication dedicated to the discussion and analysis of a variety of legal issues. This issue of the UCULR investigates how ambiguities in the distribution of power within and between sovereign governments obstruct the implementation of codified laws. By examining how American Indian tribes were forced to exert extra-legal pressures in order to reclaim land that federal and state authorities had illegally seized; how Kuwait Airways faced unexpected complications after attempting to rely upon English judgments in Canadian courts; and how Americans wondered if Ohio's early regulation of the securities industry unconstitutionally infringed upon federal power, this issue illuminates how the contest of power between sovereigns comes to bear upon the construction and enforcement of legal texts. Ultimately, the articles included here demonstrate that the laws of our communities do not exist as self-executing machines that inevitably and freely march toward their stated ends. Thus, we must not conceive of laws as abstracted ideals but, instead, as malleable instruments unavoidably implicated by the motivations and prejudices of the human actors who breathe life into their very terms.

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A Clash of Sovereigns: The Power Politics at Play Beneath the Surface of American Indian Land Claims

Liam McLaughlin†

This article is an investigation of how indigenous communities and the federal and state governments of the American political system have interacted within the geographic boundaries of the United States. Motivated by the unresolved case of the Lakota Sioux of South Dakota, it analyzes four land claims of American Indian[1] communities in depth in order to better understand what it takes for a tribe to gain actual possession of land in the United States. This analysis will reveal that, though the political structures are in place for American Indian tribes to win title to seized aboriginal land, the process of doing so is unreasonably difficult. Despite the sound statutory basis for many of these claims, pitched legal battles in and out of court must be fought with federal, state, and municipal authorities if a tribe is to successfully claim land. This paper thus holds that the burdens faced by American Indians in pursuing land claims stem from the over-arching power politics between sovereigns that guide federal and state tribal relations.

I. The Conceptual Argument

A sovereign derives its power from itself. A sovereign is not delegated authority; it is its own authority. As such, there is no higher legal power that regulates the affairs of sovereigns - between sovereigns, there is no law. When sovereigns compete over territory and resources, then, they have nothing to rely on but their own power, political or economic, relative to that of other sovereigns. Because sovereignty is binary - i.e. an entity is either sovereign or not sovereign - the success a sovereign has in using its political and economic powers to compete with other sovereigns is vital. For instance, during the European wars of the 19th century, Poland was too po-

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1: 'American Indian' refers to indigenous people living in the territory of the United States. 'Native American' refers to indigenous people living anywhere in the Americas.

litically and economically weak to maintain its sovereignty, and, accordingly, it was dismantled, stripped of its own sovereignty, and partioned between prevailing, dominant sovereigns. France, on the other hand, despite the devastating losses dealt to it by the Prussians in the Franco-Prussian War, had enough political and economic clout to retain its sovereignty. As long as an entity is not so crushed that its sovereignty is terminated, it can use whatever influence it has to keep more powerful sovereigns at bay and maintain its inherent authority. Sovereignty, as long as it survives, does not fluctuate; however, an entity's ability to affirm its sovereignty depends on its political and economic power, which is not so static.

In the United States, there are three sovereigns. The Constitution clearly establishes two of them: the federal government and the state governments. The third is the American Indian tribes. They are not sovereign because of the Constitution, but because they existed as sovereigns in North America before the Constitution. Yet, American Indian tribes are, too, a part of the American political system. Hundreds of federal treaties and laws and dozens of Supreme Court cases have not only confirmed tribal sovereignty, but have simultaneously situated tribes within the legal framework of the United States. Though American Indian tribes are exempt from state taxes and have the power to govern themselves on tribal land, they still must pay federal taxes, obey federal laws, and seek justice through American courts. As the federal government has dominated the state governments, it has also subjugated the tribes.

However, the defeated state governments had enough political and economic power to resist disintegration after the American Civil War, enabling them to retain their sovereignty and continue to challenge the federal government's power over states well into the twenty-first century.[2] The fact that the same is true for American Indian tribes is fundamental to the conceptual argument of this paper. Despite American efforts to either eliminate or assimilate them, American Indian tribes have successfully resisted annihilation throughout American history. Through military prowess and diplomacy, they forced early Americans to recognize them as sovereign, defying termination. Through whatever forces they have had available to them, they have retained this sovereignty by consistently challenging federal and state authority over them. American Indian tribes today *are* sovereigns, and consider their power to stem from none other than themselves.

2: For an example of how states have continued to challenge federal sovereignty, even in 2013, see David Savage, *In Gay Marriage Cases, Courts Must Balance Strong Traditions*, *Los Angeles Times* (2013), available at http://articles.latimes.com/2013/mar/30/nation/la-na-court-gay-marriage-20130331.

Given that they exercise sovereign authority, then, the degree to which American Indian tribes are successful in claiming territory in the United States depends on the degree to which they have the political and economic power to assert their sovereignty and contend with the federal and state governments. This paper's analysis of four different American Indian tribes' land claims will demonstrate that the sanctity of American law alone does not win a tribe back its aboriginal land. Any successful claim to land has required both solid legal reasoning *and* extra-legal power, most often in the form of political pressure via massive moral support. Tribes must go through overwhelming efforts to see the actual return of their land because they do not truly operate as any other American entity seeking justice would, as a plaintiff in a court of law. Rather, American Indian land claims constitute nothing less than a clash of sovereigns.

This article will support this thesis – that American Indian land disputes take place on a sovereign, rather than civil, level – by:

1) expanding its conceptual argument in an introduction by considering questions raised by the Lakota Sioux claim to the Black Hills;

2) analyzing four different land claims–those of the Oneida, Passamaquoddy and Penobscot, Taos Pueblo, and Alaska Natives–to demonstrate both the legal and extra-legal forces at play in actual land claim cases; and,

3) conceptualizing how the clash of sovereigns, i.e. the contestation between federal and state governments and American Indian tribes, has played out throughout American history.

II. Introduction: the Lakota Sioux & the Black Hills

As stated, this thesis is motivated by the Lakota Sioux's ongoing land claim to the Black Hills. The Fort Laramie Treaty of 1868, signed by the Lakota and federal government, guaranteed the tribe annuities and assured its sovereignty over tracts of land in the Great Plains, including a prized mountain range in South Dakota known as the Black Hills. Following the discovery of gold in the Black Hills shortly after the ratification of the treaty, Congress unilaterally seized the Hills in 1877. It then relocated the Lakota to a smaller reservation under less favorable conditions, ignoring Lakota sovereignty and breaching the legal agreement established by the 1868

treaty. In 1980, after a century of Lakota efforts to get their case heard in court, the U.S. Supreme Court condemned Congress' actions, and, based on the Fifth Amendment to the Constitution, awarded the Lakota compensation of $102 million for the stolen land. The Lakota, however, rejected the Court's compensation on the grounds that acceptance of it would extinguish their title to the Black Hills, land which they claim is still their own under the 1868 treaty.[3] They are still attempting to secure legal recognition of that title, and have continued to reject the Court-appropriated money, which has grown to more than $1.3 billion at the time of writing.

Because the Supreme Court does not have the power to cede federal or state land to an American Indian community, it cannot give the Lakota territorial compensation, even when such form of compensation may be preferable to monetary payment. Only an act of Congress can withdraw public land and annex it to a reservation.[4] Accordingly, a few sympathetic members of the U.S. Senate in the 1980's, spearheaded by a friend of the Lakota, former Senator Bill Bradley of New Jersey, drafted and attempted to enact "The Sioux Nation Black Hills Act."[5] The bill, known colloquially as the Bradley Bill, would have returned 1.3 million acres of federal land in the Black Hills to the Lakota; but it was shot down in Congress. More recently, President Obama offered to meet with and hear out the tribe if they could produce a unified proposal to put through Congress.[6] Lakota leadership has been working to draft such a proposal. Even a successful proposal would have to go through the same trials in Congress as the Bradley Bill did in the 1980's. Despite the President's offer, he can do little except urge Congressional members to accept such a proposal. Like the Supreme Court, the executive cannot cede land to a tribe pursuant to 45 U.S.C. §150.

Despite the fact that the Supreme Court has explicitly acknowledged that the Black Hills were stolen from the Lakota, neither the judicial, legislative, nor executive branches of government have yet been able to return that land to the Lakota. This raises serious questions about the American political system's capacity to deal adequately with American Indians. Is the federal government in some way institutionally flawed, unable to give back land to the Lakota and resolve their claim due to inadequate civil structures? The

3: See, generally, Jeffrey Ostler, *The Lakotas and the Black Hills: The Struggle for Sacred Ground* (2010).

4: 1919 Act, 45 U.S.C. § 150 (1919).

5: Sioux Nation Black Hills Act, S. 1453, 99th Cong., 1st Sess. (1985).

6: Francine Uenume & Mike Fritz, *Why the Sioux are Refusing $1.3 Billion*, PBS Newshour (2011), available at http://www.pbs.org/newshour/updates/north_america/july-dec11/blackhills_08-23.html.

case of black Americans prior to the late 19th century illustrates an instance in which the American political system was institutionally flawed. Before the issue of slavery came to a head during the Civil War, black Americans were structurally denied equality and freedom in the very text of the Constitution. The United States, then, was only able to confront the injustices of black slavery by amending the Constitution and altering the structure of its political system.[7] Perhaps the United States needs to change the current structure of its political system before any progress can be made towards returning land to the Lakota Sioux.

A legitimate claim to title to aboriginal land, however, is not unique to the Lakota. American Indian tribes vigorously pursued such claims throughout the twentieth century, during which special Congressional committees and key court decisions concerning jurisdiction provided tribes with the opportunity to have their day in court. As it turns out, several tribes have been extraordinarily successful in regaining unlawfully seized ancestral land. By employing a well-founded legal strategy arguing that cessions of Oneida Indian land orchestrated by the state of New York since 1790 directly violated the federal Non-Intercourse Act of 1790, the Oneida Indian Nation paved the way for several other Eastern American Indian tribes to win back substantial acreage as well as compensation for damages in out-of-court settlements with federal and state government officials. More akin to the Lakota case, the Taos Pueblo of New Mexico saw the return, in 1970, of 48,000 acres of treaty-guaranteed land that was illegally taken by the federal government in 1906.[8] In addition to several other such successes, these cases suggest that the political institutions themselves are not responsible for blocking the Lakota from the return of the Black Hills.[9] In other words, the American political system does in fact have the structures necessary to return stolen land to American Indian tribes.

Why, then, has the Lakota land claim gone unresolved in terms of the re-possession of land? A closer look at the successful claims mentioned above reveals that the tribes did not by any means have an easy time of se-

7: This is not to say that black Americans do not still face structural injustices within the present American political system. See Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010).

8: Consult *Blue Lake*, Taos Pueblo (2012), available at http://www.taospueblo.com/blue-lake.

9: One possible exception is the Bureau of Indian Affairs, a federal institution that has been a critical part of a history rife with flawed dealings with American Indian tribes. The land claim analysis below will demonstrate the Bureau's shortcomings and look at whether a structural fix might be worth considering.

curing title to their aboriginal land. As emphasized in colorful terms by noted American Indian law scholars Vine Deloria Jr. and David Wilkins, the collection of cases and policies that sets precedent for American Indian legal cases, known as 'Federal Indian Law,' is nothing more than "a hodgepodge of personal grudges, ad-hoc policies, inconsistent judicial decisions, and a general exercise of ignorance about Indians, framed in statutory language."[10] Even after overcoming hurdles just to secure jurisdiction in a court to hear the Oneida claim in 1973, Oneida attorneys still had to win cases against two municipal subdivisions of New York in the district court in 1975 and the Supreme Court in 1985. In order to win back their land, the Taos Pueblo first had to win a case in the Supreme Court in 1965 establishing the unlawful taking of their land in 1906. They then had to push support for a bill in three different sessions of Congress that would have ultimately failed if not for charismatic congressional allies. Even with support from Congress, the Taos Pueblo still had to garner wide-spread public support for the bill before Nixon signed it into law in 1970. All of the tribes who won their land claims had to undertake momentous efforts and face intense contention with federal, state, and local government officials in order to resolve what should have been clear-cut cases of legal justice.

The following section will analyze four American Indian land claims in depth in order to parse out what exactly a tribe must do in order to successfully win back possession of aboriginal land. Through this analysis, ideas of tribal sovereignty, property rights, and federal and state interaction with tribes will be made clear. Having clarified these concepts, this article will be in a position to support its central thesis: that it is the unique and confusing nature of tribes as sovereigns in the United States that makes it so difficult for them to win back possession of land. Their sovereign status has both ensured their existence and made them vulnerable to predatory actions on the part of the federal and state governments. While tribal sovereignty is the ultimate source of their claims to land, their positions as sovereigns vulnerable to domination by other sovereigns is what makes it so difficult to enforce their claims.

10: Vine Deloria Jr. and David E. Wilkins, *Tribes, Treaties, and Constitutional Tribulations* 33–34 (1999).

III. Land Claim Analysis

This section, as stated above, will take a close look at four pivotal land claims. The claims were selected because they resulted in some measure of success – i.e. a settlement with the federal, state, or municipal government – authorized by Congress, that granted the return of claimed land to the American Indian tribe. The first two cases, that of the Oneida and the Passamaquoddy and Penobscot, fall under 'Non-Intercourse Act Claims,' or land claims pursued by American Indian tribes on the East Coast whose claims rest on the Non-Intercourse Act of 1790. They were both filed against either a state or a municipal subdivision, and they demonstrate the complex tug-of-war between the sovereign tribe and the sovereign state, as well as the role of the sovereign federal government as trustee of American Indians.

The second two cases are claims against the federal government itself, with little state involvement. They are based on the concept of indigenous people's 'occupancy rights,' or the idea that they have title to land based on their consistent use of that land throughout history. In the first case, that of the Taos Pueblo, the land was set aside as National Forest land, and the Forest Service fought to retain its control over the land primarily for its valuable resources. In the second case, that of the Alaskan Natives, the land was recently acquired as a state and the natives' push for federal recognition of aboriginal title prompted the case.

The analysis will begin with the Oneida, the first tribe to successfully use the Non-Intercourse Act strategy, and will conclude with the Alaskan Natives, whose giant claim and unique settlement have brought wealth to many indigenous communities in Alaska.

IIIa. Case Study #1: The Oneida Land Claims

The Oneida land claims did not result in any sort of direct transfer of land to the Oneida Indian Nation. Rather, the Oneida secured the validity of land claims based on the Non-Intercourse Act of 1790, used the recognition of their stolen land as leverage to buy back large portions of it on the open-market, and then protected their sovereign control over it by putting it into federal trust. Importantly, though, the Oneida land claims remain unresolved–the Supreme Court is, at the time of writing, considering whether or not it will hear a suit against the Oneida filed by Madison County, New York, one of the municipal subdivisions that the Oneida ended up suing for land in 1973. After forty years of uphill legislative battles between the

Oneida, the counties, and State of New York to re-establish a portion of their 300,000 acre reservation, Madison County is calling into question the very validity of the reservation itself.

This case study is an excellent starting point to demonstrate the unreasonable level of difficulty faced by American Indian tribes that pursue a land claim in federal court. For instance, it illustrates the fact that the federal government can ignore 25 U.S.C. § 175, a law that requires the United States to represent tribes in court. In addition, it introduces the 'Impossibility Doctrine,' or the legal concept that valid American Indian claims to large tracts of land or massive amounts of damages against a state can be ignored in order to protect the functionality of the state. Moreover, while individual attorneys and judges were swayed by the extra-legal force of the Oneida's moral claims, this case study will see the *least* amount of moral support garnered by the four tribes analyzed here. Correspondingly, it is also the only one that did not reach a favorable and universally-agreed upon out-of-court settlement for the return of land to the tribe.

One of America's first allies, the Oneida tribe of New York fought alongside American revolutionary forces against the British during the Revolutionary War. Out of good faith for their service, the Oneida were guaranteed 300,000 acres of land in New York by three treaties with the federal government in 1784, 1789, and 1794.[11] However, between 1795 and 1842, the State of New York, through dozens of state treaties with the Oneida, purchased all but 700 acres of the original 300,000 acre reservation.

When Jake Thompson, then president of the Oneida Indian Nation, talked to lawyers in 1965, he originally sought only the enforcement of promised rent and annuities from the State of New York. However, upon investigating the Oneida treaties and others like them, Oneida tribal attorneys discovered an interesting case. In *Federal Power Commission v. Tuscarora Indian Nation*, the Tuscarora tribe claimed that New York had no right to assert eminent domain and seize tribal land due to the Non-Intercourse Act of 1790.[12] That Act established that "no purchases, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same made by treaty or convention entered into pursuant to the Constitution."[13] In effect, the Act states that any treaty ceding land from an American Indian tribe has to be ratified by the U.S. Senate, or else it is invalid under federal law. While New York State and many other Eastern states argued that the

11: George C. Shattuck, *The Oneida Land Claims, A Legal History* 89 (1991).
12: 362 U.S. 99 (1960).
13: Non-Intercourse Act of 1790, 25 U.S.C. § 177 (1790).

Non-Intercourse Act did not apply to the original thirteen colonies, the Supreme Court in *Tuscarora* affirmed that the Non-Intercourse Act did. The Tuscarora lost for an unrelated reason, but their case proved to be the building block of the Oneida land claims and the slew of land claims that followed it.

Based on *Tuscarora*, Oneida tribal attorneys realized that all of the post-1790 state treaties on which Oneida land was purchased were illegal transactions. Not only were these treaties not ratified by the Senate, but the Attorney General at the time actively advised Governor John Jay of New York that the state-orchestrated land cessions contradicted federal law.[14] Thus, the Oneida had a clear claim to 260,000 acres of their original 300,000 acre reservation.

However, there were two big jurisdictional roadblocks that the Oneida had to overcome before they were able to take their claim to court. In *Oneida Land Claims: A Legal History*, George Shattuck, one of the leading lawyers for the Oneida at the time of *Oneida I*, explains these legal blocks to jurisdiction. The first is what is known as the 'well-pleaded complaint' rule, which Shattuck describes as a rule that "if a cause of action could initially be brought under state law, it is never a federal question."[15] In other words, cases that can be heard in state court will not be heard by a federal court. A previous American Indian land claim, similar to that of the Oneida, was blocked by this very rule in *Deere v. St. Lawrence River Power Co.*[16] The case involved a group of Mohawk Indians who, based on federal treaties guaranteeing them land, brought suit to get that land back from the non-Mohawk owners who had held title to it for over a century. The Second Circuit Court of Appeals ruled that, as the suit was one for ejectment, or the removal of current owners of land and the return of that land to the plaintiff, and as such an action could be pursued in New York state court, the Mohawk case could not be heard in federal court.[17] *Deere* established that American Indians seeking the return of land could not pursue such a claim in federal court, even if the land was guaranteed to them by federal treaties.

Thus, the Oneida would have taken their claim to state court, if it were not for a second jurisdictional obstacle. In *St. Regis Tribe v. State*, which was another case dealing with a Mohawk land claim, the New York Court of Appeals ruled that the State of New York does not recognize American

14: Shattuck, *Oneida Land Claims* at 49.
15: *Id.* at 21.
16: 32 F.2d 550 (2d Cir. 1929).
17: *Id.* at 552.

Indian tribes as legal entities, i.e. entities that have capacity to sue.[18] If a tribe wished to pursue a claim in court, it would need special permission from the state legislature, which could authorize it to sue for land. Thus, without an enabling act by the state legislature, New York American Indian land claims could neither be heard in federal nor in state courts, effectively barring tribes from even *seeking* restitution of aboriginal land.

No tribe, however, had yet sought a legitimate land claim based on the Non-Intercourse Act of 1790. The Tuscarora's failure was a result of previous Congressional legislation, not their use of the Non-Intercourse Act. The Oneida legal team, emboldened by the solidity of their claim, decided to try their hand at re-possession of their illegally re-possessed land despite these otherwise discouraging jurisdictional obstacles. Before filing suit, however, they first tried to settle the claim by other means. As Shattuck explains, their initial approach was to "petition to the proper state governmental agencies for a settlement and, failing that, request a suit by the United States against the state in the Oneidas' behalf."[19] As established by U.S. legal code, "in all States and Territories where there are reservations or allotted Indians the United States Attorney shall represent them in all suits at law and in equity."[20] In other words, according to Section 175 of Federal Indian Law, the United States is required to assist American Indian tribes in pursuing their claims. If petitioning the various New York State government organs did not work, the Oneida might be able to get the Secretary of Interior to file suit against New York for them.

Accordingly, the tribal attorneys first petitioned the New York State executive office, the Constitutional Convention, the legislature, and the New York State attorney general and solicitor general. The general response from these bodies was that the Oneida did not have a legitimate case, and, importantly, that the claim was too big. Shattuck explains that the New York Attorney General "pointed out that the potential damage claim might range up to $858 million in 1967 dollars."[21] The idea that an American Indian land claim should not be heard because the consequences are too large, either because of the number of people it would eject or the monetary compensation due, also known as the 'Impossibility Doctrine,' is a significant one for this thesis. As further enumerations of the doctrine will reveal, American courts have limited the extent to which they are willing to seek justice for American Indian tribes with respect to land. They are willing

18: 5 N.Y.2d 24 (N.Y. 1958).
19: Shattuck, *Oneida Land Claims* at 13.
20: 25 U.S.C. § 175.
21: Shattuck, *Oneida Land Claims* at 15.

to ignore state breaches of law for the sake of the well-being of that state. While not unreasonable, this fact supports the idea that American Indian tribes are treated as the exception in federal court, not the least because of their unique status as sovereigns.

The Oneida legal team then followed its plan and petitioned the federal government. The response, however, was negative. The Department of the Interior, which, through the Bureau of Indian Affairs (BIA), is the chief federal body charged with protecting the interests of American Indian tribes, told the Oneida that the federal government was unable to help with their claim. The reason was that the Oneida, through an entirely different legal effort, had filed a similar claim through the Indian Claims Commission (ICC). The ICC was created by an Act of Congress immediately after WWII to resolve any ongoing land claims of American Indians. It was limited, however, in that a tribe could only sue for monetary damages or compensation for stolen land, rather than the land itself. The Oneida would eventually drop this suit in favor of the one pursued by Shattuck's legal team, but, at this point in the case, they were trying all possible routes. Given that the Oneida were already suing the federal government through the ICC, the BIA claimed that it could not help them in their suit against the state. After petitioning Congress, President Johnson, and then, when he took office, President Nixon, and after receiving all negative replies, the Oneida realized that they would have to go at it alone.

The Oneida legal team prepared to sue either the state or a municipal subdivision in federal court, intending to challenge the jurisdictional blocks with the strength of their claim. However, there was one more obstacle to jurisdiction. According to a precedent established regarding the 11th Amendment, citizens of a state cannot sue their own state. Even if the Oneida ignored other blocks to jurisdiction and charged ahead with a suit against New York in federal court, interpretations of the 11th Amendment would stop them from proceeding. Thus, the Oneida chose to sue two municipal subdivisions of New York that were on 100,000 acres of land purchased in the illegal 1795 New York-Oneida treaty, Madison and Oneida counties. Instead of suing for outright ejectment, which would have been too big of a case when they were still merely trying to establish proper jurisdiction for their claim, they chose to sue for the rental value of the counties' land, using the argument that, because the land still belonged to the Oneida, any landowners on it would therefore be renting from the Oneida. This was a test case with the primary goal of securing jurisdiction to litigate other claims.

As expected, the district court rejected the claim based on the 'well-plead-

ed complaint' rule. The Oneida appealed to the Second Circuit Court of Appeals, once again requesting but being denied assistance from the federal government. The Second Circuit also dismissed the case on the same 'well-pleaded complaint' basis, but Judge Lumbard wrote a dissenting opinion. There, he stated that the "federal interest in seeing that the rights of Indian tribes are heard and adjudicated is so great that they should be controlled by federal law."[22] Thus, the claim had at least one judge who thought it should be tried in federal court. The only option left to the Oneida after dismissal from the Second Circuit was a writ of certiorari from the Supreme Court. Certiorari petitions request the highest court in the country to review the decisions made by the lower courts.

The Oneida filed a petition for certiorari, emphasizing that the case brought up essential questions about federal jurisdiction. As expected, Oneida and Madison counties filed briefs in opposition. However, it was not expected that the federal government would as well. The U.S. solicitor general filed a brief against the Oneida, stressing that American Indian tribes' suits for ejectment would not qualify as a 'well-pleaded complaint.' Not only had the federal government refused to help the Oneida, despite it being required to by 25 U.S.C. § 175, but it actively opposed the tribe.

Nevertheless, interested in the case's jurisdictional questions, the Supreme Court accepted the Oneida's petition and granted certiorari on the sole question of jurisdiction. The Oneida had a shot with the Supreme Court. When drafting their official arguments to the Court, they made a bold decision to ignore the 'well-pleaded complaint' rule, which was more of an arbitrary legal loophole than an issue of substance, and argued instead that "the overriding legal premise for jurisdiction is that the United States government, no less than any individual citizen, must obey its own treaties, laws, and promises."[23] Considering that the United States had signed an act into law that barred states from purchasing tribal land without its approval and had signed three federal treaties with the Oneida guaranteeing them land in New York, it must enforce those laws and treaties against actions that went counter to them by the state. Thus, the Oneida deserved to at least be able to sue Oneida and Madison counties on that basis.

In a landmark decision, *Oneida Indian Nation of New York v. County of Oneida* the Supreme Court ruled that "federal courts do have basic federal question jurisdiction to hear Indian land claims, even though the Indians

22: *Id*. at 28. Also see *Oneida Indian Nation of New York State v. County of Oneida, New York,* 464 F.2d 916, 924-25 (2nd Cir. 1972).

23: Shattuck*, Oneida Land Claims* at 32.

are not in possession of the land."[24] The Court rejected the 'well-pleaded complaint' reasoning and asserted that the tribe's claim could be pursued in federal court. Despite the jurisdictional roadblocks in place to keep the Oneida out of court, and despite opposition from the state and federal governments, the Oneida had a case, setting a precedent for other Eastern tribes who had not been able to pursue their land claims for a century or more.

Having won the right to sue the counties in federal court, the Oneida now had to win their claim at trial. Before they could do so, however, they once again requested federal support. If the U.S. would challenge the counties via bringing suit against the State on behalf of the Oneida, they could directly challenge the 1795 State treaty. As interpretations of the 11th Amendment bar citizens suing their own state, only federal assistance would permit the Oneida to take this route. Despite its refusal to help the Oneida in all previous actions, and despite the federal government's filing a brief in opposition to the Oneida in *Oneida I*, the Department of Interior confirmed in 1976 that it had requested the U.S. Attorney to file suit against the State. The flexibility of the United States' application of 25 U.S.C. § 175 is here demonstrated. When there was no expectation that the tribe would get very far in its land claims, the federal government did not intervene. Only after the Oneida claim held up in court and thus became more certain of future victory, did the United States choose to back the tribe. Informed more by a game of power-politics than the necessity to uphold American law, the federal government's loose adherence to Section 175 here supports this paper's thesis that American Indian land claims are not dictated by law alone, but by the interaction between sovereign entities.

The only other item in the way of the Oneida's success was the *laches* defense, a legal doctrine holding that if plaintiffs delay too long in seeking justice for their cases then they can be disqualified. By demonstrating that the Oneida had repeatedly filed requests for justice throughout the years, the tribe eliminated this threat. Moreover, in the process of researching the Bureau of Indian Affairs' files in order to eliminate *laches*, they discovered some troubling things about the BIA's correspondence with the Oneida in the early twentieth century.

The BIA had consistently turned away Oneida petitions between 1910 and 1946. It had advised Oneida leaders that the United States would not be able to protect them against the state, that they had no legitimate claim to aboriginal land in New York, and even that they were not a recognized

24: *Oneida Nation*, 414 U.S. at 661.

tribe.[25] Meanwhile, in *United States v. Boylan*,[26] a minor 1920 case concerning an Oneida claim to a 32 acre plot in New York, the Second Circuit stated that "the United States has such an interest as enables it to maintain this action and restore to these wards of the nation…the possession of the lands."[27] *Boylan* clearly established that the U.S. could help the Oneida in their land claims, and it had been specifically mentioned in correspondence files between agents of the BIA at the very time they advised the Oneida that the federal government could do nothing. In short, the BIA, the federal agency charged with representing American Indians to the federal government, lied to the tribe. While this evidence did not substantiate a legal claim in this case, it did produce a moral one. The Oneida had been repeatedly cheated by both the state government, which illegally purchased their land, and the federal government, which did nothing about it, since the late 1790's. The weight of this moral claim, as it turned out, would indeed have an effect on the opinion of the court. In addition to the importance of moral forces in American Indian land claims, the BIA's complete dishonesty with a tribe that it has the responsibility to defend reveals the BIA to be at least one structure in the American political system that is deeply flawed.

The Oneida thus asserted, in the district court, their claim against the Madison and Oneida counties based on the Non-Intercourse Act and the federal treaties. In 1977, the court held that the 1795 purchase of land in question was void and that the Oneida still owned the land. The Supreme Court affirmed the lower court's ruling in 1985.[28] The Oneida had won the legal claim. However, in its judgment, the Supreme Court noted that "the question whether equitable considerations should limit the relief available to the present day Oneida Indians was not addressed…We expressed no opinion as to whether other considerations m[ight] be relevant to the final disposition of this case."[29] In other words, the Court did not necessarily rule that the counties had to relinquish their title. While awarding the tribe $15,994 from Oneida county and $18,970 from Madison county, any actual transfer of land would have to be worked out between the counties, New York, and the Oneida, all to be approved by the federal government. The tribe won jurisdiction in *Oneida I* and won their claim to 100,000 acres of their aboriginal land in *Oneida II*, but they still did not gain possession of any actual land.

25: Shattuck, *Oneida Land Claims* at 46.
26: 265 F. 165 (2d Cir. 1920).
27: *Id.* at 167.
28: *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985).
29: *Id*. at 253, n. 27.

The subsequent attempts to agree upon a settlement did not go over well. Between 1985 and 2004, bitter negotiation battles were fought between the Oneida and the state, and among the Oneida themselves. Finally, in late 2004, Governor Pataki of New York was ready to sign the bill that would have established an actual return of land. But, another landmark decision concerning American Indian land claims, *Oneida III*, also referred to as *Sherrill*, was published in 2005.

Fed up with waiting for a settlement, the tribe purchased some 17,000 acres of land on the open-market in 1997 and 1998, all in the territory that *Oneida II* validated was rightfully theirs. When Sherrill County tried to levy property taxes on the land, the tribe claimed that, according to tribal sovereignty rules, it was exempt. Because American Indian tribes *are* sovereign and their land is held in trust by the federal government, they generally do not pay local property taxes.[30] However, the Court ruled in *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*[31] that land purchased by a tribe that has not held it for quite some time, even if the tribe has a legitimate claim to it, cannot assert automatic tribal sovereignty over it. The reasoning was a mix of the *laches* doctrine, described earlier, and the aforementioned 'Impossibility Doctrine.' In its judgment, the Court stated that it "recognized the impracticability of returning to Indian control land that generations earlier passed into numerous private hands."[32] Because there were still non-Indians living on the 17,000 acres that were now in the Oneida Nation's control, for the Oneida to assert tribal sovereignty over the land would entail the assertion of sovereignty over those non-Indians. Such sovereignty would make the non-Indians liable to Oneida government and law. The Court's concern, which this paper does not find entirely unreasonable, was that it would be impractical for private landowners who, for the past 200 years, had every reason to expect that their land was secure under New York law to become suddenly liable to another sovereign's government.

After the *Sherrill* decision, Governor Pataki dropped the would-be land claim settlement bill. Negotiations between the Oneida and the state hinged on the leverage the tribe had in asserting its sovereignty over even more land; *Sherrill* seriously compromised that leverage. Yet, while the Court ruled against the Oneida based on its 'Impossibility Doctrine,' it also noted that 25 U.S.C. § 465 "authorizes the Secretary of the Interior to acquire land in trust for Indians and provides that the land 'shall be exempt from

30: *Sovereign Immunity*, American Indian Policy Center (2013), available at http://www.americanindianpolicycenter.org/projects/sovimmun.html.

31: 544 U.S. 197 (2005).

32: *Id*. at 219.

State and local taxation'…Section 465 provides the proper avenue for OIN [the Oneida Indian Nation] to reestablish sovereign authority over territory last held by the Oneidas 200 years ago.'"[33] Though the Oneida could not assume that purchased land was automatically immune from state taxation via tribal sovereignty, once they place that land in federal trust, sovereign immunity takes effect. The Department of the Interior did place 13,004 acres of the 17,000 into federal trust in 2008. *American Indian Law*, a casebook that analyzes legal decisions related to American Indians, asks a question of particular interest for this paper: does the land-into-trust process vindicate the Court's use of the 'Impossibility Doctrine', or "has the Court placed an unreasonable political burden on the less powerful actor in this tribal-state conflict?"[34] As discussed at the beginning of this case study, the 'Impossibility Doctrine' treats American Indian tribes as the exception. Though the State broke the law at the expense of the Oneida, it does not have to be punished in full measure.

The Oneida claim, however, did not end there. *Sherrill* established that the counties could levy taxes on recently-purchased Oneida land, which was exempt from tribal sovereignty to the extent that it could be taxed. However, on remand from the Supreme Court after *Sherrill*, the district court advised that the "Tribe's sovereign immunity protected it from suits to collect unpaid taxes."[35] Just as the state has sovereign immunity from suit by its own citizens under the 11th Amendment, and just as the federal government has such immunity from all actions for which it has not already waived immunity, American Indian tribes have sovereign immunity from suit in state and federal courts unless they waive that immunity or Congress abrogates that immunity. Additionally, the district court explicitly stated that the "seizing of land owned by a sovereign nation strikes directly at the very heart of that nation's sovereignty."[36] Though the counties were able to tax the Oneida property, they could not sue to seize the property, i.e. enforce the taxation. The court's explicit acknowledgment of the Oneida Nation's sovereignty here is a good example of how American courts sometimes understand the true nature of American Indian land claims – a complex struggle between three sovereigns.

33: *Id.* at 221.

34: Carole E. Goldberg, *American Indian Law: Native Nations and the Federal System, Cases and Materials* 1062 (6th ed. 2010).

35: *Id*. at 1061.

36: *Oneida Indian Nation v. Madison County*, 401 F. Supp. 2d 219, 232 (N.D.N.Y. 2010).

With reason, the Oneida and Madison counties found the ruling of the court that it could levy taxes but not enforce them to be confusing. The counties filed a petition for certiorari in 2011, which the Supreme Court granted, concerning two questions: 1) whether the tribe's immunity from suit bars the state from enforcing taxation, and 2) whether the Oneida reservation was disestablished. The second question is an evocation of *Sherrill's* use of the *laches* doctrine and 'Impossibility Doctrine'. Building off of these doctrines, the counties wanted to know whether the length of time that the land had been in private hands – 200 years – was long enough to effectively extinguish the Oneida's claim to it. Despite the decision reached in *Oneida II*, which asserted that the Oneida's claims based on the Non-Intercourse Act were valid, *Sherrill* seemed to support a different interpretation, and the counties intend to follow up on these new developments. In essence, the counties have questioned the validity of the Oneida reservation.

In response to this new challenge to their land, the Oneida officially waived their sovereign immunity from suit in order to permit the New York counties to collect property tax from the them. They publicly stated that the action was a sign of good faith between the tribe and the counties. However, this paper asserts that the Oneida's waiver was more than likely a strategy aimed at ending the counties' pursuit of answers to questions that threatened the Oneida reservation's very existence. This fourth case, *Madison County v. Oneidan Indian Nation*, however, is still ongoing at the time of writing. The Supreme Court is gathering more facts on the case before it makes a decision.[37]

The Oneida thus paved the way for the land claims of dozens of other Eastern tribes by securing federal jurisdiction for American Indian land claims in *Oneida I* and winning title to former territory through the Non-Intercourse Act strategy in *Oneida II*. However, the tribe's loss in *Sherrill* and the subsequent questions the loss has raised in *Madison* are now posing serious threats to those very tribes that benefited from the Non-Intercourse Act precedent. Nevertheless, the history of the Oneida's claim clears up certain questions concerning this paper's thesis, primarily about sovereignty and America's institutional capacity to successfully resolve American Indian land claims:

37: Gale Toensing, *Supremes Seek Solicitor General Review of Oneida Reservation Case, Indian Country Today* (2013), available at http://indiancountrytodaymedianetwork.com/2013/03/04/supremes-seek-solicitor-general-review-oneida-reservation-case-147981.

- The United States does not always help an American Indian tribe in its lawsuits, despite language in 25 U.S.C. § 175 that states that it must. The evidence from *Oneida I* and *Oneida II* suggests that the U.S. will only intervene on behalf of a tribe when it is likely to win. States can push the 'Impossibility Doctrine' to limit the compensation sought by tribes with valid legal claims. Together, these points reveal the federal government's willingness to ignore law in American Indian land claims, supporting this paper's thesis that such claims take the form of sovereign, rather than entirely legal, disputes.

- As demonstrated by the effect of the moral claim concerning the actions of the BIA revealed in *Oneida I*, individual Justices *are* moral actors and *are* swayed by moral, in addition to legal, claims. Moral arguments, thus, are a particularly useful extra-legal force that can increase the power American Indian sovereigns wield against federal and state sovereigns in determining the outcome of their claims to land. Furthermore, upon analyzing the next three cases, it might be suggested that the Oneida's failure to reach an out-of-court settlement with New York is related to the relative *lack* of moral support it garnered from the state and country.

- The BIA has a questionable track record in terms of fulfilling their responsibility to protect American Indian interests. It has unquestionably lied on several accounts to the Oneida concerning their rights and their options in terms of claiming land. An institutional fix to the difficulties of American Indian land claims might be warranted insofar as reforming the BIA.

- The Supreme Court occasionally defends American Indian tribal sovereignty. When it does, it is not afraid to break with precedent and rule in favor of tribes. The Court tends to explicitly cite tribal sovereignty in its opinions.

- As evidenced by the changing nature of the Supreme Court's view of the Oneida's title to reservation lands from *Oneida II* to *Sherrill*, as well as the fact that the *Madison* case is still in question at the time of writing, the Supreme Court does not have a clear idea about how exactly American Indian sovereignty asserts itself over

tribal land. According to this article's thesis, this can be explained by the fact that *there are no rules between sovereigns*. When attempting to impose such rules between the federal sovereign and the tribal sovereign, confusing or contradictory outcomes should be expected.

IIIb. Case Study #2: Passamaquoddy & Penobscot Land Claims

The Passamaquoddy and Penobscot land claims, like the Oneida, were based on the Non-Intercourse Act of 1790. Unlike the Oneida, they did not have a federal treaty that guaranteed reservation land off of which to work. Rather, they had four land cessions that occurred after 1790 totaling twelve and a half million acres in Maine – about two thirds of the state. Where the Passamaquoddy and Penobscot claims lacked a federal treaty that clearly established them as a federally-recognized tribe that was guaranteed a certain amount of land, they had a massive claim based on the Non-Intercourse Act that would give them enormous leverage in negotiations with the state for an out-of-court settlement. Accordingly, this case study demonstrates this article's thesis that American Indian land claims are successfully won via political and economic power, in addition to legal claims. It further supports the idea that extra-legal, specifically moral, claims in such cases are powerful. Finally, it provides a prime example of how both the State and federal governments are able to use their own powers to completely dominate a tribe by extinguishing any title the tribe has, given that political support of the tribe in the form of moral convictions is not large enough to block such extinguishment.

After looking at the four state treaties that had reduced the Passamaquoddy tribe from cherished friends of George Washington, instrumental in saving Eastern Maine from the British in the Revolutionary War, to an impoverished people relying on state handouts, the tribe's attorneys realized that the Passamaquoddy and neighboring Penobscot tribes had a real claim to land based on the Non-Intercourse Act of 1790. Emboldened by the Oneida's efforts in attaining federal jurisdiction for American Indian land claims, the Passamaquoddy began to pursue their claim. However, according to a unique Congressional statute of limitations signed in 1966, the Passamaquoddy legal team learned that they would need to persuade the federal government to bring suit against the State of Maine on behalf of the Passamaquoddy before a July, 1972 deadline. That deadline was a mere eight months

away from the time the tribes learned about the statute.[38] They could file suit on their own, but their chances at succeeding in court with such a monumental claim was drastically higher if the federal government was suing for them. The team petitioned the Commissioner of the BIA, who thought the claim had merit and passed it along to the Associate Solicitor for Indian Affairs. However, the Associate Solicitor was entirely against the claim. He purposefully delayed responding to the Passamaquoddy's petition, advised the White House that the statute of limitations was running out and that they should let it do so, and was quoted as saying it was "high time the Indians accepted the facts of life."[39] Even when one member of the BIA seeks to fulfill his or her duty to defend American Indian interests, this case shows that other authorities within the BIA can and do block such action, further supporting skepticism of this office's status as an adequate institution.

Countering the highly negative response of the Associate Solicitor was Maine's delegation in Congress and Maine's governor. The legal team petitioned these state officials and, much to their surprise, received extraordinarily positive replies. Maine's governor, both of its senators, and both of its representatives in the House publicly expressed support for the Passamaquoddy to have their day in court. While they were not necessarily in favor of returning large tracts of land to the tribe and awarding them huge monetary compensations, they did feel that the tribe's claims deserved to be heard. As the July deadline grew closer and the Associate Solicitor remained stubborn, the Passamaquoddy realized that, according to common law, if they could just convince the district court that there was a legitimate dispute between the tribe and the Department of the Interior over the meaning of the Non-Intercourse Act and also demonstrate that the court would lose its jurisdiction to rule over this legitimate dispute after the deadline, the judge could preserve the issue. Thus, the legal team deduced that they could file suit against the Secretary of the Interior and urge the judge to order the government to bring a suit to court simply to retain jurisdiction.

In June of 1972 the Passamaquoddy and Penobscot sued Secretary of the Interior Rogers Morton. They sought a declaration from the court that the tribe was entitled to federal protection under the Non-Intercourse Act, which would justify an injunction ordering Morton to file a protective suit against the State of Maine on behalf of the tribe. Morton's legal representation made a mistake in their defense, looking over a simpler argument

38: Paul Brodeur, *Restitution: The Land Claims of the Mashpee, Passamaquoddy, and Penobscot Indians of New England* 87 (1985).

39: *Id*. at 89.

they could have made against the suit. With luck on its side, the district court and the First Circuit declared in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*[40] that the Non-Intercourse Act was applicable to the Passamaquoddy tribe, despite the lack of a federal treaty guaranteeing land. Moreover, the court held that the Act created a trust relationship between the federal government and the tribe.[41] The court ordered the Department of Justice to sue for $150 million dollars of damages for both the Passamaquoddy and Penobscot tribes for the illegal seizure of twelve and a half million acres of land by the State. They would end up filing suit for the actual return of the acreage, in addition to the damages.

An out-of-court settlement was always part of the plan. When and on what terms they would reach it, however, was the question. After *Passamaquoddy v. Morton*, the Passamaquoddy and Penobscot sought a settlement with state government officials, but the newly elected new governor and attorney general rejected them. It was not until a Boston law firm declared in 1976 that it would no longer give unqualified approval for municipal bonds issued in the claimed area – two thirds of the state - that the stakes were sufficiently raised.[42] Suddenly, the state faced a huge economic crisis and state officials were forced to become involved. Though dismissed as irrelevant before the firm released its news, the tribe's claim gained power by the economic threat it imposed. This fact is direct evidence for this article's thesis that American Indian tribes most capably assert their sovereignty when they are able to wield sufficient political or economic power.

The following negotiations for a land settlement between 1976 and 1980 were a mess of lobbying campaigns, sly negotiating tactics, and politics. The BIA and the Department of Justice most certainly fulfilled their duty in protecting the tribes in the remainder of this case–throughout the rest of the process, they worked hard and honorably to get the best possible deal for the Passamaquoddy and Penobscot. The case became so big that the Carter administration was forced to get involved, and President Carter, despite opposition from his own advisors, dealt favorably with the tribes. The State of Maine, as one could expect, fought viciously the claim and any settlement in which the State would be forced to pay large sums of money. Points of interest for this article are as follows:

40: 528 F.2d 370 (1st Cir. 1975).
41: *Id.* at 379-80.
42: Brodeur, *Restitution* at 97.

- The State delegation introduced bills into both houses of Congress that would have extinguished the tribes' claims. Individual Congressmen stood up for the tribes and blocked any of that sort of legislation. One attorney for the tribe criticized the State in that it felt like it "need only live within the legal system so long as it doesn't prove burdensome, and that when it does the state can either ignore the law or retroactively change it."[43] The State's attempt to use legislation to completely nullify the tribes' claim is a textbook example of its intent to, as a sovereign, subjugate the sovereignty of an American Indian tribe. The stand by individual Congressmen to block the State in doing so further demonstrates the extra-legal power a tribe can gain by moral claims.

- The tide of the claim changed when the tribal legal team enlisted Archibald Cox, a lawyer who had become legendary for his role in prosecuting the Watergate scandal. Cox volunteered his services, convinced of the morality of the tribes' claims.

- The advisor that Carter picked to analyze the case and recommend a settlement felt that the case should not be allowed to go to court, as, in line with the 'Impossibility Doctrine,' it would devastate the State of Maine. However, he also felt the force of the moral argument that, considering the federal government had partially created the problem by not protecting the tribes when Maine first illegally seized their land, the federal government should take part in settling the claim. The same advisor, though, drafted a settlement that would punish the tribes if they did not accept it by proposing legislation that would extinguish their claims. Though Carter rejected this idea in favor of a settlement on fairer terms, the fact that an advisor to the President suggested that the Executive branch flex its muscle and threaten the tribes with downright extinguishment furthers this article's thesis. When backed into a perceived corner, the federal government can, at all times, retroactively change the laws and treaties from which American Indian land claims gain their legal weight *because there is no higher authority that regulates affairs between sovereigns*. This truth clearly places tribal land claims outside of what would be considered a normal legal sphere, i.e. one in which the actors involved must act pursuant to the law. Though the

43: *Id*. at 98.

> legal aspect of the claim is necessary, both sides can do all in their power to influence the outcome. Limitations on the federal side, then, can only be explained by moral considerations.

Ultimately, the tribes ended up with an unprecedented deal. The Maine Indian Claims Settlement Act of 1980 appropriated $81.5 million from the federal treasury for the Passamaquoddy and Penobscot tribes in exchange for extinguishment of all claims to aboriginal land in Maine.[44] $54.5 million of that compensation was to be used to buy land in the claimed territory, with the first 150,000 acres bought by each tribe to be put in trust by the federal government. The remaining land purchased would be held in fee simple and would be treated as any other privately held land in Maine. The $27 million that was not used to purchase land would be placed in a trust fund for the tribes, which the Secretary of the Interior would invest with and distribute to members of the tribes each year. Importantly, the settlement also established a "modified sovereignty approach," in which all state laws apply to tribal lands and the state has civil and criminal jurisdiction over all tribal lands, even those placed in trust of the U.S.[45] That the settlement was a give-and-take between the State sovereign and the tribal sovereign, with the State relinquishing some of its land while the tribe relinquished jurisdiction over its own community, is further evidence that American Indian land claims are truly about the interaction between sovereigns rather than the pure enforcement of law.

The settlement saw one of the most favorable deals for an American Indian tribe pursuing a land claim in American history so far. Using the momentum built from the Oneida cases, the Passamaquoddy and Penobscot tribes skillfully used the Non-Intercourse Act strategy to compel federal support and lay claim to a staggering amount of land and damages in Maine. Needing only to win the original case that ordered the federal government to file suit on their behalf, the tribes were then able to use their huge claims as leverage to produce a favorable settlement with the State out of court. Points demonstrated by the case that are important for this article include:

44: Maine Indian Claims Settlement Act, 25 U.S.C. § 1724 (1980).
45: Goldberg, *American Indian Law* at 1058.

- This article's thesis–that, despite the legal veneer of American Indian land claims, extra-legal forces are necessary to secure a favorable deal for a tribe–is supported by this Passamaquoddy and Penobscot case study. Actors critical to the success of the claims, such as the attorney Archibald Cox and President Carter himself, were convinced to support the tribe's claims by their moral convictions. Moreover, the fact that these same moral convictions are what compelled individual Congressmen to block the Maine delegation's attempt to retroactively ratify the State-tribal treaties is direct evidence in support of this paper's assertion that the degree to which an American Indian tribe wields political and economic power affects the degree to which it is able to assert its sovereignty over the State or federal government's sovereignty.

- The claim of this article mentioned just above is further supported by the economic factors at play in this case. That the State responded to Passamaquoddy and Penobscot offers for a settlement only after it faced an economic crisis at the hands of the tribes directly supports the idea that tribes can use economic power to assert their sovereignty.

- Though it was not followed, the executive advisor's advice to force the tribes into a settlement by threatening to extinguish their claims reveals the fact that, as the dominant sovereign, the United States *can* change the law to win out over American Indian tribes as it sees fit. The force of this fact brings home this paper's central idea that these cases are ultimately about sovereigns, not legal proceedings.

- The government officials of Maine were actually quite amicable to the Passamaquoddy when they were originally seeking to be heard in court. Moreover, while the BIA and federal government acted counter to the tribes before the *Morton* decision, they carried out their duties afterwards in good faith. Congress and the President also protected the interests of the tribes in this case. Individuals in federal and state governments, even in situations where they might be expected to oppose American Indian claims, can sometimes act favorably.

The previous two case studies have involved Eastern tribes whose claims are based on the Non-Intercourse Act of 1790. Dozens of other tribes in the East have pursued and won claims based on this same strategy, most based on precedent set by the Oneida, Passamaquoddy, and Penobscot cases. The following two case studies involve Western tribes whose claims are based on federal treaties and concepts of aboriginal title and rights of occupancy. The motivating case for this article–the Lakota Sioux claims to the Black Hillls–falls under this type of claim.

IIIc. Taos Pueblo Land Claims

The Taos Pueblo's sixty year struggle to regain exclusive use of its sacred 50,000 acre Blue Lake watershed in New Mexico was a case that spurred an intense battle between federal government officials, and was prolifically written about in top national newspapers. As such, it demonstrates better than any other case presented by this article, and ultimately solidifies, the idea that extra-legal power in the form of moral convictions on the side of an American Indian tribe is essential to the actual re-possession of lost aboriginal land. Moreover, it is this article's first analysis of what a successful land claim against the federal government itself, rather than a State or municipal subdivision, looks like. The very disorder of the entire ordeal further suggests that American Indian land claims are not normal legal proceedings. Because there are no rules between sovereigns, the outcomes of tribal claims against the federal government are based little on legal fact, and more on the political pressures exerted by each side.

It all began as a good-faith effort of early 20th century conservationists and friends of the Taos Pueblo to protect the tribe's interests and their sacred Blue Lake. In 1906, President Roosevelt, following advice from Bert Phillips, a long-time friend of the Taos Pueblo, put the Blue Lake watershed into a forest reserve. Roosevelt and the others involved in the process entirely intended the action to ensure that the Taos Pueblo would have exclusive access to the Blue Lake, and that non-Indian hands seeking to develop or harvest the land would not be able to get access to it. Phillips, the first ranger of the forest, absolutely refused to give permits to any applicants, fulfilling his promise to the Taos that it was to be theirs alone.[46]

However, the idea that the land would be safeguarded as nationally-protected forest land proved to be flawed with the early 20th century

46: R.C. Gordon-McCutchan, *The Taos Indians and the Battle for Blue Lake* 13 (1991)

establishment of the Forest Service and the agency's priority of tending to the nation's forests as one would a farm. While the Forest Service has always intended to keep the nation's forests and water sources, such as the Blue Lake watershed, healthy, their methods were very different, and, indeed, intrusive, when compared to the Taos' way of life. Rather than leaving the land untouched, the Forest Service built roads to increase access, established cabins, horse paths, and, in accordance with its goal of reaping the rewards of stewardship, harvested timber from the forest. As the Taos Pueblo were extraordinarily vocal and vigorous in protesting this use of the land that they had lived off of, tended to, and considered to be sacred since roughly 1300 A.D., the Forest Service saw the Taos Pueblo as an obstacle to its 'farming' efforts. To ensure that it maintained sole authority over the valuable land, the agency sought to remove all claim of title of the Taos Pueblo.

The decades between 1906 and 1951 saw a confused mixture of governmental agencies and individuals within single agencies either protecting or opposing the Taos' claim to the Blue Lake. Certain agents of the Office of Indian Affairs, which was to become the BIA later in the century, dutifully pursued protection of the Taos Pueblo's spiritual homeland. Yet, others viciously persecuted the tribe's religious rights and belittled their claims. Some officials of the Department of the Interior adamantly pursued the objectives of the termination policy of the mid-20th century, which sought to strip American Indians of their rights and assimilate them into mainstream American culture, while others faithfully stuck by the Taos' sides. It is difficult to establish a sole agency, department, or group that was consistently on one side or the other of the Taos land claim, with the exception of the officials within the Forest Service. As the main opponents of the Taos' claim, they were convinced that the Blue Lake watershed was an asset that the Forest Service could not lose and they felt that they were using the land's resources better than the Taos ever could. The Taos' primary, consistent ally, on the other hand, was the American people. Inspired by the beauty of Blue Lake and the spirituality of the tribe, hundreds of creative and wealthy American intellectuals would become involved in activism for the Taos throughout their claim.

After being double-crossed by the Pueblo Lands Board in 1926, a committee established to settle New Mexican indigenous land claims, and after 'winning' an unsatisfactory permit deal from the Senate Indian Affairs Committee in 1933, the Taos Pueblo took major strides to actually gaining possession of their Blue Lake in 1951 when they filed a suit with the Indian

Claims Commission.[47] Though they knew the ICC could only award them monetary compensation, the Taos figured that judicial support for their claim would gain them leverage to get the land itself back. The key to the ICC claim was to establish that the Taos Pueblo had 'original Indian title, i.e. that the tribe had consistently and throughout history occupied and lived off of the land claimed.

A short explanation of what exactly 'original Indian title' means would be constructive. In *New York v. Shinnecock*,[48] Judge Bianco gave a fairly consolidated clarification of the rather abstract and misunderstood term. He stated that 'aboriginal land title' refers to "Indians' exclusive right to use and occupy lands they have inhabited from time immemorial."[49] When the British and American sovereigns explored and asserted control over North America, "Indians were permitted to occupy portions of territory over which they had previously exercised sovereignty."[50] However, "Indians were [only] secure in their possession of aboriginal land until their aboriginal title was extinguished by the sovereign discoverer."[51] Extinguishment could come through a treaty, military conquest, or other exercise of dominion. But, importantly, it had to be specifically stated in documentation that the government intended to extinguish aboriginal title. Indeed, "any ambiguity on the issue of whether aboriginal title has been extinguished must be resolved in favor of the Indian tribe."[52] To summarize, aboriginal land title is federally recognized title to land that is established by proof of occupancy on the land consistently throughout history. It can be used to claim aboriginal land, as in the Taos Pueblo case, unless it has been specifically extinguished through federal treaties, legislation, or conquest.

In the Taos case, even though Roosevelt made the Blue Lake a forest reserve through executive proclamation, there was no proof that the federal government specifically and wholly *extinguished* the Taos tribe's aboriginal title to the watershed. Accordingly, after extensive ethnographic research and presentation of evidence from historic documents, the ICC ruled in 1965 that the Taos had aboriginal title to the Blue Lake watershed and that it was illegally taken from them by the federal government in 1906. They were awarded monetary compensation, but the real victory was that a federally-commissioned court had established the validity of the Taos claim.

47: *Id.* at *xvi*.
48: 523 F. Supp. 2d 185 (E.D.N.Y. 2007).
49: *Id.* at 250.
50: *Id.*
51: *Id.*
52: *Id.* at 251.

With legitimacy established, the Taos began pushing for legislation in Congress that would return the sacred 50,000 acre watershed to the tribe. Because the Forest Service had made it clear that it would oppose a bill no matter what, the team drafting the bill did not have to worry too much about compromise. They received strong support from important political actors, such as then Senator Robert Kennedy, and won backing from religious institutions by framing it as a cause for religious freedom. The classic metaphor for the claim was that it was as if the government tore down an important Christian church and started developing on the once-sacred land. New Mexican citizens, who saw the trust title as unfairly privileged, and a slew of environmentalist organizations, which supported the Forest Service's care of the land and feared Taos mismanagement, opposed returning the land to the Taos.

In 1966, the first proposed bill, Senate Bill 3085, died without action in the Senate Interior and Insular Affairs Subcommittee. Noting the strong backlash from environmentalist groups, the Taos and their allies added amendments to the return of the watershed that ensured some measures of wilderness preservation. Moreover, further emphasizing religious aspects of the claim, they stressed the veneration the Taos had for the land and demonstrated the good stewardship that the tribe had exercised over the watershed since 1300 A.D. The second bill, House Bill 3306, passed in the House unanimously, but, once again, died in the Senate Interior and Insular Affairs Subcommittee in 1968, due to blocks from the Department of Agriculture. Undeterred, the Taos' allies in Congress reintroduced House Bill 3306 as House Bill 471, known colloquially as the Blue Lake bill, in 1969. This time, newspapers such as the New York Times and Washington Post were actively supporting the Taos in advertisements, articles, and op-eds.

Then, in early 1970, President Nixon announced his support for the bill, delivering a speech that the return of Blue Lake to the Taos would constitute his new American Indian policy of just and honorable dealings. After the eventual deletion of underhanded substitute measures and amendments that would have cheated the Taos out of the true return of the land, the Senate approved the Blue Lake bill on December 2nd, 1970. Nixon signed it into law on December 15th. The bill granted 48,000 acres, including the sacred Blue Lake, to the Taos under federal trust title, as well as exclusive use but not title to 1,640 acres surrounding the lake.[53]

53: Blue Lake Bill, H.R. 471, 91st Cong. (1970).

The Taos Pueblo were returned their sacred watershed, which they still enjoy tribal sovereignty over, and the American public, which had so actively been involved, felt like it had finally done right in a case that represented the wrongs done to American Indians for two centuries. This case departs and expands on lessons learned from the previous two cases in some important ways:

- The most significant factor for the success of the Taos Pueblo was the massive media and public support they garnered during the legislative pushes in Congress. As moral arguments swayed the opinions of judges in the previous cases, moral considerations swayed the voices of hundreds of thousands in this case. Without such support, Nixon and other key political actors might never have gotten on board with a favorable Taos settlement. This fact ties directly into this paper's over-arching argument that power in the form of political pressure can work to influence the outcomes of disputes between sovereigns. Though it is the federal government that ultimately signs a bill into law that gives back aboriginal land, tribes can nevertheless assert their sovereignty with sufficient political power, i.e. political pressure via massive moral support.

- Aboriginal title is one of the few tools tribes can use to assert sovereign claims over land in court that has otherwise been claimed by the sovereignty of the federal government. This tool represents what it means to say that American Indian tribes are sovereign. At the same time, the fact that the United States can so easily extinguish that title is telling of which sovereign dominates the other.

- Whereas the previous two cases saw fairly consistent allies and opponents to the American Indian's claims, with the exception of the Forest Service, the Taos claim was rife with unexpected alliances and enemies, even within a single agency. For instance, since the claim began in 1906, the Office of Indian Affairs, or what is today the BIA, produced a commissioner that fought the Taos claim throughout his entire time in office, and another who was instrumental in the Taos' success. The bipartisan nature of the claim speaks to the weight of relative individual moral convictions rather than objective legal facts. Moreover, the chaos that ensued between and within federal agencies over the claim demonstrates

that *no one really knows what they are doing* in American Indian land claims. As stated previously, this is because there are no rules between sovereigns. The appearance of a legal structure that regulates tribal-federal interaction is the source of widespread governmental confusion.

- Not all land claims are prompted by mal-intended seizures of American Indian land. The Taos' claim began because friends of the Taos convinced President Roosevelt to try to protect the Blue Lake watershed by making it a forest reserve. The effort was a success until the Forest Service took the management of the forest in an unforeseen direction.

IIId. Case Study #4: Alaska Native Land Claims

The settlement that came out of the Alaska Natives' land claims is by far the most extensive and innovative of any other in the United States. It appropriated $962 million to be invested in trust funds for Alaska Natives, and, instead of adding land to reservations held in trust by the government, as has always been done in the rest of the United States, it established fourteen Alaska Native Regional Corporations and 305 Village Corporations that provide a sustainable income for the indigenous people of Alaska. However, the settlement also questions the Alaska Natives' tribal sovereignty. While the tribal governments are still sovereign, the Regional and Village Corporations own the land in fee simple, rather than the tribe owning the land held in trust by the federal government. What is sovereignty if the sovereign does not have a land base?

More than anything else, however, the following Alaska Natives case study demonstrates in full force the effect that pure political power has in Native American land claims. In the previous cases, American Indian tribes had to rely on moral support from the American public and key political actors in order to exert political pressure on the federal government. However, Alaska's population is 14.8% indigenous. Other states have significantly lower percentages of indigenous communities, with New Mexico tallying the next highest with 9.4%.[54] As such, American Indian tribes in most states do not have much recourse through the ballot or through sheer size

54: *United States – American Indian and Alaska Native Population Percentage by State*, Index Mundi (2013), available at http://www.indexmundi.com/facts/united-states/quick-facts/all-states/american-indian-and-alaskan-native-population-percentage#map.

to force the federal or state governments to heed their demands. Though Alaska Natives, just like the previous three cases, did benefit from the moral convictions of individual politicians, their position as a significant portion of the Alaskan constituency provided them with political power not held by other American indigenous communities. They effectively used this power to assert their sovereign claims over not only the new Alaskan state sovereign, but also the federal sovereign's interests in Alaskan oil wealth.

The Alaska Native land claims were largely prompted by the passage of the Alaska Statehood Act in 1958. The Act gave the new State the right to select 103 million acres of the public domain, stipulating that lands to which indigenous communities have aboriginal title were exempt.[55] Despite this stipulation, the State began to select choice land with oil and mineral wealth that was clearly occupied by natives, and the Bureau of Land Management began to process these selections without telling the natives. However, the natives picked up on the State's plan and organized in order to stop the State's land grabs, founding the *Tundra Times* in 1962 in order to give a voice to the Alaska Natives.[56] They filed complaints with the Department of the Interior, and Interior Secretary Udall heard the natives out. He stopped awarding claimed land to the State and, by 1964, virtually halted the selection process so that the claims of natives might be settled. In 1966 and again in 1969, Udall formalized the 'freeze' in selection, and issued an order that the State could not select any more land until it negotiated a settlement with the Alaska Natives. Moreover, plans for an 800-mile pipeline that would go through aboriginal land was halted pending settlement with the natives. In 1966, the natives founded the Alaska Federation of Natives to protect their sovereign rights.

Due to the freeze, which paralyzed the formation of the State and threatened economic opportunities such as the pipeline, the State began to pay attention to the natives' claims. The Senate passed legislation in 1970 that provided the Alaska Natives title to 10 million acres of land to be held in federal trust in exchange for extinguishment of the tribes' claims to the rest of Alaska. Having demanded a minimum of 40 million acres, the natives would not agree to settle. While the State and natives waited for the next Congress, the natives gained supporters in the Senate who agreed to propose a bill for no less than 40 million acres to the natives during the next session.

55: Alaska Statehood Act of July 7, 1958, P.L. 85-508, 72 Stat. 339 (1958).
56: *Historic Alaska Native Land Victory,* 82 Indian Affairs (January, 1972)

After the tribe gained more support for such legislation throughout 1970 and 1971, President Nixon came out in support of a bill that granted 40 million acres to the natives in 1971. Finally, in late 1971, Nixon signed the Alaska Native Claims Settlement Act (ANCSA).

The legislation that the House and Senate committees came up with was incredibly different from any previous legislation dealing with American Indians. Abandoning the notion of the federally-protected, dependent reservation system that the United States has pursued since its inception, the Alaska Natives were organized in a "market-based system of corporate land ownership…without establishing any 'permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship.'"[57] The Alaska Natives received 40 million acres of land divided among 220 Corporate Villages and 13 Regional Corporations. Rather than being held in federal trust, this land is held in fee simple by the native corporations, which are incorporated according to state law. $962 million was appropriated, $462 million from the U.S. treasury to be distributed over 11 years, and $500 million in damages in mineral revenue from minerals already extracted by the U.S. on aboriginal land. The money was placed in the Alaska Native Fund, a trust fund distributed among the Village and Regional Corporations. In exchange, the Act extinguished all aboriginal title rights to over 360 million acres of land in Alaska, as well as all hunting and fishing rights.

What, then, is one to make of Alaskan Native tribal sovereignty if these tribes are organized not as reservations but as corporations? *John v. Baker,*[58] a case concerning state jurisdiction over a custody battle that involved a member of one of the native tribes, clarifies this question. The Alaska Supreme Court stated that "the nature of tribal sovereignty stems from two intertwined sources: tribal membership and tribal land…Tribes not only enjoy the authority to exercise control within the boundaries of their lands, but they also possess the inherent 'power of regulating their internal and social relations.'"[59] Whereas tribal governments are sovereign entities, corporations, which are the entities that actually own the land, are not sovereign; as such, tribal sovereignty is not asserted over the land itself, just the members of the tribe. Still, because "Alaska Native tribes have inherent sovereignty to adjudicate internal tribal disputes, the tribes must be able to apply their

57: Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 (1971).

58: 982 P.2d 738 (AK 1999).

59: *Id.* at 754-55 (quoting, in part, *United States v. Kagama,* 118 U.S. 375, 381-82 (1886)).

tribal law to those disputes."[60] Whereas most tribal sovereignty is over 'Indian Country,' or the land itself, Alaskan Native sovereignty can be thought of more as over the members of the tribe.

Indeed, the corporations can revise the rules that constituted them and they are exempt from property tax, just as in 'Indian Country.' Moreover, specific parts of the law are dedicated to protecting the corporations from seizure by non-Indian creditors. In a way, then, the corporations have the semblance of 'Indian Country' without the baggage that goes along with it. On the other hand, one could see ANCSA as having "stripped these Native communities from many federal protections for tribal sovereignty and land."[61] Still, most of the corporations have been, at the time of writing, a relative success, "rank[ing] among Alaska's largest companies…benefit[ing] the state economy, and creat[ing] opportunities for Alaska Native shareholders by boosting their standard of living through dividends, jobs, and scholarships."[62] At the same time, some argue that such benefits can only be seen by those who have adopted a corporate, rather than tribal, way of thought, and that many of the benefits of ANCSA are not appreciated by Alaskan Native youth today.[63]

The Alaska Native land claims were, to some extent, much simpler than the previous three cases. Alaska Natives' occupancy rights were a given, Native organization against attempted injustices was swift, and Native bargaining power in Congress was effective, with a legislative push that would be considered minor by those on the Taos and the Passamaquoddy and Penobscot legal teams. The settlement itself, however, was extraordinarily bold and complex. It challenged fundamental notions of what a Native American community looks like by abandoning the reservation model for a model focused on economic self-sufficiency. This move towards a market-based system also challenged the extent to which Alaska Natives can be called 'sovereigns.' Without a land base, 'sovereign' governments can claim little.

The most valuable findings of this case study are:

60: *Id.* at 761.

61: Goldberg, *American Indian Law* at 786.

62: *Anniversary Marks 40 Years of Progress*, CIRI Alaska Native Regional Corporation (2013), available at http://www.ciri.com/content/history/ancsa40today.aspx.

63: *Success and Future of ANCSA* (2013), available at https://openancsa.community.uaf.edu/section-3/module-15/.

- Out of any of the other cases, the Alaska Natives were *most* effective at initial organization and in their ability to block unjust land grabs before they happened. They leveraged the political power derived from their make-up as a large portion of the State's population and took advantage of the fact that Alaska was in the process of confirming its statehood in order to ensure that the new State would favorably treat its natives.

- Though successful American Indian land claim settlements have tended to follow a predictable course, the Alaska Natives' settlement was entirely novel. This fact supports this paper's concept that American Indian land claims are settled on a sovereign, and therefore ultimately unpredictable, level. Because there are no rules between sovereigns, out-of-court settlements can take any form the negotiating sovereigns agree upon.

IV. Findings of the Land Claim Analysis

The previous section reviewed the history of four different land claims that all, to varying degrees, saw the restitution of aboriginal land to an American Indian tribe. It analyzed these claims in order to get a better idea of what exactly a tribe must do if it wishes to actually regain possession of illegally seized land. With the Lakota Sioux land claim in mind, it sought to determine the sources of the immense difficulties faced by tribes in attempting to get back their land. The following points constitute the key findings, in order of significance, of the land claim analysis:

1) Extra-legal means of winning back aboriginal land are essential to an American Indian land claim's success. These extra-legal forces most often take the form of support from individual, influential politicians and the public, all of whom are motivated to act on behalf of the tribe's claim based on moral convictions alone. While American Indian land claims take on a seemingly legal veneer, morality is fundamentally tied up in their results. Without leveraging moral support as political pressure, it is unlikely that these tribes could have wielded enough power to assert their own sovereignty over that of the federal and state governments. Though applicable to fewer cases, some tribes created the same effect by combining moral support with economic and voting pressures.

2) As best demonstrated by the Oneida Indian Nation and Passamaquoddy and Penobscot claims, federal and state governments often ignore explicit laws in order to avoid ceding land and money to American Indian tribes. Although the Passamaquoddy were able to force it do so, the federal government *does not*, without enough pressure, interfere in State-tribal land disputes on behalf of Ameri can Indian tribes, though 25 U.S.C. § 175 states as law that it must. The 'Impossibility Doctrine' foregoes just compensation for Ameri-can Indian tribes who are victims of federally-recognized breaches of law in favor of protecting State and federal interests. The potential threat by the state and federal governments to enact legislation to retroactively extinguish Passamaquoddy, Penobscot, and Taos claims to land demonstrates the willingness of the state and federal sovereigns to side-step the force of law through their own political powers. All together, these actions point to procedures that do not line up with an established set of rules governing American Indian tribes' interactions with state and federal governments, but rather compete with the tribes on a dog-eat-dog, sovereign-to-sovereign level.

3) As evidenced by the ongoing fundamental questions about Oneida sovereignty in New York, the chaos seen between and within federal agencies throughout the Taos Pueblo land claim settlement negotiations, and the entirely novel settlement reached in the Alaska Native land claim settlement, *no one is really quite sure how to navigate American Indian land claims*. Different courts have issued different rulings on the same concepts. Indeed, this analysis of four landmark American Indian land claims has overwhelmingly confirmed Deloria Jr. and Wilkins' assertion that Federal Indian Law is a "hodgepodge of personal grudges, ad-hoc policies, inconsistent judicial decisions, and a general exercise of ignorance about Indians, framed in statutory language."[64] It affirms that this legal confusion is the result of the fact that *there are no rules between sovereigns*. As will be further described in the following section, the American attempt to impose a legal framework on interactions between sovereigns is the source of the 'hodgepodge.'

64: Vine Deloria Jr. & David E. Wilkins, *Tribes* at 33-34.

4) The American political system is entirely capable of returning land to American Indian tribes. Courts and Congress have, respectively, reached decisions and passed legislation that do so. Thus, it is not a flaw within the fundamental structure of the American political system that explains the difficulties faced by tribes in pursuing their land claims. The one exception is, perhaps, the Bureau of Indian Affairs. Though it has assisted tribes in select cases, it has in many more instances failed to defend, if not downright opposed, the interests of American Indian tribes. Major reform or dissolution of the flawed agency may be in order.

V. Conclusion: A Clash of Sovereigns

This article's primary thesis is that the complexities of American Indian Law fundamentally stem from the fact that American Indians *are* still sovereign. Given the findings of the land claim analysis above, this article is in a better position to advance its thesis.

When the United States was a fledgling nation, it needed American Indian allies, both to fight the English and to ensure its own survival against the tribes themselves. It is crucial to the understanding of this argument that American Indians *were not* easily and immediately conquered upon the arrival of European forces. They were a very real military threat to the new nation, and, accordingly, the United States treated them as such. Though early American language concerning natives does reveal that white Americans most certainly thought of them as inferior and savage, they were nevertheless forced to treat tribes as serious forces. Accordingly, the American tradition of approaching American Indian tribes *as sovereign* was developed. The early United States was not able to assert itself over American Indian tribes, and it thus had to negotiate with them on a sovereign-to-sovereign basis.

Then, as the United States grew more powerful and the tribes weakened due to disease, a lack of centralized governments, and a shrinking land-base, the federal government began to reveal its true intentions to the American Indian tribes. The United States by all means was in North America to exploit it. The United States government intended to get the most out of the territory it possessed as it possibly could. Because sovereigns are all-powerful over their own territory, American Indian tribes were a natural obstacle that the U.S. sovereign had to overcome in order to make the most out of American soil. Thus, as soon as it was able to, the U.S. began to remove the tribes

from the Eastern seaboard and push them out West.

Then, fragile and spread thin after the Civil War, the United States was once again vulnerable to the American Indian. As Americans moved West in droves, American Indian mastery of the plains and a desire to protect their land was an entirely real and formidable threat. The U.S. Cavalry wars with the Lakota Sioux, Cheyenne, Crow, and other tribes of the Great Plains in the second half of the 19th century were by no means easy and swift for the United States. Indeed, the United States was overwhelmingly defeated in many battles. Not only tired from war but *unable to defeat the American Indians*, the United States once again began to deal favorably with American Indian nations at the time. The Fort Laramie Treaty of 1868, which, though ceding large swaths of territory to the U.S., was quite favorable to the Lakota Sioux and was a direct result of a Lakota military victory over U.S. cavalry forces. Yet, as it did after the Revolutionary War and War of 1812, the United States once again pursued complete domination over the tribes of the Great Plains once it had restricted them to reservations and regained its strength.

The 1960's and 1970's proved to be an incredibly fruitful time for American Indian rights and, as this paper has shown, American Indian claims to land. This period saw the return of millions of acres of sacred land to tribes who had been vying for their return for centuries. Was this because the tribes began to make better legal arguments? Was it because they learned how to manipulate the system better? Perhaps a little, but these changes cannot account for the wild success seen by tribes during these decades. It is this paper's opinion that the United States was *forced* to acquiesce to American Indian demands for land as the tribes began, more and more, to attach themselves to the mounting Civil Rights revolutionary movement that had taken a firm hold in America during the 60's and 70's. The American Indian Movement explicitly pursued what was called 'Native American Civil Rights,' paralleling the black Civil Rights movement that had gained irrevocable momentum at the time.[65] Protests at Wounded Knee on the Lakota Sioux reservation in South Dakota saw violence.[66] It was only in this setting that, when American Indian tribes such as the Oneida and Passamaquoddy began to realize the massive claims to land and monetary damages that they

65: *American Indian Movement* (2013), available at http://www.aimovement.org.

66: Emily Chertoff, *Occupy Wounded Knee: a 71-Day Siege and a Forgotten Civil Rights Movement*, The Atlantic (2013), available at http://www.theatlantic.com/national/archive/2012/10/occupy-wounded-knee-a-71-day-siege-and-a-forgotten-civil-rights-movement/263998/.

could bring to court, the federal government had to respond.[67]

There are no rules between sovereigns. Because a sovereign derives power from itself, sovereigns see other sovereigns as equals, which subsequently means that no sovereign can appeal to a higher authority to limit the actions of another. The American political system has not one, but three sovereigns: the federal government, the state governments, and the American Indian tribes. Throughout its history, the federal government has come to clearly dominate the other two. Yet, because it wishes to retain a semblance of legality, the United States must, to some extent, recognize the laws and agreements made between the three sovereigns when they are within an equal playing field.

The point is that when the United States is vulnerable to American Indians, who, unlike any other community in America, are uniquely situated to negotiate with the federal government because they are sovereign, the U.S. must concede certain rights and benefits to them. Because the American political system is based on a system of law, once the federal government is no longer vulnerable to American Indian tribes, it cannot justly throw away the concessions it made. However, because both are sovereign and because sovereigns seek to dominate one another, the United States by no means keeps those concessions to American Indians in full faith. It attempts every legal and extra-legal remedy to overcome whatever advantage it was forced to concede at an earlier date. This reality, the reality of power-politics between sovereigns, explains why American Indian law is such a jumbled morass. No one is quite certain how tribal sovereignty and tribal rights fit into the American political system because such sovereignty was only recognized by the federal government out of necessity, and then systematically ignored and undermined by the U.S. whilst begrudgingly retained in the official records of law.

Indeed, one course that American Indians might take within the political system is to ensure the consistent realization of their rights through democratic measures. Blacks and other oppressed groups have made significant ground through the power of the ballot. Yet, here lies the kicker–Native Americans account for 1.5% of the total population of the United States.[68] Because of their minimal size, they have little to no recourse in public politics on the federal level. Indeed, the percentages are different on the state level. Alaska, as noted, is 14.8% native. Accordingly, Congress was forced

67: Though, as demonstrated in Section III, it did everything it could to avoid responding.

68: *FAQ,* Bureau of Indian Affairs (2013), available at http://bia.gov/FAQs/index.htm.

to listen when Alaska Natives opposed the new State's illegal land grabs. The settlement reached by the Alaska Natives was more favorable to them than are the vast majority of settlements to other American Indian groups. This point is further supported by the fact that Native American movements for the restoration of aboriginal land in Latin America, whose countries see indigenous populations range from 12.4% in Mexico to 60.3% in Guatemala, have seen far greater success than those in America.[69]

If an American Indian tribe wishes to see its rights enforced, it cannot rely on the recourse of American law. Not quite normal citizens, yet not the dominant sovereigns, American Indian communities must assert their tribal sovereignty via economic and political relevance. The way sovereigns usually achieve this relevance when they have a claim to land in another sovereign's territory is by military force, and the American Indians did pursue this course in the eighteenth, early ninteenth, and late nineteenth centuries. The tribes of the 1970's, however, had to rely on another source of relevance: political pressure via moral claims. Individual Americans throughout United States history have been incredibly sympathetic to American Indian troubles, and, as was demonstrated in the Taos push for legislation, tribes can use this sympathy as leverage in Congress.

Though the Lakota Sioux garnered moral support in favor of their own legislative pushes for a Black Hills bill in 1985, such support was not enough. The American people had grown tired of American Indian claims after two decades of constant activity, and the power of the Civil Rights Movement had died down. Indeed, the vast majority of non-Lakota, and a growing number of Lakota themselves, have asked whether it would be better just to accept the Court-appropriated money and use it to attempt to curb the overwhelming poverty afflicting the reservation, or perhaps to buy back the Black Hills piece by piece.[70] If this article stresses one thing, it is this: the Lakota Sioux cannot simultaneously accept Court-appropriated money and retain their inherent sovereignty. Just as the Taos and Alaska Natives refused to settle for anything less than their select, sacred land, and used whatever forces they had available to contend with the federal government, so too must the Lakota hold out until they have the power necessary to push their claim to the Black Hills once again.

The Lakota have understood this for thirty years at the time of writing. They have refused to take monetary compensation out of the conviction

69: See Deborah J. Yashar, *Democracy, Indigenous Movements, and the Postliberal Challenge in Latin America*, 52 World Politics 76 (1999).

70: Frederic Frommer, *Black Hills are Beyond Price to Sioux*, Los Angeles Times (2001), available at http://articles.latimes.com/2001/aug/19/news/mn-35775.

that it will someday be possible to reach a deal with Congress resulting in the return of land. And when they do, the Lakota will have been successful for no other reason than that they asserted themselves as sovereign, truly powerful in their own right and equal to the challenges of the sovereignty of the federal government.

Liberty or Dignity: Investigating the Fundamental Ideals Underlying American & German Abortion Jurisprudence

Bradley Silverman†

I. Introduction

The United States and Germany have much in common. As Western economic powerhouses, the U.S. possesses the world's largest economy, while Germany possesses the fourth largest. Likewise, both the U.S. and Germany have large populations, 308 million and 89 million, respectively, and both are highly-developed industrial societies grappling with technological change. The United States and Germany share intellectual traditions such as the writings of Leibnitz, Humboldt, and Goethe, and both states strive to protect individual freedoms and liberties while simultaneously maintaining a stable social order. Both the U.S. and Germany have well-established histories of constitutionalism – the United States Constitution is, at age 221, the oldest written constitution still in use, while Germany's constitutional order has been in existence for over six decades – that have both withstood tremendous trials, most notably the Civil War in the U.S. and Unification in Germany.[1]

And yet, comparative abortion jurisprudence offers a striking illustration of how similar Western societies have applied their respective primary constitutional values to reach remarkably divergent policy conclusions. Abortion policy has long been an emotionally charged aspect of the law, engendering fierce debate over the sanctity, origins, and very meaning of human existence, as well as the ability of women to maintain autonomous lives. It likewise touches on notions of liberty, human dignity, privacy, and faith. Nations across the world have pursued contrasting legal approaches to the issue, ranging from highly permissive abortion schemes to wholesale proscription. Today, the U.S. and Germany stand at very different points along this spectrum. While the U.S. has some of the most permissive abortion laws in the world, abortion is heavily restricted in Germany, only available under certain, limited circumstances.[2] The contrast between American and German approaches

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1: See, generally, Edward J. Eberle, *Dignity and Liberty* (2002).

2: Mary A. Glendon, *Abortion and Divorce in Western Law: American Failures, European Challenges* (1987).

to abortion law offers insight into how these societies have reached divergent conclusions on issues of fundamental ethical importance, and how the differences in each society's cultural values have informed these outcomes.

II. *Roe v. Wade*

In the United States, the most important contribution to abortion jurisprudence is undoubtedly the 1973 Supreme Court case *Roe v. Wade*.[3] *Roe* established that the right to privacy, which the Court had previously declared inheres in the Constitution, protects a right to abortion access, albeit one that can be restricted during the second and third trimesters.[4] More specifically, the Court held in *Roe* that the Due Process Clause of the 14th Amendment guarantees a substantive right to privacy that generally prohibits the state from interfering with a woman's ability to obtain an abortion.

IIa. Case Background

In 1969, Norma McCorvey, a resident of Dallas, Texas, sought to obtain an abortion upon discovering that she was pregnant with her third child.[5] After failed efforts to convince authorities that she had been raped so as to procure an abortion legally, she challenged, under the alias Jane Roe, the Texas anti-abortion statute as a violation of her right to liberty. The case went to the U.S. Supreme Court, which in a 7-2 decision held that a fundamental right to privacy rooted in the Fourteenth Amendment protected McCorvey's right to obtain an abortion. The Court thereby struck down both the Texas statute in question and other states' laws prohibiting abortion.[6]

In a majority opinion written by Justice Harry Blackmun, the Court ruled, principally, that the Due Process Clause contained a fundamental right to privacy. In doing so, the Court relied on the earlier case of *Griswold v. Connecticut*,[7] which invalidated, as violating the right to privacy, a Connecticut statute prohibiting the usage of contraceptives by married adults.[8] In that case, the Court held that although no explicit right to privacy could be found in the text of the Constitution, "specific guarantees in the Bill of Rights have

3: 410 U.S. 133 (1973).
4: *Id*. at 164-66.
5: Norma McCorvey & Andy Meisler, *I Am Roe: My Life,* Roe v. Wade*, and Freedom of Choice* (1994).
6: *Roe,* 410 U.S. at 166.
7: 381 U.S. 479 (1965).
8: *Id*. at 485-86.

penumbras, formed by emanations from those guarantees that help give them life and substance…[and that these] various guarantees create zones of privacy."[9] Under some circumstances, the Court said, state infringements on the right to privacy could substantively violate due process protections.

IIb. The Decision

In *Roe*, the Court held that the right of women to obtain abortions fell within the protected right to privacy, and could only be curtailed in a narrow set of circumstances. Specifically, since the Court deemed abortion a fundamental liberty, it could now only be denied through 'due process of law' when the state could proffer a compelling interest to do so, which itself would be subjected to a heightened standard of review.[10] But, notably, the Court declined to assert the point in the process of human development at which life begins, declaring that "when those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[11] In doing so, it tacitly dismissed the argument that a fetus' right to life overrode a woman's right to privacy.

However, the Court did identify some state interests that, under proper circumstances, could justify restricted access to abortion. It declared that the state possessed a legitimate interest in protecting the health of pregnant women, which after the first trimester could outweigh the right to abortion.[12] In addition, although the Court refused to recognize a fetal right to life, it acknowledged that the state has a legitimate interest in protecting the potentiality of human life. *Roe* thus devised a balancing test, dividing the pregnancy into three trimesters and weighing the right of the pregnant woman against these two state interests in each period. In the first trimester, the Court held that the development of the fetus had not yet reached a point where it could survive outside the womb, and thus that the interest in protecting potential life was insufficient to burden the right to abortion. Likewise, because the mortality rate for women undergoing abortions in the first trimester was found to be equal to or lower than that of women experiencing normal childbirth, the state's interest in protecting health could not justify limiting

9: *Id*. at 484.
10: *Roe,* 410 U.S. at 163-64.
11: *Id.* at 159.
12: *Id.* at 164-66.

abortion access.[13] In the second trimester, however, the state's interest in protecting the health of pregnant women could justify regulations intended to protect the woman's health and safety, even if such rules burdened abortion access. Nonetheless, during this period states still could not outlaw abortion entirely.[14] Yet, after the point of viability, which the Court deemed to occur somewhere around the beginning of the third trimester, it reasoned that because the fetus could survive on its own outside of the womb, the state's interest in protecting potential life could outweigh the right to privacy.[15] For that reason, states were permitted prohibit abortion after the third trimester began, if they chose to do so.

IIc. Criticism of Roe

Roe had profound implications on American jurisprudence, constitutionalizing a right to abortion that had not existed before. Along with its companion case, *Doe v. Bolton,*[16] it affected abortion laws in forty-six states, striking down many statutes that partially or wholly proscribed the practice.[17] *Roe* has gone down as one of the most controversial cases in Supreme Court history, evoking fierce and often emotional debate over its correctness. Even some who support abortion availability as a matter of policy have expressed ambivalence over the manner in which the court handled the issue. Professor John Hart Ely, who was pro-choice, argued that the expansive protection that the court afforded the right to obtain an abortion is justified by neither the text of the Constitution nor the intentions of the framers.[18] *Roe*, he said, "is not constitutional law and gives almost no sense of an obligation to try to be."[19] Ely asserted that the Court would not have hesitated to uphold a democratically enacted law infringing upon similar liberties, such as one prohibiting the killing of a pet. Another liberal criticism of *Roe* was offered by future Supreme Court Justice Ruth Bader Ginsburg. She believed that the Court would have been wiser not to issue such a sweeping decision, and that by doing so ig-

13: *Id.* at 163.
14: *Id.* at 163-64, 166.
15: *Id.* at 166.
16: 410 U.S. 179 (1973).
17: William Mears & Bob Franken, *Thirty Years after Ruling, Ambiguity, Anxiety Surround Abortion Debate*, CNN (2003), available at http://articles.cnn.com/2003-01-21/justice/roevwade.overview_1_abortion-debate-norma-mccorvey-alan-guttmacher-institute?_s=PM:LAW.
18: John H. Ely, *The Wages of Crying Wolf*, 82 Yale L. J. 920 (1973).
19: *Id.* at 947.

nited an explosive and entirely avoidable cultural battle, impeding a general movement toward more permissive abortion schemes.[20] A general trend of growing public support for liberal abortion laws would have occurred, she argues, had the decision been narrower in scope.[21] She would have preferred a decision that declared that inflexible prohibitions on abortion which fail to account for the interests of female autonomy are unconstitutional, without establishing a rigid trimester framework or specifically defining the relevant state interests at play.[22]

A number of American cases on abortion jurisprudence decided since *Roe* have affirmed its central holding while rolling back abortion rights to varying degrees. In *Planned Parenthood v. Casey*,[23] the Court ignored calls to overturn *Roe* in its entirety, upholding the "essence" of the ruling.[24] Yet, the Court did declare constitutional some regulations burdening the right to abortion, such as waiting periods and parental notification laws.[25] In *Gonzales v. Carhart*,[26] meanwhile, the court upheld a law outlawing a form of post-viability, partial-birth abortion, ruling that such a method was seldom the only procedure available to obtain an abortion.[27] Interestingly enough, *Bolton* itself held to the contrary, noting that a woman may obtain an abortion after the point of viability if necessary to protect her health.[28]

III. *Abortion I*

In contrast to *Roe*, the most important case in German abortion jurisprudence - the *Abortion I* case – declared abortion to be unconstitutional under most circumstances, with very few exceptions.[29] The ruling did not merely hold that the state may restrict abortion if it so chose; it in fact placed a positive obligation on Germany's federal government to expressly outlaw abortion.

The precise status of abortion law in Germany before *Abortion I* fluctuated

20: Ruth B. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375 (1985).
21: *Id.* at 379-380.
22: *Id.* at 382.
23: 505 U.S. 833 (1992).
24: *Id*. at 869.
25: *Id.* at 899-900.
26: 550 U.S. 124 (2007).
27: *Id*. at 1637-39.
28: *Doe,* 410 U.S. at 192.
29: *Abortion I*, BVerfGE 39.1 (German Constitutional Court, 1975).

over time, but a general trend toward the liberalization of abortion practices was evident. The Nazi regime outlawed abortion in most scenarios, and after 1943 abortion became punishable by death.[30] At the same time, however, Nazis often forced abortions, as well as sterilization, on members of 'socially undesirable' groups, such as 'non-Aryans,' the 'antisocial,' and the 'disabled.' Abortion law liberalized after 1968. But the easing of restrictions was challenged by conservative elements in the federal parliament, as well as by some German *Länder*, which are the German equivalent to American states.

In *Abortion I*, the German Federal Constitutional Court ruled that the principle of respect for human dignity contained in Article One of the Basic Law requires the criminalization of abortion under the overwhelming majority of circumstances. Also relevant to its judgment was Article Two, which establishes that "Every person shall have the right to life and physical integrity."[31] The Court held that the meaning of "Every person" in that sentence is "every living human being, or, put differently, every human being possessing life," and that the state's duty to protect life therefore extends to the unborn.[32] Unlike the U.S. Supreme Court, the Federal Constitutional Court confronted head-on the question of when life begins. It asserted that "where human life exists, it merits human dignity," regardless of whether its holder is conscious of that right or able to maintain it by him or herself. In doing so, the Court reaffirmed the centrality of the value of dignity in the Basic Law, which represents the ordered values of the German people and is binding on all governmental decisions, as well as the primacy of the value of human life, the "prerequisite [for] all other basic rights."[33]

The Court acknowledged that a woman possesses a right to the free development of her personality under Article Two. It then noted that if the unborn fetus were to be regarded simply as an extension of the mother's physical and biological being, the right to obtain an abortion might fall within that protected "sphere of private life decisions into which the legislator may not intrude." It also recognized that the relationship between a woman and the unborn entity within her is unique and possesses no parallel or equivalent. However, after considering several arguments for the availability of abortion, the Court declared that the woman's right to privacy is not absolute. It held that the right of the unborn to life and dignity trumped that of the woman to autonomy and free development of her personality. "No balance is possible

30: Eberle, *Dignity & Liberty,* supra.
31: Basic Law for the Fed. Rep. of Germany, Art. II.
32: *Abortion I,* supra.
33: *Id.*

which would guarantee both the protection of the life of the nasciterus and the freedom of the pregnant woman to terminate her pregnancy," the Court declared, "for the termination of a pregnancy always means the destruction of unborn life."[34] While unwanted pregnancy and childrearing limit the personal development of women, it said, unborn life is utterly destroyed by abortion.

The Court did allow for abortions to be performed in some cases. These cases included the first thirteen days following conception and during the first twelve weeks when the pregnancy is the result of rape or would endanger the woman's health or safety, so long as the woman consents to the procedure. In addition, the Court held that in other exceptional cases when pregnancy would force the woman to "sacrifice her own values to an unbearable degree," the legislature may exercise its own judgment in allowing or prohibiting abortion. Finally, the Court held that the state is obligated to protect unborn life through proactive means such as social welfare policy and public assistance, though it is not obligated to employ the same means it would use to protect born life.

The Constitutional Court's *Abortion I* decision is open to criticism on several fronts. The most obvious is its sheer inflexibility in burdening the fundamental right to autonomy that is recognized and protected for women in other societies throughout the world. Aside from slim exceptions for rape and the woman's health, the interest of the unborn fetus is said to always trump that of the pregnant woman. Restricting abortion in nearly all situations constitutes an unnecessarily and inappropriately broad conclusion. In their dissent, Justices Rupp-Von Bruenneck and Simon, while agreeing that abortion is constitutionally impermissible, argue that the majority went too far in prescribing a detailed manner in which the state must go about protecting human life, rather than leaving such decisions up to the legislature. They argue that the Court's function "lies in warding off injuries to the personal sphere caused by excessive interventions of state authority."[35] The case marked the first time that the state was required to criminalize certain acts. By taking an activist role that mandated legislative action to outlaw abortion, Rupp-Von Bruenneck and Simon said, the decision required novel, untested action on the part of the German government. Indeed, the notion that a court can obligate the government to pass certain laws, rather than merely uphold or invalidate public actions, is uncommon, although not unheard of, in American jurisprudence.[36]

The status of German abortion jurisprudence was altered by a second abor-

34: *Id.*

35: *Id.*

36: Eberle, *Dignity & Liberty,* supra.

tion case decided by the Court in 1993.[37] In *Abortion II*, the Court invalidated significant portions of a law that reconciled differences between East and West German abortion law following reunification. Though much of the new statute, which had liberalized abortion law in West Germany in many aspects, was struck down, the Court eased the restrictions on abortion in one significant way. Previously, a woman in her first twelve weeks of pregnancy needed a third-party determination that she had appropriate legal cause before obtaining an abortion. The Court ruled that it was acceptable for the legislature to replace this provision with one requiring counseling for pregnant women wishing to seek an abortion during the first twelve weeks, while allowing the final decision ultimately to be left to the women themselves.[38] Its reasoning was that it would be rational for the legislature to assume that a system which encouraged women to cooperate with, rather than evade, the law was more likely to effectively reduce abortion. But still, the Court again held that the state was obligated to use welfare policy in ways to discourage abortion.

IV. Values Underlying American & German Abortion Jurisprudence

The differences between American and German abortion jurisprudence – between *Roe v. Wade* and *Abortion I*, and those cases that followed – are numerous and stark. Most obvious is the difference in conclusions reached by each society on the degree to which abortion should be accessible. Each decision also embodies the fundamental values of its respective state – liberty, for America, and dignity, for Germany. One declares abortion to be protected by the fundamental right to privacy, the other that it is prohibited by the fundamental principle of human dignity. While the Constitutional Court held that a fetus is entitled to the protection of its right to life, the Supreme Court rejected this argument by refusing to determine the point at which life begins. On a structural level, there are also several similarities between the decisions. Both have been criticized as sweeping and overly broad, imposing a technical and unduly legislative regime over existing law and substituting the Court's policy opinions for those of elected officials.[39] To critics of both decisions, the strict trimester system in *Roe* and the state obligations in the *Abortion I Case* read more like legislative enactments than court opinions.

37: *Abortion II*, BVerfGE 88.203 (German Constitutional Court, 1993).

38: *Id.* Consult Gerald L. Neuman, Casey *in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany,* 43 Am. J. Comp. L. 273, 275-77 (1995).

39: Glendon, *Abortion & Divorce in Western Law*, supra.

IVa. Human Dignity in Germany

Both the U.S. and German constitutions lay forth the structure and powers of government as well as the relationships between horizontal branches and vertical layers, and both aspire to protect human rights. However, at the core of each document lie fundamentally different values and "strateg[ies] to realize the objective of securing liberty and human happiness."[40] At the heart of the Basic Law lies a legal order based on "moral and rational idealism," in particular the ideals of Kant and Hegel.[41] A set of objectively ordered principles permeates the German constitution, the highest one of which is respect for human dignity. Unlike other constitutionally protected values, human dignity cannot be restricted by 'reasonable' legislation or subordinated to other constitutional values. It is inviolable, forming the very essence of German legal order.

Recognition of human dignity is found primarily in the very first Article of the Basic Law. This placement is no accident; the creators of the German constitution wished to affirm that respect for human rights is not an afterthought in the German legal order, but a principle concern that illuminates every other aspect of the law.[42] By enshrining human dignity at the very beginning of the constitution, they ensure its centrality to the constitutional order. Article One reads, in part:

> "(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
>
> (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world."[43]

The exact meaning of "human dignity" is ambiguous. Essentially, the essence of the language is the Kantian principle that "each person must always be treated as an end in himself or herself," as an independent personality. The concept of respect for human dignity is inherent in other constitutional provisions that guarantee the right to life and the right to the free development of one's personality, for example. Human dignity forbids torture, slavery, and

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40: Eberle, *Dignity & Liberty* at 6.
41: *Id.* at 7.
42: *Id.* Also see Basic Law for the Fed. Rep. of Germany, Art. I.
43: *Id.*

the death penalty, and, in conjunction with other constitutional provisions, protects a right to privacy. Mary Ann Glendon argues that the elevation of human dignity as the principal value of the German constitution reflects a communitarian view of the law, rights and society, as opposed to the tenacious individualism that marks American law.[44]

The status of dignity as the highest constitutional value in German law is rooted deeply in German history. The Basic Law was written in 1949, four years after the end of World War II, an event that heavily influenced German constitutionalism. Horrified by the inhumanity of Nazism and the Holocaust, Germans attempted to build a constitutional order situated upon a respect for humanity that had been absent in the Third Reich. They sought to ensure that human interests and rights were not to be sacrificed for "the exigencies of the day," as they were under Hitler.[45] Whereas the old order had abused the law for its inhumane ends, Germans hoped to build a new legal order upon the basis of justice, respect, and dignity.

The other event that influenced the direction of German constitutionalism was the failure of the democratic experiment that took place during the Weimar period preceding the Third Reich. The Weimar Republic, which lasted fourteen years, possessed a weak central legislature that was often plagued by paralysis and stalemate. The Reichstag, unable to form stable majorities, delegated more and more authority to the President, whose fiat-like regulations came to hold the force of law. This system finally led to the rise of Hitler and the National Socialist Party. David Currie has called the Republic a "democracy without democrats," as voters were never able to agree on a parliamentary majority in office long enough to form a stable governing regime.[46] According to Edward Eberle, the centrality of the Basic Law's role in steering social public policy can be attributed to an understandable distrust of democracy.[47]

The place of human dignity in the context of German constitutionalism is further clarified by other constructions that the Constitutional Court has given the Human Dignity clause over the years. In the *Life Imprisonment* case, the Court held that a life sentence in prison without the possibility of parole at some future point violates the dignity of the prisoner, who is still human, by "strip[ping] him of all hope of ever regaining his freedom."[48] In

44: Glendon, *Abortion & Divorce in Western Law,* supra.

45: See, generally, David P. Currie, *The Constitution of the Federal Republic of Germany* (1994).

46: *Id*. at 7.

47: Eberle, *Dignity & Liberty*, supra.

48: *Life Imprisonment,* BVerfGE 45.187 (German Constitutional Court, 1977).

the *Microcensus* case, the Court ruled that the state may not "treat a person as an object subject to an inventory of any kind" by recording all aspects of his or her personality.[49] In the *Transsexual I* case, meanwhile, it affirmed the right of individuals to be classified on the basis of the gender with which they psychologically identify.[50] Finally, in the *Mephisto* case, the Court ordered an injunction against a book that impugned the reputation of a deceased actor who possessed unsavory ties to the Nazis. There, the Court reasoned that the publication of information regarding the plaintiff's past crimes violated his dignity.[51] Collectively, these cases demonstrate a commitment in German law to a concept of human dignity that transcends many other compelling interests, including freedom of speech, and which can even compel the state to take positive action.

IVb. Liberty in America

In contrast to Germany, the highest constitutional value in the American system is not human dignity but liberty. Eberle writes that "American constitutional law has never really sought to define or invigorate human dignity as an animating value… Self-sufficiency, independence and personal responsibility is the language of America, not community, human solidarity, or *fraternité*."[52] The guarantees of "life, liberty, and property" appear in the Due Process Clauses of the Fifth and Fourteenth Amendments, broad sources of individual liberty in the Constitution, and are phrased similarly to the Declaration of Independence's guiding ideals of "life, liberty, and the pursuit of happiness." The terms originated, in part, in the writings of Enlightenment philosopher John Locke, whose ideas regarding individual liberty, the social contract, and liberalism profoundly affected the American Framers.[53]

Compared to the Basic Law, the U.S. Constitution is less ambitious in attempting to impose a vision of proper behavior or morality on society. As John Hart Ely writes in *Democracy and Distrust*, the Constitution is a largely value-neutral document.[54] Instead of declaring fundamental values, it outlines a system through which decisions can be made by citizens on a continuous basis regarding which values merit recognition and legislative embodiment through the democratic lawmaking process. Those values that are

49: *Microcensus,* BVerfGE 27.1 (German Constitutional Court, 1969).
50: *Transsexual I,* BVerfGE 49.286 (German Constitutional Court, 1978).
51: *Mephisto,* BVerfGE 30.173 (German Constitutional Court, 1971).
52: Eberle, *Dignity & Liberty* at 8.
53: *Id.* at 15-17.
54: John H. Ely, *Democracy and Distrust* 87-88 (1980).

constitutionally protected, according to Ely's "representation-reinforcement" theory of constitutionalism, are all essential to the functioning of the democratic process.

Another crucial difference between the American and German constitutions is that the theme of liberty is far less pronounced in the American constitution than is the theme of human dignity is in the Basic Law. While dignity is explicitly laid out as a central value in the German constitution – in the very first article, no less – there is no overt guarantee of liberty in the U.S. Constitution. It is instead implied throughout the whole document, most significantly in the limitations placed on government power in Articles I through IV, which restrict the manner in which the government can act and intrude into the lives of citizens. Rights such as freedom of speech, free exercise of conscience, and equal protection are protected in the Amendments. The Fourteenth Amendment's Due Process Clause, which the Court has on occasion held to contain a substantive element, is often cited as the most sweeping protection of individual rights in the U.S. Constitution. Moreover, while human dignity is said to be inviolable under the German order, trumping virtually every other constitutional provision, the guarantees of liberty in the American system are not nearly unconditional; virtually every constitutional right can be abridged or even denied in some way or another, although the government will often be required to put forth a highly compelling reason to do so. Article One in the Basic Law is a rigid and inflexible guarantee of human dignity. In contrast, the Fourteenth Amendment's Due Process Clause, on its face, does not actually even guarantee liberty – just that liberty will not be denied "without due process of law."[55] The literal meaning of this phrase recognizes that at times liberty will indeed be curtailed.

The strong emphasis that the U.S. Constitution places on liberty is rooted in the experience of the original colonists, many of whom came to the continent to escape religious persecution or other forms of oppression in their home countries. Later, when the thirteen colonies rebelled against King George III, their chief complaints were primarily the various intrusions on liberty by the crown, such as the levying of taxes without input by the colonists or representation in Parliament. The Framers' experience under English rule taught them to be skeptical of the rule of men, leaving them a desire to protect liberty, rather than affirmatively promote human dignity against government. The Framers did not believe that human dignity was unimportant, but they thought that it was best achieved through the establishment of negative rights that prohibit the state from intervening in certain spheres of

55: U.S. Const. amend. XIV, § 1, cl 3.

personal life. In other words, they believed that human dignity required space for individuals to lead their lives as they choose, free from government interference. Dignity is thus protected, indirectly, by protections of individual liberty. Finally, Glendon suggests that liberty took root in America due to a high level of mobility unique to the New World, with individuals often moving from one trade to the next and one area to another. The U.S. was "one of the most fluid and unstructured societies the civilized world had ever seen… the powerful rhetoric of liberty was bound to strike a different chord."[56] Viewed in this light, the prominence of American law's commitment to individual liberty makes sense in the context of America's early history.

IVc. Applying Human Dignity in German Abortion Jurisprudence

The application of constitutional principles in the German and American abortion decisions reflected each state's fundamental constitutional values. Regarding Germany, the Constitutional Court's decision in *Abortion I* to sharply curtail abortion access thus directly implicated the Human Dignity Clause. "Developing life also partakes in the protection of human dignity," the Court declared, noting, "Where human life exists, human dignity attaches." The Basic Law guarantee that "Everybody shall have the right to life" must apply to the "developing life in the mother's womb" as well.[57]

With this assertion, the German Constitutional Court held that life begins before birth. Although the Court did not directly declare the moment where the cluster of living cells and tissue developing in a woman's womb becomes a human being, its decision rests on an understanding that after a certain point early in the pregnancy the unborn is said to be alive and in possession of constitutional rights, including the rights to life and human dignity. While the U.S. Supreme Court did not openly declare that an unborn child does not possess life, its refusal to consider the question of when life begins foreclosed the possibility of weighing the mother's rights against those of the fetus. It essentially denied that the unborn has a right to life, if it did not say as much in so many words. In Germany, the Court boldly declared that human dignity does not depend "on birth or a developed personality."

In *Abortion I*, the Constitutional Court weighed the right of the pregnant woman to freedom in her private decision-making against the fetus' rights to life and human dignity. The fetus' right to life was deemed weightier than the woman's right to self-determination, as abortion destroys the fetus, whereas the denial of abortion only places a burden on the woman. As Glendon notes,

56: Glendon, *Abortion & Divorce in Western Law* at 117.
57: *Abortion I,* supra.

it is significant that the test used here pits the right of the woman against the right of the unborn child, thereby acknowledging the rights of the unborn in the first place. It is a balancing of two rights: one individual's against another's. When this is the case, a court is far likelier to prioritize the unborn child's right.[58]

This in turn leads to one of the most important implications of the Court's application of the Human Dignity Clause. The Basic Law does not merely prohibit the state from taking certain actions, but has a proactive element, mandating that the state achieve the objectively ordered principles contained within it through positive action. This aspect of Germany's constitutional regime underpins Glendon's characterization of German conceptions of rights as having a distinctly communitarian bent, in contrast to the individualism of the American constitution.[59] And Eberle writes, "The objective dimension of basic rights is tied to the value-oriented nature of the German constitutional scheme."[60] Thus, the German constitution contemplates both objective and subjective rights, positive and negative liberties. This confers duties on the state to engage in proactive measures where necessary to achieve the fulfillment of these rights. This proactive element is seen clearly when the Federal Constitutional Court commands the state to prohibit abortion outright, and to use welfare policy to further this goal. That the Court transcended the principle of negative liberties to expressly instruct the state to take affirmative measures to protect human dignity underscores the primacy of that value and its distinctive, unique effect on the German legal order.

IVd. Applying Liberty in American Abortion Jurisprudence

The *Roe* decision, meanwhile, had the immediate effect of broadly legalizing abortion. It placed the right of a woman to obtain an abortion almost entirely beyond the reach of legal restriction during the first trimester, while allowing for only limited restrictions in the second trimester. While the German court held that life begins before birth and that fetal life is afforded constitutional protection, the U.S. Court explicitly refused to do so. This choice has been criticized by opponents of *Roe*, such as Ely, as giving insufficient weight to the interests of the fetus.[61] However, it goes a long way toward explaining the different outcomes reached by the American and German courts. The American court weighed a right – that of the pregnant woman to privacy

58: Glendon, *Abortion & Divorce in Western Law,* supra.
59: *Id.* at 35.
60: Eberle, *Dignity & Liberty* at 25.
61: See, generally, Ely, *Democracy & Distrust* at 2, 248-50.

and decisional autonomy – against mere interests – those of the states in protecting health and potential life. This contrasts with the German decision, which weighed one human being's right against another. When two rights are balanced against each other, the proper outcome involves a more nuanced and complicated balance, with the matter often coming down to the strength of each right. In contrast, when a fundamental right is balanced against mere interests, rights will generally trump interests.

Like many decisions involving the principle of individual liberty, the key constitutional provision applied in *Roe* was the Fourteenth Amendment's Due Process Clause. However, that clause was not originally intended to serve the purpose for which courts use it today. According to Professor John Harrison, the constitutional provision that was originally designed to protect individual liberty was the Fourteenth Amendment's Privileges or Immunities Clause,[62] which reads, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[63] This, Harrison writes, was meant in part to apply the liberty protections contained in the Bill of Rights to the states, as well as to ensure that laws did not discriminate on the basis of invidious classifications.[64] In a sense, it served the purposes that today are read into the Due Process and Equal Protection Clauses. The Due Process Clause, in contrast, was intended only to prevent arbitrary governmental action: to ensure that denials of life, liberty, and property would not occur without law and appropriate procedures in place allowing for them.[65] The Equal Protection Clause, meanwhile, was intended to ensure only equal enforcement and administration of laws; it did not mean the protection of equal law.[66]

The Supreme Court effectively nullified the Privileges or Immunities Clause in *The Slaughterhouse Cases*,[67] erroneously deeming it a redundancy of Article IV, section 2's Privileges and Immunities Clause.[68] Subsequently, the Court adapted to this jurisprudential development by reading aspects of the Privileges or Immunities Clause into the Due Process and Equal Protection Clauses. As a result, the modern understanding of the Due Process Clause contains a substantive element. It contains an understanding that certain fun-

62: John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L. J. 1385 (1992).

63: U.S. Const. amend. XIV, § 1, cl 2.

64: Harrison, *Reconstructing the Privileges or Immunities Clause* at 1387.

65: *Id.* at 1454.

66: *Id.*

67: 83 U.S. 36 (1873).

68: Harrison, *Reconstructing the Privileges or Immunities Clause* at 1414-16.

damental liberties "implicit in the concept of ordered liberty" receive special protection, requiring that the government must prove the existence of "important" or "compelling" state interests to abridge them.[69]

Finally, while the German decision can be characterized as compulsory in nature, the American decision is prohibitive – it forbids the government from taking, but does not mandate, specific actions. The state is told what it cannot do, but not what it must do. Though forbidden from proscribing abortion wholesale during the first two trimesters, it is neither obligated nor forbidden to provide or subsidize abortions. Unlike the German decision, *Roe* did not compel the state to provide social welfare services. Likewise, it allows state governments to limit abortion access to various degrees in the second and third trimesters without mandating that they do so, leaving such decisions to the political process.

This feature of *Roe* strongly ties into the American notion of liberty through limited government. "Americans," Eberle says, "are by nature skeptical about the existence and use of government power."[70] The core, then, of the American vision of government is the idea that happiness is best achieved by "careful delineation and limitation of the power of government… With government properly assigned to its own sphere, people could be left alone to determine their best interests."[71] The Framers believed that human dignity required space for individuals to lead their lives as they choose, free from government interference; dignity is thus protected, albeit indirectly, by protections of individual liberty.

V. Conclusion: Looking Forward

In the decades following *Roe v. Wade* and the *Abortion I* case, the statuses of abortion availability in America and Germany have trended back toward one another, slowly approaching a mean.[72] *Planned Parenthood* upheld the constitutionality of a number of restrictions on abortion while affirming the general principles embodied in *Roe.* Notably, it eschewed the trimester framework for a two-stage alternative relying on the viability of the fetus outside the womb. The *Abortion II* case, meanwhile, effectively decriminalized abortion in the first twelve weeks while it otherwise maintained preexisting abortion

69: See *Washington v. Glucksberg,* 521 U.S. 702, 720-721 (1997) (quoting *Palko v. Connecticut,* 302 U.S. 315, 325-26 (1937)) for a traditional account of modern substantive due process jurisprudence.

70: Eberle, *Dignity & Liberty* at 26.

71: *Id.* at 16.

72: See, generally, Neuman, Casey *in the Mirror,* supra.

prohibitions. In each case, the courts retreated from their earlier, bolder holdings while affirming the essential principles behind them. Thus, the abortion jurisprudences of each society have moved closer toward one another. The emerging pattern seems to be one of relatively easy abortion access during the first trimester, and not much else beyond that point.

One prominent advocate for this legal approach, Professor Glendon, writes that Western European abortion law "communicate[s] that fetal life is an important interest of the society, and that abortion is not a substitute for birth control" even though abortion must still remain accessible in certain circumstances.[73] Such a compromise in America, she says, would fully satisfy neither pro-choice nor pro-life advocates but would give each some cause for celebration. While the compromise might seem ineffective for those hoping to prevent abortion, it would "create a climate of opinion which impedes more extensive violations of the norm."[74] Likewise, she says that while the pro-choice camp would be unhappy with any restrictions on abortion access, the compromise would still be better than an absolute ban. She also urges pro-choicers to "consider what a set of legal arrangements that places individual liberty or mere lifestyle over innocent life says about, and may do to, the people and the society that produces them."[75] While compromise on abortion may be possible, it is doubtful that this debate will ever truly cease. The issue is too emotionally charged and society too divided to believe either camp could ever be satisfied with less than the full realization of its ideals. For this reason, it is unlikely – though not impossible – that the American and German jurisprudential approaches to abortion will ever fully converge.

73: Glendon, *Abortion & Divorce in Western Law* at 59.
74: *Id.* at 60.
75: *Id.* at 62.

The Phantom Plaintiff: Kuwait Airways, Sovereign Immunity, and International Public Law

Sebastien Akarmann†

I. Introduction

In 2003, after the U.S.-led coalition invasion of Iraq, the no-fly zone over Iraq was lifted. Consequently, the Iraqi Airways Company, the government-owned national airline of Iraq, was finally able to resume its operations. However, in May 2010, when Iraqi Airways commenced its first flights to Europe since the Gulf War, it was confronted with a series of seizures by Kuwait Airways Corporation and its legal team, authorized by English courts. Aircraft built in Canada, office buildings in Quebec and Jordan,[1] and even jet fuel intended for Iraqi Airways' planes in Europe were all targets of Kuwait Airways' seizures.[2] This brought to light a longstanding dispute over Iraq's failure to adequately compensate Kuwait after Saddam Hussein's forces during the Gulf War caused $1.2 billion in damage by stealing both planes and aircraft components from Kuwait Airways. Yet, Iraqi law claimed such actions were legal. Importantly, Iraq's Revolutionary Command Council, which was the primary governing body in Iraq, legalized the acquisition of Kuwait Airways during the war by issuing Resolution 369, a law that merged Kuwait Airways' planes and assets with those of Iraqi Airways.[3] Whether or not this law was legitimate would eventually be questioned by Kuwait Airways in courts all around the world.

In an effort to recover all of its losses, Kuwait Airways would sue Iraqi Airways in any jurisdiction in which it could maintain a legal foothold, including, for example, the courts of England, Canada, and Jordan. Notwithstanding the complexity introduced by multiple lawsuits in different legal

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1: *Kuwait Said to Have Seized Iraq Airline Assets in Jordan*, Arab Times (2012), available at http://www.arabtimesonline.com/NewsDetails/tabid/96/smid/414/ArticleID/169652/reftab/96/t/Kuwait-said-to-have-seized-Iraq-airline-assets-in-Jordan/Default.aspx.

2: *Iraqi Airways Drops Europe Flights in Row with Kuwait,* BBC News (2010), available at http://www.bbc.co.uk/news/10160016.

3: Valdini, Claire. *Kuwait MPs OK $500m Iraq Airways Deal*, Arabian Business Publishing (2013), available at http://www.arabianbusiness.com/kuwait-mps-ok-500m-iraq-airways-deal-487072.html. See also Note 1.

environments, Iraqi Airways would further complicate the case by employing sovereign immunity as part of its defense, since the company maintains that it is a government-owned entity. Now known as "the longest-running case to be held in the English commercial courts"[4] and one that has been extensively appealed within the Canadian judiciary, the feud between Iraqi Airways and Kuwait Airways offers a unique study into the legal processes arising from war, the enforcement of foreign judgments, sovereign immunity, and public international law.

II. English Courts

In 1995 the first court case regarding the issue surfaced in England: *Kuwait Airways Corporation v. Iraqi Airways Co*.[5] The most important obstacle in this case for Kuwait was Iraqi Airways' potential immunity under England's Sovereign Immunity Act of 1978.[6] Pursuant to the Act, Iraqi Airways would be entitled to immunity from suit if its actions had been directly ordered by a government or at least strongly influenced by one.

In the first hearing of the case, the court denied Iraqi Airways' request for immunity. It noted that none of Iraqi Airways' behavior "constitute[d] acts done in the exercise of sovereign immunity."[7] Accordingly, the court allowed the suit against Iraqi Airways to proceed, after which it found Iraqi Airways had interfered with Kuwait Airways' aircraft.[8] Yet, the court also ruled that Kuwait Airways would have suffered damages to its aircraft regardless of the interference caused by Iraqi Airways, obviating the airline's liability for the losses.[9]

Both companies appealed the rulings they found unfavorable but the court's judgment was later upheld, including the argument that Iraqi Airways was not liable for four Kuwait Airways aircraft that were destroyed by coalition forces at an airport in Mosul, Iraq. However, Kuwait Airways was

4: Asa Fitch & Hadeel Al Sayegh, *Jordanian Court Rules Kuwait Can Seize Iraq Air Assets*, The National (2011), available at http://www.thenational.ae/business/aviation/jordanian-court-rules-kuwait-can-seize-iraq-air-assets.

5: Reported at [1995] 1 WLR 1147.

6: Ying Tan, *Iraqi Airways Cannot Claim State Immunity,* The Independent (1995), available at http://www.independent.co.uk/news/people/law-report-iraqi-airways-cannot-claim-state-immunity-1596306.html.

7: *Kuwait Airways Corp. v. Iraqi Airways Co.,* 2002 UKHL 19, ¶ 5, available at http://www.bailii.org/uk/cases/UKHL/2002/19.html.

8: *Id.* at ¶ 6.

9: *Id.*

given an opportunity to recover partial damages. This opportunity arose from the fact that Iraqi Airways had flown six of Kuwait Airways aircraft to Iran during the onset of Desert Storm. After the war ended, Iran forced Kuwait Airways to pay for the maintenance and return of the aircraft. The court determined these forced payments were damages that were recoverable from Iraqi Airways, as Iraqi Airways was the entity which decided to fly the planes to Iran.[10]

A final appeal, filed by Iraqi Airways, to the House of Lords followed shortly. Within this venue, Kuwait Airways experienced significant difficulties with the applicability of Iraqi Law in the English courts. Today, according to the Private International Law Act of 1995, if a tort is tried in English courts the laws of the country where the tort occurred apply to the case. However, the proceedings against Iraqi Airways by Kuwait Airways commenced before the passage of that law, so the courts were forced to rely on the "double actionability rule." This rule questioned whether the challenged actions would be considered a tort under English law, and, if so, whether that tort broke any of the laws in the country where it occurred. Proving that Iraqi Airways had committed a tort pursuant to English law would not be an insurmountable project. However, the second prong of the 'double actionability rule' would cause great trouble for Kuwait Airways, as it would have to marshal Iraqi law in order to prove its case to the English court.[11] And *RCC 369*, the Iraqi law which merged all of Kuwait Airways' assets with those of Iraqi Airways, was already in effect at the time that the damages occurred. In short, according to Iraqi Law, Kuwait Airways had no assets on which to lay claim.

Kuwait Airways searched for a way to overcome this legal obstacle. After considering the issue, it requested that the English court simply not consider *RCC 369* in its judgment. Eventually, the court agreed, arguing that *RCC 369* was enacted as part of a broader intention to remove all aspects of Kuwaiti government and infrastructure after Iraq's invasion. As the court noted: "An expropriatory decree made in these circumstances and for this purpose is simply not acceptable today…it would be contrary to [English] public policy to permit application of the repugnant Iraqi law."[12] This strongly-worded rejection of the Iraqi law takes into full account the circumstances of the war in which this controversial law was enacted.

Although the applicability of *RCC 369* was rejected in 2002, it would take six more years for an English court to order Iraqi Airways to pay any

10: *Id.* at ¶ 7.
11: *Id.* at ¶ 12.
12: *Id.* at ¶ 28.

money to Kuwait Airways. Even then, the court in 2008 only allowed Iraqi Airways to collect legal fees from Kuwait Airways, which, although large, did not constitute restitution for damages from the Gulf War. Yet, Kuwait Airways' application to have the state of Iraq as a co-defendant was approved, allowing the Kuwaiti airline to pursue Iraq's public assets as compensation for its legal fees.[13] The British courts thus handed Kuwait Airways at least a minor victory.

III. Canadian Courts

As part of its expansion efforts, Iraqi Airways sought to modernize its fleet and placed an order with the Canadian aerospace manufacturer Bombardier. After learning of the company's intention to enter Canadian jurisdiction, Kuwait developed a plan to bring its claims against Iraqi Airways into the Canadian courts. After filing an action with the Quebec Superior Court, Kuwait Airways made the same arguments as it had previously made in England and noted the positive judgment it had received from the English courts in 2008. And Iraqi Airways, as it did in England, asserted its sovereign immunity, claiming it was protected under Canada's State Immunity Act. The Quebec Superior Court did not recognize the English judgment and accepted Iraqi Airways' claim of sovereign immunity. Kuwait Airways then appealed the case to the Quebec Court of Appeals in 2009, which also maintained that Iraqi Airways was entitled to immunity.

Afterwards, Kuwait Airways appealed to the Supreme Court of Canada. It argued that the question of Iraqi Airways's sovereign immunity was moot since it had already been resolved by the English courts. Kuwait Airways claimed that because the English courts had voided Iraqi Airways' claim to immunity, the Canadian court was bound to allow the litigation to proceed. This claim was rejected by the Court. It asserted that, due to broader concerns relating to Canada's own sovereignty, foreign judgments simply could not self-execute within Canadian courts. The Court could come to its own conclusion in the case.[14]

Simply because the Court denied that the issue was moot did not mean that Kuwait Airways had lost its claim. Rather, the Court engaged in a *de novo* review of whether or not the state activities of Iraq were so closely entwined with those of Iraqi Airways that the latter could be entitled to the immunity of the former. Thus, deciding whether sovereign immunity

13: *Kuwait Airways Corp. v. Iraqi Airways Co.,* [2008] EWHC 2039, ¶ 15 (TCC) (2008).

14: *Kuwait Airways Corp. v. Iraq,* 2010 SCC 40.

applied in Canada was very similar to the inquiry conducted within the English courts. Like in England, immunity would be assumed if the Court determined the sovereign entity acted through the private entity at issue in the litigation. But, in addition, the Court also considered the intent of the private actor in the case, and thus implemented a more holistic approach.[15]

After conducting its review, the Court concluded that Iraqi Airways did not establish a connection between Iraq's sovereign seizure of aircraft from Kuwait and the retention and use of such aircraft by Iraqi Airways in Iraq. By failing to establish this link, Iraqi Airways could not be entitled to sovereign immunity.[16] Since Iraq's immunity defense failed to protect Iraqi Airways, Kuwait Airways was finally authorized to seize Iraqi Airways' assets within Canada. Consequently, it seized two office buildings as well as the undelivered Bombardier jets already paid for by Iraqi Airways.[17] Like in the English courts, Kuwait Airways did not receive the full monetary recovery it desired; yet, it was able, at least partially, to recoup the losses it incurred as a result of the Gulf War.

IV. Settling Outside of Court

Although Kuwait Airways enjoyed moderate success in courtrooms around the world, it struggled to deal with various jurisdictions, as shown by its initial difficulties in the Canadian courts. In March 2012, instead of continuing with pending litigation, Kuwait decided to reach an out-of-court settlement with Iraqi Airways for compensation. Iraqi Prime Minister Nuri al-Maliki agreed to a $500 million settlement. In exchange, and after receiving payment, Kuwait Airways would drop all of its legal claims against Iraqi airways.[18] Although the settlement was promising, a standoff occurred a few months later in October. The Iraqi government asserted that it would not give any money to Kuwait Airlines before the latter first dropped its legal claims against Iraqi Airways.[19] Kuwait was hesitant to dismiss its

15: *Id.*

16: *Id*.

17: *Id.* Also see *Quebec Superior Court Allows Seizure of Iraqi Aircraft*, 6 Transportation Notes: Legal Decisions and Developments Affecting the Transportation Industry in Canada 1, 2 (2010), available at http://www.lexcanada.com/lib-av-1003-02.html.

18: *Kuwait Agrees $500 Mn Deal over Iraqi Airways,* The Economic Times (2012), available at http://economictimes.indiatimes.com/news/international-business/kuwait-agrees-500-mn-deal-over-iraqi-airways/articleshow/12265216.cms.

19: Khalid Al-Ansary, *Iraq Says Won't Pay Kuwait Before Airline Lawsuit Dropped,*

legal claims after twenty-two years of litigation, but, in late December, the chairman of Kuwait Airways, under instructions from the Emir of Kuwait, signed a compromise agreement with Iraq. By mid-January of 2013, Iraq paid the $500 million in compensation.[20] Immediately after, all of Kuwait Airways's legal claims were dropped.[21]

V. Conclusion

The conflict between two government-owned commercial enterprises, Kuwait Airways and Iraqi Airways, during a time of war involving both of the airlines' respective countries, created a legal battle the likes of which is not frequently seen. Kuwait Airways' audacity in consistently appealing and challenging court rulings contributed to clarifications in many areas of international law. For instance, the English courts, by rejecting the applicability of an obviously malicious foreign law, set a precedent that will allow such inappropriate laws to be disregarded more easily in the future, at least in the English courts. More broadly, this case shows the dangers of how rogue legislation and its effect on liability can complicate international public law. It also demonstrates how laws issued by a sovereign power, no matter how unjust, can shield that power and its subordinate legal entities from prosecution in the country's own courts. Additionally, the fact that both parties reached such a simple $500 million dollar agreement in 2012 clarifies how much more easily this situation would have been resolved if Iraq had adhered to diplomatic negotiations from the onset instead of doggedly clinging to its own declarations of sovereign immunity. Instead, a legal battle raged on for twenty-two years, consuming the precious time and resources of various courts, private practitioners, and sovereign governments.

Bloomberg News (2012), available at http://www.bloomberg.com/news/2012-10-04/iraq-says-won-t-pay-kuwait-before-airline-lawsuit-dropped.html.

20: Valdini, *supra*.

21: *Kuwaiti Airways Drops Lawsuits Against Iraqi Airways,* Al-Shorfa (2012), available at http://al-shorfa.com/en_GB/articles/meii/newsbriefs/2012/12/20/newsbrief-09.

Policing the Power of States in the Emerging U.S. Financial Market: A Story of the Geiger-Jones Investing Company

Yuliya Barsukova†

I. Legal Background

With the emergence of extensive cases of fraud in the field of speculative securities markets at the beginning of the 20th century, the state of Ohio passed an act "to regulate the sale of bonds, stocks and other securities and of real estate not located in Ohio and to prevent fraud in such sale." The law joined the rows of those already enacted all over the United States, known generally as Blue Sky laws. These laws aimed to protect people from buying fraudulent securities by means of imposing strict licensing rules over the distribution and sale of those financial instruments. For instance, Ohio's Blue Sky law, which was passed in 1913, prohibited individuals and corporations from distributing securities within the state without first receiving a license from the state Securities Commissioner. The process of acquiring the license included the payment of a fee and the disclosure of particular information about the activities of the company, including copies of all of its advertising. The term "securities", as defined by Ohio's Blue Sky law, included such financial instruments as stocks, stock certificates, bonds, debentures, and collateral trust certificates, among others.[1] Then, amendments made to the law in 1914 allowed for, *inter alia*, the regulation of bonds, stocks, and other securities not located in Ohio. Several classes of securities, however, were exempt from the license requirement, including Ohio public bonds, standard listed stocks, mortgages on Ohio real estate, and other financial instruments already under state regulation.[2] While aimed at protecting consumers from fraud, the law aroused much indignation from companies that had been working for decades, had established reputations, and now were required to pay extra, onerous fees every year.

The Geiger-Jones Company was one such enterprise. Since 1907, it had specialized in buying and selling the stocks and bonds of industrial cor-

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1: Gale U.S. Supreme Court Records, Hall v. Geiger-Jones Co. T*ranscript of Record and Supporting Pleadings* § 54, 7 (2011).

2: *Public Protected From Swindlers by New Blue Sky Law,* The Democratic Banner, 3 (August 12, 1913).

porations in Ohio. The company challenged the Blue Sky law before the District Court for the Southern District of Ohio. The company asserted that the Blue Sky law endowed the Securities Commissioner with impermissibly subjective and arbitrary power; deprived the company of its property without due process of law, in violation of the Fourteenth Amendment; and regulated interstate commerce, contravening the Commerce Clause. In response, the court first held that the law infringed upon the protections guaranteed by the Fourteenth Amendment.[3] Its opinion noted that the unbounded power given to the commissioner offered persons no protection from the "fatal inequality" that would arise if the commissioner enforced the law differently relative to different classes of corporations.[4] Then, more centrally, the court noted that the law imposed burdens upon interstate commerce that were "so direct, positive and substantial" that the Ohio Blue Sky law was void fully and immediately, since its constitutionally offensive features predominated throughout its body and were not severable.[5]

In reaching its conclusion, the court relied heavily on Supreme Court decisions that had been issued in 1910 and 1912. In those cases, the Court held unconstitutional state license requirements for foreign corporations engaging in purely interstate transactions within a state's borders.[6] Those opinions held that such laws imposed direct burdens on legitimate interstate commerce and thus infringed the Commerce Clause of the federal Constitution. Applying these precedents to the case of the Ohio Blue Sky law, the district court concluded that "the draftsman of the act here in question, unwittingly, no doubt, but with strange fatality, incorporated into it substantially all of the vices of the statutes considered in the above named cases, and added others equally, if not more, obnoxious."[7]

Such contention over the issue of the Commerce Clause and state licensing was not accidental. The Constitution of the United States grants every citizen of the United States a right to carry on interstate commerce,[8] and every infringement of the commerce clause is a violation of one's constitutional rights. Over the course of history, however, the meaning of interstate commercial activities and the scope of the privileges granted to citizens have evolved, taking on various forms. Specifically, the Constitution grants Con-

3: Geiger-Jones Co. *Transcript of Record* at § 54, 37.

4: *Id.*

5: *Id.*

6: See *International Textbook Co. v. Pigg*, 217 U.S. 91 (1910) and *Buck Stove & Range Co. v. Vickers*, 226 U.S. 205 (1912).

7: Geiger-Jones Co. *Transcript of Record* at 38.

8: See *International Textbook,* 217 U.S. at 109-10.

gress the right "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[9] The broad nature of the Clause's language, however, has constructed an arena for debate over the definition of interstate commercial activity and what is to constitute its instruments. Further controversy has evolved around the states' power to regulate matters of local concern that indirectly affect interstate commerce.

Questions regarding the distribution of federal and state power over interstate business activities were first noted in *Gibbons v. Ogden*.[10] There, the Supreme Court ruled that Congress maintained exclusive rights to regulate interstate navigation. The next category that followed navigation was trade between states. The Supreme Court secured the free flow of goods for sale in foreign states against protective legal measures of the states in a series of Commerce Clause decisions between 1875 and the 1890s. Among the landmark cases was *Welton v. Missouri*,[11] in which the Court ruled in favor of I. M. Singer & Company and declared Missouri's trade barriers unconstitutional, thus opening the state's borders for the company's market expansion.[12] By 1885, the Commerce Clause had also been used successfully to strike down state tax laws. Interstate companies thus received federal protection from unfair state protectionist policies when transporting and selling goods within a foreign state.[13] Next, in *Minnesota v. Barber,*[14] the Commerce Clause was expanded from prohibiting tax barriers to also allow for federal control of inspection laws. The Supreme Court granted to Congress, as opposed to the states, the authority to conduct pre-slaughter and post-mortem inspections of meat such that out-of-state companies might be protected against discrimination by biased and protectionist state authorities.[15]

By the late 1880s, the federal government was granted, pursuant to the Commerce Clause, regulatory powers that had traditionally fallen within the domain of the states. However, the licensing of enterprises and other ecnomic activities still remained in the powers of states. This unequal

9: US Const. art. I, § 8, cl 3.

10: 22 U.S. 1 (1824).

11: 91 U.S. 275 (1876).

12: For the history of the cases see Charles W. McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875- 1890*, 38 J. Econ. Hist. 631, 636-41 (1978).

13: Charles W. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903*, 53 Bus. Hist. Rev. 304, 311 (1979).

14: 136 U.S. 313 (1890).

15: McCurdy, *American Law and the Marketing Structure of the Large Corporation* at 647-48.

distribution of power between the federal government and the states can be explained, first, by the incremental nature of common law precedents and, second, by a Supreme Court opinion issued twenty-five years prior to the *Welton* decision. In 1852, the Court, in *Cooley v. Board of Wardens*,[16] narrowed its reading of the Commerce Clause to the context of each particular case:

> "When the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation."[17]

In *Cooley* the issue revolved around the constitutionality of a Pennsylvania law that required all ships entering or leaving Philadelphia to hire a local pilot. Otherwise, they had to pay a fee to benefit the Society for the Relief of Distressed and Decayed Pilots. On the grounds that the state maintained exclusive local rights to regulate pilots, the Court upheld the state law. As professors Martin Redish and Shane Nugent of Northwestern University argue, the Court reasoned that "the power to regulate commerce must be viewed in terms of the subject being regulated."[18] While some subjects were national in character and required a uniform federal rule, others required diverse regulations that only the states could provide.

The subject matter of commercial regulations, thus, became the cornerstone factor in courts' decisions on whether particular state attempts to regulate business activity violated the Commerce Clause. Soon, state regulation of the manufacturing activities of foreign companies within foreign state borders came into question. Charles McCurdy has observed that "when a corporation chartered in one state controlled productive apparatus–wheth-

16: 53 U.S. 299 (1852).

17: *Id.* at 319.

18: Martin Redish & Shane Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 36 Duke Law Journal 569, 578 (1987).

er by purchase, lease, or exchange of stock with a domestic corporation–within another state, its property necessarily became part of the general mass of property in the State, subject as such to its taxing and regulatory jurisdiction."[19] When the war on state taxes and inspection laws discriminating against foreign business ended, a new war on state laws regulating manufacturing and mining activities began. The main question that stood in front of the courts was, again, whether such activities were of interstate importance, and, thus, fell under jurisdiction of Congress, or if they fell under the category of state policing powers. Despite Congress's attempt to curb state control over manufacturing by means of the Sherman Anti-Trust Act and its insistence on the inclusion of manufacturing within the ambit of the Commerce Clause, the Supreme Court proclaimed manufacturing of goods to be the sole prerogative of state authorities, even if those goods would subsequently be made available for interstate distribution. States were thus given legal power to prohibit foreign manufacturing corporations from exercising franchises within their borders. In the landmark case *United States v. E. C. Knight Co.*,[20] Chief Justice Melville Weston Fuller narrowly read the Commerce Clause and upheld state control over the chartering of corporations for the next forty years, until the end of the 1930s. Here, the Court cited *Coe v. Errol*,[21] which recognized that goods which had not yet been transported were liable for taxation at the place of their origin. On these grounds Fuller declared:

> "The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce."[22]

The antagonism between states and federal authorities over commercial issues only worsened by the end of the 19th century. In 1890, the Supreme Court rejected state regulation of activities that were technically within the competency of the federal government but had not yet been regulated. The *Leisy v. Hardin*[23] case examined arguments over transportation and distribution of liquor in a foreign state where the sale of any intoxicating liquors was

19: McCurdy, *Knight Sugar Decision of 1895,* at 314.
20: 156 U.S. 1 (1895).
21: 116 U.S. 517 (1886).
22: *E.C. Knight Co.,* 156 U.S. at 13.
23: 135 US 100 (1890).

prohibited. Since liquors were articles of commerce, Justice Fuller declared that they fell within Congress' domain. But if Congress left the industry unregulated, the states were not authorized to exercise control over the subject.[24] The *Leisy* Court took congressional silence as tantamount to a legislative determination that the field should be kept free of regulation entirely, including that of the states.[25] Justice Fuller declared "where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation ... the State can act until Congress interferes and supersedes its authority. But, "where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States ... Congress can alone act upon it."[26] The opinion further complicated the debate over the distribution of federal and state power to regulate economic activity. By the end of the nineteenth century, the scope for interpretation of which activities were of local concern and which possessed an interstate, national character had broadened significantly.

And so, at the turn of the century, the issue of state authority over interstate activities was nowhere close to being determinatively and finally resolved. Such ambiguity would inevitably set a framework for conflict regarding the regulation of the rising market for industrial securities.With accelerated merger movement, companies had started turning to preferred stock as a means to finance their growth. The transition from "inside" ownership to semipublic "outside" possession gave way for the expansion of the securities disposition industry.[27] With an increasing number of brokerage firms, the industry also attracted swindlers and dealers in highly speculative securities. The public, often amateur in questions of the securities market, became victims of dealers in fraudulent stock. In response to the rising numbers of such victims, the first Blue Sky law in American history was passed by Kansas in 1911.

The legislation immediately faced opposition on the grounds that it was unconstitutional because it regulated interstate commerce on a state level. At the beginning of the 20th century, judges were heatedly debating whether the interstate distribution of securities was an issue of interstate commerce and, thus, whether states could create laws regulating the industry in the

24: 135 U.S. 100 (1890).

25: *Leisy*, 135 U.S. at 109-10, which notes "so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammeled."

26: *Id.* at 119.

27: Thomas Navin and Marian Sears, *The Rise of a Market for Industrial Securities, 1887-1902*, 29 Bus. Hist. Rev. 105 (1955).

absence of federal regulation. The following story of *Hall v. Geiger-Jones Co.* discusses the constitutionality of Ohio's Blue Sky law on the basis of its relation to the Commerce Clause and state policing powers. Although the district court first struck down the law on the basis of its direct burden on the Commerce Clause, the Supreme Court would take another trajectory and declare that the securities market, though having an interstate character, could be regulated by the states, so long as Congress passed no regulations of its own. As a result, the Court dismissed the legacy of Justice Fuller and the congressional silence doctrine. Noting that the Commerce Clause was complimentary rather than prohibitory, it proclaimed that, in the absence of federal legislation, state police powers were dominant in the regulation of the disposition of securities. State power over interstate commercial activities was once again expanded.

II. The Speculation Fever

Over the course of 20 years, the number of Americans owning financial stock increased from 4.4 million in 1900 to 14.4 million in 1922.[28] This constituted a rise from 5 percent of the population to about 12 percent, an increase of more than double. As a rapidly growing industry, financial markets required some legal framework for operation. Due to the growing attractiveness of the young industry, the disposition of securities became a tempting environment for fraudulent and high-risk activities. The public needed security against the growing amount of swindlers. In the end, the need for protection of the population led to state regulation of the field.

The first wave of policing regulation came towards bucket shops. Due to the high price of brokerage services, the majority of the American population—the middle and the working classes—became *habitués* of bucket shops. The latter were "places where customers wagered small sums on the price movements of stock and commodities."[29] The nature of a bucket shop consisted of side speculation on the rise or fall of stock prices. In comparison to the actual brokerage, however, there was no transfer or delivery of the stock or commodities nominally dealt in. Despite the high risk and questionable nature of the bucket shop business, they became an alternative market for those wishing to become rich quickly and enticed many potential Stock Exchange customers. Soon enough, bucket shops outperformed

28: David Hochfelder, *'Where the Common People Could Speculate': The Ticker, Bucket Shops, and the Origins of Popular Participation in Financial Markets, 1880-1920*, 93 J. Amer. Hist. 335, 336 (2006).

29: *Id.* at 335.

the average daily volume of stock exchanges. The New York Times estimated in 1889 that the nation's bucket shops had the equivalent of one million shares in bets per day, dwarfing the 140,000 shares daily of the New York Stock Exchange.

Although bucket shops were rising in popularity among Americans, their highly risky nature left thousands of people broke. Books of raided bucket shops often showed a heavy preponderance of losses over winnings. In one example, Ridgeway Bowker, a sixty-year-old typesetter who had zero experience with the stock market, read *Guide to Investors* and started speculating at a bucket shop with $150 in his pocket. Although he first enjoyed successful stakes, he, after some time, ended up with $3,200 of debt and was forced to pay off his debt with a job that paid $60 a month.

The Chicago Board of Trade eventually opened a legal war on bucket shops, emphasizing the gambling nature of their business and their thoroughly demoralizing effect on industrial and mercantile life.[30] In 1905, it won a Supreme Court case prohibiting bucket shops from acquiring the Boards' stock quotations. In his majority opinion, Justice Oliver Wendell Holmes, siding with the Board, affirmed the distinction between speculation and gambling, noting that bucket shops were to be classified as enterprises of the latter as opposed to the former.[31] After the Panic of 1907, which was partially attributed to bucket shops' speculation, the states of New York, Illinois, and Missouri banned the bucket shop business.[32] In the next couple of years, other states would follow the example.

Elimination of bucket shops didn't fully protect the public from reckless speculation and loss of money in worthless securities. Based on a sample of estimates from a number of newspaper articles, in the 1910s securities fraud was removing at least $1 billion annually from the bank accounts of

30: *The Chicago Board of Trade, How It Helps the Farmer, Grain Dealer and Shipper*, Ticker, 2, 258 (Oct. 1908).

31: *Board of Trade of Chicago v. Christie Grain & Stock Co.,* 198 U.S. 236, 247-49 (1905).

32: William J. Quirk, *Too Big to Fail and Too Risky to Exist*, 81 Amer. Scholar 31 (2012).

ordinary Americans.[33] The *Chicago Daily Tribune* cautioned its readers in 1906 against the allure of getting rich quickly. The newspaper mentioned the story of Dr. Jacobs, who ventured a dozen of fraudulent enterprises including banks, "inducing the farmers to put up real money against his worthless securities."[34] After one of the business enterprises imploded, Jacobs moved to another to continue the swindling activity. Jacobs started the Chicago Loan and Trust Company, which offered various get rich quick schemes. "It was from a director's meeting of [the Chicago Wax Paper company] that Jacobs rode to the courtroom in an automobile and pleaded guilty to fraud in the Chicago Loan and Trust concern. Anyone who wanted to start an insurance business could find the necessary capital by paying money to Jacobs, who would furnish him with fake bonds and stocks and certificates of deposit indicating that vast sums had been deposited in the coffers of the Chicago Loan and Trust company."[35] Jacobs is but one example of many individuals who attempted to make a living by defrauding common Americans.

In response to the danger such swindlers posed, John Moody first published Moody's Manual of Industrial and Miscellaneous Securities in 1900, providing helpful information on stocks and bonds of financial institutions for the amateur public. In 1906, he described different deceitful schemes surrounding the displacement of securities in *The Washington Post*. He talked about advertising columns as one of the ways to defraud a naïve American and "steer" his investment into unsafe channels. By widespread advertising,

33: A sample of fraud cost estimates can be seen with the following: *Why 'Blue Sky' Laws Are Needed*, Indianapolis Times (December 11, 1923); *Financial Crime Loss Is Three Billions Yearly*, New York Times, H5 (6 July 1924); *Debit 3 Billions a Year to Crooks*, Current Opinion, 510 (October 1, 1924); *War on the White Collar Bandits*, Literary Digest, 11-12 (March 6, 1926); *Getting Rich by Going Broke*, Literary Digest, 65-67 (April 27, 1929); E. Jerome Ellison & Frank W. Brock, *The Run for Your Money* 3-4 (1935), in Edward J. Balleisen, *Private Cops on the Fraud Beat: The Limits of American Business Self-Regulation, 1895-1932*, 83 Bus. Hist. Rev. 113, 118 (2009).

34: *Don't Try to Get Rich Too Fast: Twenty cases now on the criminal docket. Every day victims complain to the police. Credulous people always ready to be swindled. Money for stamps only capital needed. Forty million dollars taken in by a few schemers. How L.D. Abbot Company was managed. Borrowed money to pay first printing bill. Get rich quick men arrested during the year. Fake diamond company was one of many. Unique career of Perbohner: committed suicide. Dr. Jacobs is premier of promoters. Established trust company, which failed. One legitimate enterprise and a score of frauds,* Chicago Daily Tribune (September 23, 1906).

35: *Id.*

a gang of "mining swindlers" that were located in New York and operated in forty branch offices all across the United States and Canada, defrauded people into buying shares of their firm with a promise of high dividends. The first dividends were paid with no profits backing them up. The company, however, continued exchanging its worthless stock for stock in equally worthless companies. "It is reported that this firm has bilked something like 16,000 small investors in the United States and Canada, to the tune of several million dollars," cautioned Moody.[36] Apart from advertisers, sellers of securities were among the first to exploit the device of the mailing list. Those on the "sucker list," as *The New York Times* called it in 1909, would first receive a fancy advertisement in the mail soliciting them to invest with high commission. Deceived victims would then receive fraudulent stocks in an envelope, which allowed the swindling schemes to go unnoticed by the police.[37]

The first discussion of possible legislation to prevent stock fraud came out of the state of Kansas. During the period of 1910-1911, Kansas was not an exception to the prevalence of securities scams: fake investment advertising schemes swindled innocent citizens out of four to eight million dollars each year.[38] The state bank commissioner J. N. Dolley acknowledged the flood of securities fraud into Kansas. To protect the public from swindlers, Dolley proposed a state bureau to provide the public with information on the background of stock dealers. After doing background checks on the companies, the bureau notified any inquirers about the companies' financial standing. In the first week of the bureau's operation, it received a dozen letters of inquiry.[39] After the success of the bureau,, Dolley called for the passage of state legislation to stop fraudulent speculation. After successfully lobbying Kansas's legislature in 1911, Dolley succeeded in influencing the passage of the first Blue Sky law in the history of the United States. The law required firms selling securities in Kansas to acquire a license from the Bank Commissioner and to file regular reports of financial standing in order to be

36: John Moody, *'Get-Rich-Quick' Schemes: From 'The Art of Wall Street Invoking' Courtesy of the Moody Corporation*, The Washington Post, § Real Estate, Financial, & Want Advertisements (November 11, 1906).

37: *How the Mails Are Used to Catch the Unwary*, New York Times, § 5 (September 12, 1909).

38: Walter A. La Bar, *Kansas' 'Blue Sky' Law: It Is Designed to Keep 'Fake' Promotion Companies Outside the State*, New York Times (October 13, 1911).

39: *Dolley Investors Guide: Bank examiner gets many inquiries from Kansas. State overrun with stock selling sharks, who gold brick the innocent investors,* Iola Daily Register, 4 (April 11, 1910).

able to operate in the securities business within the state.[40] Shortly after its passage, the law prohibited 44 out of 500 companies to operate within the state of Kansas. After the first year of the law's operation, Dolley proudly announced that the law had saved the people of Kansas more money than it had taken to run the entire state government during that year.[41]

Dolley's legislation was a unique invention to protect the public from stock swindlers. For more than a year, Kansas was the only state to enact a Blue Sky law. However, in his article in *Bankers Home Magazine*, Dolley boasted that almost every state in the union had sent a request for a copy of the law, and that England, France, Germany and Canada were considering the enactment of a similar legislation.[42] Indeed, after Kansas, citizens of many other states started discussing the possibility of enacting Blue Sky laws. For instance, in response to urgent demand for a measure against stock fraud, Iowa created a committee to work on similar legislation.[43] California also offered "hearty endorsement" of such legislation.[44] In 1912, Arizona[45] and Vermont[46] adopted Blue Sky laws modeled after Kansas' example. Yet, Louisiana enacted a statute that year which differed from the Kansas law in at least one respect, as it did not ban securities from the state if they simply did not promise a fair return on the investment. Most of the states' Blue Sky laws, however, had one central motive in common. All of them required securities dealers to obtain a license from a state commissioner to be able to sell securities, bearing significant liabilities for false statements in connection with the traded stock.

Americans did not unanimously welcome Blue Sky laws, though. There was an opposition movement, mostly in states with a big financial market presence, like New York, Pennsylvania and Massachusetts, or those competing for corporate charters such as Maine, Delaware, Nevada and Maryland.[47] Much criticism of the legislation was based on the argument that the

40: *Kansas Beats Stock Swindling: The 'Blue Sky' Law That Has Regulated the Dealing in Securities*, Wall Street Journal (March 2, 1912).

41: Walter A. La Bar, *Kansas' 'Blue Sky' Law*, supra.

42: The article was quoted within *Id*.

43: *Blue Sky Law is Needed*, National Democrat (November 28, 1912).

44: *The Blue Sky Law*, Oakland Tribune (July 21, 1913)

45: Act of May 18, 1912, ch. 69, 1912 Ariz. Sess. Laws 338 (vesting enforcement powers in the state's corporation commission).

46: Act of Feb. 13, 1913, No. 170, 1912 Vt. Laws 196 (vesting enforcement powers in the state's bank commissioner).

47: See, generally, Jonathan Macey & Geoffrey Miller, Origin of the Blue Sky Laws, 70 Tex. L. Rev. 347 (1992).

laws were bounded within one state, allowing for no uniformity on a broader level. The Investment Bankers' Association called the Kansas Blue Sky law a "crazy-quilt cure-all impossible of operation." The association attacked the laws on the grounds that they went against any interest of the dealers in the securities business.[48] Many, however, acknowledged the necessity for some sort of legislation to protect investors from fraudulent securities. By 1915, twenty-seven states had introduced Blue Sky laws despite increasing opposition to the legislation and frequent challenges to these laws in the courts.[49]

III. The Blue Sky Law Controversy in Ohio

A Blue Sky law was eventually introduced in Ohio, a state with a big New York investment house presence, in 1913. As amended in 1915, it required dealers, both in-state and foreign, to acquire a license from the State Superintendent of Banks by means of disclosing to him certain information and undergoing a background check, along with providing copies of all advertising published in the media. The introductory section of the law stated:

> "Except as otherwise provided in this act, no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all hereinafter termed "securities") evidencing title to or interest in property, issued or executed by any private or quasi-public corporation, co-partnership or association (except corporations not for profit,) or by any taxing subdivision of any other state, territory, province or foreign government, without first being licensed so to do as hereinafter provided."[50]

The law then defined who was and who was not a 'dealer.' It also stated that applicants had to pay a preliminary fee of $10 and an annual fee of $50, with an additional $5 for every agent they employed. The superintendent, under the law, could revoke a license or refuse renewal for cause, which then could be reviewed in the court upon the dealer's complaint.

When the Ohio law was passed, the Superintendent of the Banking Department of Ohio was Harry T. Hall. Before enforcing Blue Sky legislation, he had already established a reputation of being a bitter enemy to bucket patrons. In 1916, he authorized raids and arrests of managers of twelve bucket

48: *Bankers to Fight Get-Rich-Quick Men,* New York Times, XX15 (April 26, 1914).
49: *Blue Sky Laws*, Wall Street Journal (November 29, 1915).
50: Ohio, Blue Sky Law, as amended, 1915.

shops. In the State Banking Department's estimation, each of the raided establishments "was doing enough business to net a daily profit of $3,000" by operating fraudulent security agencies.[51] After successfully shutting down the bucket shops, Hall concluded: "[A fatal] Blow has been struck that was needed to halt [a] conspiracy which reaches from [the] Atlantic to [the] Missouri River," adding that bucket shops would not operate in Ohio "as long as [he was] banking superintendent."[52] After ending the securities gambling business in Ohio, Hall proceeded to issue licenses for businesses willing to sell securities in the state.

The Attorney General Edward C. Turner helped Henry Hall revoke the licenses of swindling enterprises. A graduate of the Ohio State University School of Law, he first worked as a prosecutor in Franklin County, and became distinguished when he successfully compelled the county treasurer to collect delinquent taxes. "When he took office," reported the local Ohio newspaper *The Perrysburg Journal*, "the civil and criminal docket of his office was about 300 cases behind, but now it stands up to scratch."[53] Described as "a quiet looking little fellow, with the determined chin of a man who doesn't make much noise,"[54] Turner would soon make history by arguing, at the Supreme Court, Ohio's case for the legitimacy of Blue Sky laws.

In 1915, the Geiger-Jones Company, specializing in buying and selling stocks and bonds of industrial corporations, applied to Hall for a license pursuant to the Blue Sky law. At the time, the company owned $1,655,200 in issued and outstanding stock. Its surplus approximated $285,000, and it had an established clientele of 11,000, residing both within and outside of the state of Ohio. The company was selling securities of twenty corporations organized under the laws of Ohio, other states, and foreign countries, amounting to $25,000,000 per share value. As later reported, none of the Geiger-Jones Company's 11,000 clients ever reported incurring any losses as a result of investing in the securities acquired through Geiger-Jones.[55] Overall, the company had established a respectable reputation in Ohio by the time it applied for license renewal.

However, Commissioner Hall rejected the Geiger-Jones Company's renewal request. After investigating the company's affairs, Hall concluded that Geiger-Jones was not fully complying with the provisions of the Blue

51: *Ohio Bucket Shops Raided*, The Sun (February 5, 1916).
52: *Ohio Bucket Shop Prosecutions*, Wall Street Journal, 5 (February 5, 1916).
53: *Edward C. Turner*, Perrysburg Journal (October 29, 1914).
54: *Id.*
55: Geiger-Jones Co.*, Transcript of Record* at § 54 pp, 2.

Sky law.[56] In a series of charges, the state official accused the company of wrongfully claiming an existing surplus of $265,000. In fact, Hall stated, an audit noted that no surplus existed at all. In response, the company filed a lawsuit against the Banking Superintendent and the Attorney General, claiming, first, that the Commissioner's decision rested upon incorrect facts and was in need of correction and, second, that the Blue Sky Law was an unconstitutional violation of the Commerce Clause.

Before the court decided the issue, however, it allowed other interested parties to consolidate their own challenges to the law with the challenge of Geiger-Jones. The first of these new parties was William Rose, who, as a citizen of the state of Ohio, had developed a prosperous business by buying and selling investment securities. Previously, the RiChard Auto Manufacturing Company, a newly organized West Virginia car manufacturer, needed to raise capital to produce and sell cars. For fundraising purposes, the auto manufacturing company issued stock, which Rose put on the market for sale. Subsequently, Rose became a secretary of the RiChard Auto Manufacturing Company. While Rose continued to sell securities of the auto company, the Attorney General conducted an investigation into the affairs of the enterprise and found no manufactured automobiles or automobile parts. On the assertion of fraud, a constable arrested Rose.[57] The jury of the court of Cuyahoga County found Rose guilty of unlawfully attempting to sell stocks, but Rose removed his case to the federal district court. Like Geiger-Jones, Rose claimed that the Blue Sky law under which he was arrested was unconstitutional. In court, he stated that the legislation deprived citizens of their property without due process of law, unconstitutionally delegated *ultra vires* power to the superintendent, and imposed a burden that practically amounted to a prohibition upon interstate commerce.[58] Since Rose's accusations were so similar to those of the Geiger-Jones company, the district court, in the interest of judicial efficiency, consolidated both cases.

A third party, Don Coultrap, also joined the case after making the same argument against the law's constitutionality. As a citizen of the state of Pennsylvania and a dealer within the Geiger-Jones Company, he had filed a parallel complaint against Hall. Coultrap held stock in several companies that were registered in Ohio and in Missouri. The dealer regularly traveled between the states of Ohio and Pennsylvania, trading stock in both states and often sending securities from one state to the other for sale by mail.[59]

56: *Ohio's 'Blue Sky' Law Held Invalid,* Detroit Free Press, 6 (February 11, 1916).
57: Geiger-Jones Co.*, Transcript of Record* at § 61, 2.
58: *Id.* at 4.
59: *Id.* at § 47, 2-4.

He charged that the state officials' revocation of the license of his employer "will operate as a cancellation of his authority" and, consequently, "interrupt and destroy his business."[60]

Thus, the Court had to address the concerns of three different plaintiffs: an established but opaque business enterprise, a dealer convicted of the disposition of fraudulent securities, and a reputable dealer whose extensive network of clientele was at stake. With all three cases in mind, the Court issued one opinion on the constitutionality of the Blue Sky law. The judge mentioned that an application of the police power would be valid in these cases, but only if it *incidentally* affected interstate commerce. Citing previous court decisions in the states of West Virginia[61] and Iowa,[62] the court defined stocks and bonds as articles of legitimate interstate commerce. Consequently, sales and transmission of them between the states constituted interstate commerce.

After defining such basic terms, the court determined whether the provisions of the Ohio Blue Sky law directly burdened interstate commerce. In the process, the judge repeatedly mentioned the unlimited power of the commissioner, granted to him by the Blue Sky statute, to revoke the license if he had any reason to believe that the certificate holder's business was fraudulently conducted.[63] The unlimited power of state officials over this kind of business became the deciding factor in the judge's ruling. He called it "uncontrolled discretion", noting that the State Commissioner was "at liberty to hear, if he [chose], only evidence unfavorable to the investigated party."[64] The court also questioned the constitutionality of the law on the basis that it was not acceptable for a state legislature to require business owners to obtain a license as a condition of transacting a lawful business. According to its opinion, it was out of state jurisdiction to:

> "prescribe, as a condition of the right of a foreign corporation to engage in legitimate interstate transactions, that it should prepare a statement as required, as to its stock, authorized and paid up, and its par and market value, as to its assets, liabilities, officers, trustees, directors, managers, and stockholders, with a showing of stockholdings of each of the latter and the amount paid on his holdings,

60: *Id.* at 32.
61: *Bracey v. Darst*, 218 Fed. 482 (N.D.W.V. 1914).
62: *Compton v. Allen,* 216 F. 537 (S.D. Iowa 1914).
63: Geiger-Jones Co.*, Transcript of Record* at § 54, 37-39.
64: *Id*. at 41.

> and the post office address of all of such above named persons."[65]

The state had too much regulatory power over the securities industry, in the court's opinion, and, hence, presented a threat to the free exercise of interstate commerce. In conclusion, the court added that the one-to-three week prohibition upon all business transactions while the enterprise was filing its application for license renewal constituted a fatal paralysis of commerce and further violated the constitutional provision.[66]

The court further tested the Act by its effect on citizens' right to pursue a lawful calling under the Equal Protection Clause of the Fourteenth Amendment. This test, in the judge's opinion, further proved the Blue Sky law to be in violation of the Constitution:

> "Legitimate commercial transactions, such as the disposal of securities of the kind above mentioned, cannot be regulated by legislative enactment. The act in question seeks to regulate private transactions, but the person, natural or artificial,[67] that sells securities based upon reasonable value, is entitled to the protection of the same safeguards as the man who sells clothing, dry goods, groceries, or hardware, or engages in any other private business that is not affected by a public interest."[68]

On these and the previous accounts of the Commerce Clause violations, the judge rejected any "supervisory and regulatory" power of the Blue Sky legislation. The state of Ohio had assumed too much policing power over the securities industry, and, according the court, had thus gone beyond its jurisdiction. As a result, the court declared the law unconstitutional. Yet the war over Blue Sky laws had surely not concluded.

65: *Id*. at 38.

66: *Id*. at 39.

67: Chartered companies were recognized as artificial beings under law, whose size and market power ought to be regulated because they owed their very existence to a government grant. Nineteenth-century jurists and legislators viewed the corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law." *Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819). Moreover, the New York Court of Appeals, in *People v. Ballard*, 134 N.Y. 269, 274 (1892), noted: "A corporation is purely artificial, having no natural or inherent power, but only such as its charter confers. … A corporation cannot cease to exist of its own will. Its life continues until either the charter period has expired, or the court has decreed a dissolution."

68: Geiger-Jones Co., *Transcript of Record* at § 47, 40.

IV. Hall Goes to the Supreme Court

On February 15, 1916, *The Wall Street Journal* celebrated the district court's opinion and declared it to be the sane view on the rights of persons and the rights of property. The *Journal's* article noted that, since "the price of wheat is not to be maintained in the world market by local legislation," neither is a state to control the market of financial securities.[69] After the court held that regulation of the disposition of securities was out of the scope of state power, the white collars cheered. The Superintendent of Banks and Banking Harry Hall, however, could not allow the investment companies that he asserted were deceiving their clients to go unpunished, and thus, he filed an appeal directly to the Supreme Court.

Since all three cases were heard together in the District Court of Ohio and were disposed of in one opinion, Hall submitted them all together to the Supreme Court. In the filed appeal, Hall pointed out that all three companies had a negative business repute and that it was within the state's policing authority to protect its citizens from becoming victims of fraud.[70] While sticking to the same principles as they had offered in the previous hearings, the appellees conceded that the prevention of fraud was generally within the power of the state but that this power could specifically be constrained whenever it contravened the freedom of interstate commerce. Citing *International Textbook Co. v. Pigg*[71] and *Buck Stove & Range Co. v. Vickers*,[72] attorneys for the appellees claimed:

> "When an order comes from another State to a dealer in Ohio for stocks and bonds, the sale occurs at his place of business, and this sale is one of the ingredients of the transaction, which is interstate commerce. The act regulates and conditions the right to effect such sale. Thus it appears that the very first element of interstate commerce is prohibited unless permitted by the State. Also, if the dealer is prohibited from selling, the result is to prohibit him from importing securities for sale. The act, therefore, forbids all traffic in articles of interstate commerce so long as sales are to be effected in Ohio."[73]

69: *Exodus of the Radical*, Wall Street Journal (February 15, 1916).

70: *Hall, Superintendent of Banks and Banking of the State of Ohio v. Geiger-Jones Company, et al.*, Brief of Appellant at 539 (1916).

71: *International Textbook Co.,* 217 U. S. at 91.

72: *Buck Stove,* 226 U. S. at 205.

73: *Geiger-Jones* at 547.

In parallel with *Hall v. Geiger-Jones Co.*, the Supreme Court was hearing cases concerning the constitutionality of Blue Sky laws in the states of South Dakota and Michigan. The laws in all three states were essentially the same. All three forbade the sale of certain classes of securities within the states until a commissioner issued a permissive license. Similarly, all three lower court decisions held the state laws unconstitutional. Samuel Spring later observed: "It was felt that this accord in the views of the lower Federal Courts indicated an affirmance of these decisions by the Supreme Court and this episode as to our blue sky laws seemed ended.[74]

In the meantime, other states were waiting for the Supreme Court decision with great unrest. In some of them, previously enacted laws were at stake; in others, there was the possibility of new protective measures. Among those desperately counting on the Supreme Court's rulings were dozens of Oklahomans who had fallen victim to sham oil securities. At the time, the Oklahoma oil boom made the state a favorable ground for the growing market of financial instruments. People recklessly invested in oil securities, believing in the endless abundance of underground oil. The industry subsequently attracted a number of swindlers, who traded oil securities of "no sounder basis than a pumped-out oil well."[75] "That State," reported *The St. Louis Post*, "it is complained, is being overrun by cheated investors and that the home interests are unable to do anything about it until the investor, carrying his stock as proof that he has been swindled, arrives."[76] After Oklahomans finally recovered from the speculation fever, they were looking forward to enacting an analogue of the Blue Sky law to protect citizens from falling victim to further swindling. The future of Oklahomans' security from stock fraud now rested in the hands of the Supreme Court.

The opinion authored by Justice McKenna offered victory to Hall, Turner, and hundreds of deceived depositors. To begin, the opinion returned to the question of whether the policing powers of states offered an independence basis upon which to justify the laws. Justice McKenna started by calling those powers "the least limitable of the exercises of government."[77] In the enactment of Blue Sky laws, McKenna saw a single important end—the public's protection from losing money in securities scams. In response to the previous indication of the arbitrary power of the commissioner, the Justice noted that as far as the commissioner could "prevent deception and

74: Montgomery Rollins & Samuel Spring, *Blue Sky Laws, With a Discussion of the Decision of the Courts Concerning Blue Sky Laws,* 12 (1919).

75: *Where a 'Blue Sky' Law is Needed*, St. Louis Post, 2 (January 28, 1917).

76: *Id.*

77: *Geiger-Jones Co.*, 242 US 539, 547 (1917).

save credulity and ignorance from imposition," his authority was recognized to be without question.[78] McKenna, contrary to the lower court, considered the state policing abilities to be of the utmost importance. To end any accusations against the commissioner's policing powers on the grounds of their supposedly discriminatory nature, the Justice cited *Central Lumber Co. v. South Dakota*:[79]

> "[A state] may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. . . . If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the 14th Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law."[80]

Accepting the need for policing authority over the sale of securities was an easy task. Justice McKenna now had to prove to skeptics the insignificance of Blue Sky laws' burden on interstate commerce. Federal courts had previously proclaimed Blue Sky laws to be in violation of the Commerce Clause because they allegedly granted too much regulatory power to a state. Only the district court in Michigan had suggested that the Commerce Clause merely restricted the states from regulating and interfering with, specifically, the transportation component of interstate commerce. Other courts, meanwhile, envisioned much more broadly the constraining influence of the Commerce Clause.[81] In *William R. Compton Co. v. Allen*,[82] for example, a judge took a narrow approach in defining what constituted "inspection."[83] Consequently, as Clarence Laylin observed, "the duty of the State official charged with the administration of the particular 'Blue Sky' law before the court was held not to fall within the definition of the term, and the conclusion that the requirements of the law constituted therefore a direct burden on interstate commerce was immediately reached."[84] In *Bracey*

78: *Id*. at 551.
79: 226 U. S. 157 (1912).
80: *Id*. at 160-61 (citations omitted).
81: See Clarence D. Laylin, *The Ohio 'Blue Sky' Cases*, 15 Mich. L. Rev. 369, 379 (1916).
82: *Compton*, 216 Fed. at 537.
83: *Id.* at 548-49.
84: Laylin, *Ohio 'Blue Sky' Cases* at 379.

v. Darst,[85] the United States District Court for the Northern District of West Virginia peremptorily recognized stocks, bonds, debentures and other securities as articles of interstate commerce.[86]

The Investment Bankers' Association of America, through former Attorney General Wickersham, had tried to attack the Blue Sky statutes on the grounds that they, as instruments of interstate commerce, could be subject only to national supervision. Justice McKenna had another opinion. While admitting the supremacy of the federal power over interstate trading activity, he noted that apart from prohibiting state legislation, Congress by its inaction might have allowed such legislation. This consideration went against the previous Supreme Court decision of Justice Fuller in *Leisy v. Hardin.* Instead of curbing state powers on the premises of congressional silence, Justice McKenna used the latter to expand state authority over interstate trade in securities.

Additionally, argued McKenna, since the provisions of Blue Sky laws applied to the disposition of securities within the state, there was no interference with their transportation. The regulation only applied when the instruments of interstate commerce moved inside the state borders. Hence, there was no burden on the actual interstate activity.[87] McKenna summed up the reasoning for the law's constitutionality as a result of its jurisdiction over trading activity only within state borders:

> "There is the exaction only that he who disposes of them [securities] there shall be licensed to do so, and this only that they may not appear in false character and impose an appearance of a value which they may possess,— and this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such. It is a police regulation strictly, not affecting them until there is an attempt to make disposition of them within the state."[88]

By virtue of prioritizing the importance of state policing powers over the freedom from state regulation of interstate commerce, the Supreme Court proclaimed Blue Sky laws constitutional. Justice McKenna, admitting to the interstate nature of trade in securities, concluded that the safety of Americans from financial fraud was of the higher importance. As a result, states,

85: *Darst*, 218 Fed. at 482.
86: *Id.* at 495.
87: *Geiger-Jones Co.,* 242 U.S. at 558.
88: *Id.*

in the absence of federal legislation, fully accepted their expanded power over the securities industry. Yet, inconsistency in Blue Sky laws across states would soon burden their goal of protecting Americans from securities fraud.

V. Public Debate in the Aftermath of *Geiger-Jones*

The *Hall* decision evoked both positive reactions and criticism. Bankers, stock salesmen, and corporations accused the Supreme Court of imposing economic and legal burdens on lawful business. In his 1926 study, Forrest Bee Ashby estimated that, while having little effect on speculative securities, Blue Sky laws imposed undue burden and additional costs on low-risk securities.[89] The Investment Bankers' Association adopted a similar opinion. While admitting that legislation was needed to stop the 'fly-by-night' dealers, the Association denounced Blue Sky laws as a sub-optimal solution to the problem. It pointed out that the enacted legislation added cost to standard securities and drove many legitimate enterprises out of business just because a particular state official thought their price was too high or their terms unfair.[90] Justice McKenna, however, in his comment regarding Michigan's Blue Sky law provided a response for such accusations:

> "The statutes burden honest business, it is true, but burden it only that, under its forms, dishonest business may not be done. Expense may thereby be caused, and inconvenience, but to arrest the power of the state by such consideration would make it impotent to discharge its functions. It costs something to be governed."[91]

Another discussion of Blue Sky laws evolved around their possible loopholes. By signing a contract of securities disposal in one state, a dealer could deliver the securities to the customer in any other state by mail. Right after the *Hall* decision was issued, the *Banking Law Journal* admitted that the case left unsettled dealers' liabilities, who traded securities across the country by mail, telephone, or newspaper advertising, without having a state license

89: See, generally, Forrest Bee Ashby, *The Economic Effect of Blue Sky Laws (1926).*

90: See *Bankers to Fight Get-Rich-Quick Men*, supra, and *Blue-Sky Legislation So Far of Little Value: Investment Bankers Favor Laws That Will Prevent Offering Fraudulent and Misrepresented Securities*, Wall Street Journal (October 29, 1919).

91: *'Blue Sky Law' Upheld: Supreme Court Sustains State Statutes,* Washington Post, 8 (January 23, 1917).

authorizing the disposal.[92] Jonathan R. Macey and Miller Geoffrey made the same observation decades later in their article in the *Texas Law Review*.[93] Since Justice McKenna pointed out that transportation was the key to interstate commerce, sale of a security to another state by mail fell only into the competency of the federal government:

> "By the same token, promotion of a security by interstate mail or telephone calls could not be regulated by the Blue Sky laws. And, although McKenna's opinion did not speak to this issue directly, it also seemed clear, given First Amendment considerations, that states would incur a substantial risk of invalidation if they attempted to regulate the promotion of securities by means of newspapers or other media-at least as long as the advertisement in question proposed a transaction to take place outside of the state's borders."[94]

The state laws were powerful within their geographical limits, but with the advancement of technology they became helpless in policing fraud over their borders. A decade after the *Hall* decision, people were far more bearish regarding Blue Sky legislation's capability to protect investors from losing money in increasingly complex, speculative, and nationalized securities. To combat new forms of fraudulent securities, states, granted exclusive powers to regulate the securities industry, began enacting novel Blue Sky provisions that diverged from those of other states. This lack of uniformity, in the end, would hamstring the states' ability to enforce the laws' originally intended policing functions. The issue therefore demanded a solution from the federal government.

92: *The Blue Sky Law Decisions: Constitutionality of Blue Sky Laws of Ohio, South Dakota, and Michigan Upheld by United States Supreme Court,* 34 Banking L. J. 159, 162-65 (1917).

93: Macey & Miller, *Origin of the Blue Sky Laws* at 347.

94: *Id.* at 388.

VI. The Legacy of *Geiger-Jones*

While upsetting dealers all across the Union, the *Hall* decision served as relief for thousands of deceived investors across the United States. Blue Sky legislation became firmly established in the United States following the decision. By 1919, thirty-eight states had enacted Blue Sky laws.[95] Despite its loss of the case, the Geiger-Jones Company reacquired its license. A new State Banking Superintendent re-conducted the investigation into the company. The inquiry concluded, "the solvency, good business repute, legitimacy and legality of the Geiger-Jones Co. [were] proved beyond the shadow of doubt."[96] This news was a relief for 16,000 Ohio workmen, whose employers traded their stock through the Geiger-Jones Company. The report also stated that the company had never received a customer complaint or lost a dollar of their investors' money.[97] And, after the case, Henry Hall received a promotion, after which he was appointed vice-president of the Merchant's National Bank.[98]

Not every state was as enthusiastic about the new status of Blue Sky laws as Ohio and Michigan. The Government of New York, a state with the highest presence of financial services businesses, disapproved of enacting anything like Blue Sky legislation. A commission, appointed by Governor Smith to investigate a possibility of restrictive legislation in the state, criticized the practice of state licensing, as well as the imposition of civil and criminal liabilities for misrepresentation in advertising. Upon the end of its investigation, the commission summed up its proposals in the following manner: "What is needed is a flexible, virile fraud hunting state machinery, driven not by statute, but by human intelligence and human activity."[99]

Delaware and New York did not hurry to exercise their police powers over the disposition of securities. By allowing disposal of financial instruments without acquiring a license, the states planned on attracting capital and business inside their borders. In fact, the *Atlanta Constitution* reported, the state of Georgia started losing its companies to the unregulated state of

95: Frederic Haskin, *Congress May Pass Federal Blue-Sky Bill: Agitation to Curb Fakers,* Indianapolis Star, 4 (December 10, 1919).

96: *License Awarded to Geiger-Jones Co.: the Protracted Hearing of Canton*, Labor Journal, 2 (May 11, 1917).

97: *Id*.

98: *Merchants National Bank,* Wall Street Journal, 8 (March 1, 1917).

99: *'Gold Brick' Securities,* New York Tribune, A1 (December 28, 1919).

Delaware after the former implemented a Blue Sky law.[100] Feeling disadvantaged, many states with such laws exempted a myriad of securities from their Blue Sky laws in order to attract business and investment once more. In the 1920s, business lobbyists got state authorities to exempt from their Blue Sky laws any security listed on a stock exchange; the securities of public utilities and other regulated industries; the securities of companies with a recent history of profits; and local, state, and federal bonds.[101]

However, the heterogeneity of Blue Sky laws across the United States gave swindlers another chance to fool trusting citizens. Since some states like Delaware and New York didn't enact any policing legislation, companies, registered in those states, could operate there without any license. Swindlers would reside in those sates and make deals over mail or telegraph without facing legal prosecution. This is how the *Atlanta Constitution* described the new generation of scams:

> "Living in Georgia he [a purchaser of the wildcat stock] might get a judgment by going to Delaware. But there would be no property in either state to make that judgment worth anything. He would have to go to some third state, where the supposed property was located before he could find any asset in any case, and, said Secretary of State McLendon, in seven cases out of ten he would then find that there was no property of any value anywhere."[102]

The newspaper compared Delaware to New Jersey, which at the end of the 19th century acquired the reputation of "the rotten corporation state." New Jersey allowed any kind of manufacturing business on its grounds until the public revolted. Meanwhile, Delaware welcomed all kinds of securities dealers, including prospective swindlers. By means of mail and wires, crooks were also operating out of the state of New York. In 1929 the President of the National Association of Securities Commissioners, Jesse Craig, reported that he had "received answers from thirty states, praising the operation of their laws, but complaining in many instances that 'boiler shop' operators in New York, Chicago, and other large cities had been vitiating there performances by campaigns arrived through the mail, by telegraph and tele-

100: *Seek Legislative Action To Curb Incorporation Scandals In Delaware*, Atlanta Constitution, 11 (November 23, 1919).

101: Dan Ernst, *Blue Sky Laws and the Progressive Regime*, Legal History Blog (2009), available at http://legalhistoryblog.blogspot.com/2009/05/blue-sky-laws-and-progressive-regime.html.

102: *Seek Legislative Action,* supra.

phone."[103] Craig further stated:

> "New York is an especially bad center for such operators and more that 100 of them operate from the Wall Street district along according to estimates furnished by persons who have looked into the matter. The trouble is that there is no law in New York State requiring them to register and, even though they are traced and located, it is often impossible to prosecute and drive them out."[104]

Within a decade after the Supreme Court ruled that states could exercise their extensive police powers to protect citizens from scams of securities swindlers, it became obvious that states alone were helpless in front of a bigger – nation-wide – threat. Extradition of offenders was difficult under Blue Sky laws, and states without such legislation were especially reluctant to do so. In 1919, at their convention in St. Louis, the Investment Bankers' Association of America proposed a federal Blue Sky law. However, it was difficult for states to come to a consensus over unified Blue Sky legislation. As the *San Francisco Chronicle* noted, the provisions of such a law "must be so drawn as to prevent the flotation and sale of fraudulent or misrepresented securities on the one hand and at the same time not impose a hardship upon legitimate business which would make it impossible for the honest investment banker to conduct his business."[105] What was a protective measure against swindlers for one state became an undesirable restraint of business for another. States would continue to reluctantly discuss a possibility for Federal Blue Sky law up until it would be too late – the Great Depression would put everything in its place. With the introduction of the Securities and Exchange Commission following that economic collapse, a short period of almost unlimited state power to regulate the securities industry would be over.

103: Edward Pendray, *War Planned on Stock Frauds: Security Commissioners Find Traffic*, New York Herald Tribune, B7 (February 10, 1929).

104: *Id.*

105: *Steels Show Gains, Republic Iron Shares Honors with General Motors*, San Francisco Chronicle, 18 (October 29, 1919).

VII. Conclusion

Owing to a 1917 Supreme Court decision, states were able to exercise extensive regulatory powers within the securities industry. The emergence of new investment opportunities in the field of financial securities increased the influx of both investors and opportunistic swindlers into the industry in the 1900s. The rising number of victims of fraudulent investments indicated a necessity for a state legislation that would protect innocent citizens from notorious securities dealers. A series of Blue Sky Laws, first enacted in Kansas, and then spreading to thirty-eight states by 1919, was designed with that policing purpose in mind. The laws, however, instituted additional costs for honest dealers to exercise their business. In the state of Ohio, one investment enterprise, the Geiger-Jones Company, one of its dealers Don C. Coultrap, and a trader in industrial securities of questionable content, William Rose, all filed lawsuits to challenge the constitutionality of the Ohio Blue Sky law on the ground of the direct and impermissible burden it placed upon interstate commerce. Despite the law's initial invalidation by the district court, Justice McKenna, writing for the Supreme Court, noted its constitutionality. Justice McKenna saw congressional silence regarding regulation of the securities industry as a complimentary rather than prohibitory concept. Based on this interpretation, he dismissed the allegation that state policing authority over the disposal of securities directly burdened interstate commerce. Instead, McKenna extended state regulation to the national financial market. The *Hall v. Geiger-Jones Co.* decision signified another attempt to empower states in regulating interstate business activity before the major switch to federal regulation following the Great Depression.

Indeed, the scattered Blue Sky laws would prove to be useless in protecting American citizens from reckless and thoughtless investments. The ruinous experience of the Wall Street crash of 1929, later attributed to the enormous amount of misrepresented securities, led the federal government to finally adopt a national solution to the regulation of the securities industry. With the establishment of the Securities and Exchange Commission in 1934, the power to regulate the national trade of financial instruments would once and for all transfer into the hands of the federal government.

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