Case Note: *Means v. District Court of the Chinle Judicial District* and the *Hadane* Doctrine in Navajo Criminal Law

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INTRODUCTION

On December 29, 1997 Navajo Nation police arrested noted Oglala Sioux activist and actor, Russell Means, near Chinle, Arizona after an incident involving his father-in-law Leon Grant (a member of the Omaha tribe) and Jeremiah Bitsui, a Navajo male.[2] At the time of the incident Russell Means was married to Gloria Grant, an enrolled member of the Navajo Nation.[3] The Navajo Nation Prosecutor's Office subsequently charged Means with one count of "threatening" and two counts of "battery"[4] under the Navajo Nation Code.[5]

Before trial in the Chinle District Court of the Navajo Nation, Russell Means moved to dismiss the charges for lack of subject matter jurisdiction.[6] Relying primarily on the U.S. Supreme Court decision of *Duro v. Reina*, Means contended the Navajo courts did not have criminal jurisdiction over an Indian who was not a member of the Navajo Nation.[7] Means attacked the constitutionality of the so-called "*Duro* fix"[8] that reaffirmed the inherent authority of a tribe to prosecute any "Indian" by effectively overruling *Duro*. He asserted that he lacked the ability to participate in the Navajo political process, as he could not vote and could not run for office. He argued that any congressional action to subject him to Navajo jurisdiction then violated his right to equal protection under the Fifth Amendment of the United States Constitution. He also contended the Navajo Nation had explicitly given up any such authority in the Treaty of 1868.[9]

As a jurisdictional issue, Russell Mean's case would appear to be a matter exclusively decided under federal law. As the jurisdiction of tribal courts has been defined and interpreted by federal courts under federal legal principles, the main thrust of the case centers around case law defining tribal power over three categories of individuals: (1) "Indians" who are members of the governing tribe; (2) "non-member Indians" who are members of another tribe; and (3) non-Indians. Through piece-meal Supreme Court decisions and congressional acts, federal law has shaped and restricted tribal power in the criminal sphere by utilizing these constructed categories.[10] Assuming the "*Duro* fix" was indeed unconstitutional, Means' apparent status as a non-member Indian would permit him to escape Navajo jurisdiction.

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[2] *See* Navajo Nation v. Means, No. CH-CR-2205/2207—97, slip op. at 1 (Chinle Dist. Ct. July 20, 1998).

[3] *See id*.

[4] 17 NNC §§ 310(a)(1), 316 (1995).

[5] *See* Navajo Nation v. Means, No. CH-CR-2205/2207-97, slip. op. at 1.

[6] *See id*. at 1—2.

[7] *See id*.

[8] 25 U.S.C. § 1301(2) (1994).

[9] *See* Navajo Nation v. Means, No. CH-CR-2205/2207—97, slip. op. at 1.

[10] *See generally* DAVID GETCHES, CHARLES WILKINSON, AND ROBERT WILLIAMS, FEDERAL INDIAN LAW 485—88 (4th ed. 1998).

When the Navajo courts heard the Means case, they appealed to Navajo common law, the indigenous Dine legal tradition, as one ground for exerting jurisdiction over him.[11] The Navajo Supreme Court asserted he was a *hadane*, or in-law under Navajo law by virtue of his marriage to a Navajo woman.[12] As a *hadane*, Russell Means had "affiliated" himself with the Navajo Nation and, along with his activities within the Nation, therefore consented to Navajo criminal jurisdiction. Though by federal principles he appears to be a "non-member Indian," the Navajo Nation under common law derived from custom and tradition concluded that he carried the jurisdictional attributes of a "member" Indian.[13]

An analysis of the Navajo Supreme Court *Means* opinion might be approached in two different ways: (1) as an independent analysis of Navajo law outside of considerations of federal notions of tribal sovereignty; or (2) as a comparative analysis considering the probable success of the Navajo opinion vis-a-vis extant federal common law on tribal criminal authority.

As an examination of Navajo law on its own terms, the first type of analysis has the attraction of fostering what might be termed "jurisprudential sovereignty"- that is an appreciation and facilitation of the sovereign authority of a tribe to define its own law under its own traditions and customs regardless of outside federally imposed limitations. Such examination of Navajo law in a vacuum in the context of this case has the disadvantage of ignoring existing federally constructed legal reality. As a potential guide to future litigation, a case note on a tribal case implicating federal law confronts pressure to fully define "what the law is" as opposed to what it might be were the tribe fully free to define its own law. Given such concerns, the second analysis has the advantage of gauging the potential success of tribal law in a federal system, but also of comparing two different legal systems and the cultural world-views that inform them. However, the second approach potentially undermines and subordinates tribal law by suggesting it is ultimately dependent on federal approval for legitimacy.

In the end, the author decided on incorporating both approaches in this paper. In Part I, the paper describes federal common law constructions of tribal criminal jurisdiction, and specifically Justice Kennedy's construction of "consent," as background leading to the *Means* decision. In Part II, the paper then considers Navajo jurisprudence concerning the incorporation of tradition and customs of the Dine people for criminal jurisdiction, and examines its implications for non-Navajos potentially subject to Navajo law. Through a comparative examination of the *Means* opinion and the *Duro* case, Part III of the paper analyzes the holding, sources, and rationale of *Means* and their potential compatibility with existing federal common law. Ultimately, the paper considers the Navajo theory of "consent" through intimate affiliation and its implications for potential non-Navajo defendants.

As a threshold matter, the author feels it important to note that he is a non-Navajo and a non-Indian. His approach reflects not only his cultural and

[11] *See* Means v. District Court of the Chinle Judicial District, 2 Navajo Appellate Rep. 528, 535—36, 26 ILR 6083, 6087-88, No. SC-CV-61-98 (Nav. Sup. Ct. 1999).
[12] *Id.* at 535, 26 ILR at 6087.
[13] *Id.*

pedagogical background, but also his current status as a *hadane*, or in-law to a Navajo family. The author notes that he does not purport to know Navajo traditions and customs, but seeks to analyze and explain the Navajo Supreme Court's *Means* decision from the perspective of an outsider, non-Indian attorney, and as an individual potentially subject to Navajo jurisdiction by virtue of the Navajo Nation's law.

With these caveats in mind, it is important to note that the *Means* opinion presents a new and provocative declaration of tribal sovereignty vis-à-vis United States Supreme Court jurisprudence. Beyond its specific facts, the *Means* case may create a conflict between federal and Navajo law over classification of individuals for criminal jurisdiction. The case also challenges the ability of tribes to fully exert their sovereign authority to apply its own customs and traditions to questions implicating federal law. While it appears decisions of tribal courts under tribal law receive absolute deference in federal courts,[14] the decision of the Navajo Nation threatens to undermine the convenient federal categorization of criminal defendants. Ultimately, the application of Navajo common law as a theory of consent presents a provocative question to Federal Indian law: Can indigenous customary law define an individual's status for purposes of federal criminal jurisdiction?

I. Development of Tribal Criminal Jurisdiction Under Federal Law

Since the beginning of the United States, federal laws and statutes have divested tribal governments of full and exclusive criminal jurisdiction within their territory. The result has been a confusing morass requiring charts and a list of racial and political identities to discover which government has criminal authority.[15] Unlike civil jurisdiction, the status of the land within tribal territory is immaterial.[16] Instead jurisdiction between the three sovereigns (tribal, federal, and state) is premised on the identity and tri-partite classification of individual criminal offenders (tribal members, non-member Indians, and non-Indians).[17]

The General Crimes Act early on subjected "interracial" crimes between Indians and non-Indians to concurrent federal/ tribal jurisdiction.[18] Fearing the extension of traditional notions of restorative tribal justice,[19] Congress passed the Major Crimes Act of 1885.[20] The act subjected Indians within tribal territory to

[14] *See e.g.,* Hinshaw v. Mahler, 42 F.3d 1178, 1179 (9th Cir. 1994) ("The Tribal Court's interpretation of Tribal law is binding on this court."); Nevada v. Hicks, 944 F.Supp. 1455, 1461 (D. Nev. 1996) (Federal courts defer on determinations of tribal law unless they "implicate substantial federal questions.")(quotations added).
[15] *See* WILLIAM C. CANBY, AMERICAN INDIAN LAW IN A NUTSHELL 168 (3rd ed. 1998).
[16] *See* Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351 (1962).
[17] *See* CANBY, *supra* note 14, at 168.
[18] 18 U.S.C. § 1152 (1994).
[19] The Major Crimes Act was explicitly passed in response to the Supreme Court decision in Ex Parte Crow Dog, 109 U.S. 556 (1883). There the Court held that a murder of Spotted Tail, a Sioux chief, by another Sioux Indian was within the exclusive jurisdiction of the tribe. The tribe imposed restitution, creating outrage among government officials who considered the punishment too lenient. *See generally* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 100—41 (1994).
[20] 18 U.S.C. § 1153 (1994).

federal jurisdiction for a number of enumerated crimes commonly prosecuted as felonies.[21] In United States v. McBratney[22] and Draper v. United States[23] the Supreme Court held that crimes between non-Indians were subject to state government prosecution.

However, the most significant divestment of tribal power resulted from two recent Supreme Court decisions, Oliphant v. Suquamish[24] and Duro v. Reina[25]. In Oliphant the United States Supreme Court ruled as a matter of federal common law that Indian tribes lacked any inherent authority to prosecute "non-Indians" who commit crimes within their territory.[26] Appealing to a purported lack of congressional and executive recognition of tribal power, the Court held that under federal common law such jurisdiction was "inconsistent with their dependent status."[27]

A. Duro v. Reina and Non-Member Criminal Jurisdiction

In Duro v. Reina, the Court ruled that Indian tribes also lacked criminal jurisdiction over non-member Indians like Russell Means.[28] Justice Kennedy's opinion most fully articulated the Court's view of tribal jurisdiction over non-members who are citizens of the United States:

> … criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States. We hesitate to adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them.[29]

By appealing to theories of civil "inclusion" the Supreme Court applied Anglo-American political theory to demarcate the extent of tribal jurisdiction. In his opinion Justice Kennedy articulated and imposed a constitutional theory of tribal authority, asserting the origin of such power derives from "consent of its members."[30] Kennedy concluded that federal jurisprudence has accepted tribal criminal authority over tribal members due to "the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent."[31] In the end, Kennedy asserted that "[t]he retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members."[32]

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[21] *Id.*
[22] 104 U.S. 621 (1881).
[23] 164 U.S. 240 (1896).
[24] 435 U.S. 191 (1978).
[25] 495 U.S. 676 (1990).
[26] *Oliphant*, 435 U.S. at 211.
[27] *Duro*, 495 U.S. at 688.
[28] *Id.* at 211.
[29] *Id.* at 693 (emphasis added).
[30] *Id.*
[31] *Id.* at 694.
[32] *Id.* at 693.

Importantly, Kennedy expressed clear discomfort with Indian tribunals that decide matters based on traditional law or custom. He explicitly noted that "[w]hile modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve."[33] He also alleged that tribal courts are "often" subordinate to "the political branches of tribal governments" with legal methods "possibly" depending on "unspoken practices and norms," quoting the usually indisputable Cohen Handbook of Federal Indian Law.[34]

Tribal courts then appear to Kennedy to be the antithesis of the federal judicial system and its purported uniformity and political independence. The sovereign authority to apply its own traditional laws appears to justify federal common law divestment of tribal authority over anyone deemed unfamiliar by virtue of their non-membership in the host tribe. Kennedy's palatable discomfort with tribal court jurisdiction over anyone not a voluntary member of that tribal community reflects his distrust of a tribe's ability to be "fair" free of direct constitutional restrictions.

One root of this discomfort appears to be previous Supreme Court precedent, especially Talton v. Mayes,[35] which established that tribal governments are not subject to the Constitution's Bill of Rights. Kennedy reminded the reader that while the Indian Civil Rights Act[36] provides "some statutory guarantees of fair procedure," they are not equivalent to "their constitutional counterparts."[37] Without directly stating so, Kennedy suggested that any federal affirmation of tribal power over non-members would constitute an unconstitutional delegation to a fundamentally unfair judicial system. [38] Under Kennedy's theory, tribal governments, as extra-constitutional tribunals can only be trusted to prosecute those who can theoretically "participate" in the government. The end result of Duro is the de facto absorption of tribal governments into the constitutional framework without explicitly overruling Talton.

B. Duro and a Federal Theory of Consent

Importantly, Justice Kennedy does suggest that those who were not born biological members of a tribe could theoretically "consent" to tribal jurisdiction.[39] However, Kennedy suggests that for such "consent" to be effective under federal law the "consent" must include the "concomitant right of participation" in the political process of the tribe.[40] In his discussion, Kennedy cites

[33] *Id.*
[34] *Duro*, 495 U.S. at 693 (citing FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 333—334 (1982 ed.)).
[35] 163 U.S. 376 (1896).
[36] 25 U.S.C. § 1302 (1994).
[37] *Duro*, 495 U.S. at 693.
[38] *Id.* at 693—94 (bolstering his argument Kennedy cited an earlier case involving military courts and a civilian wife: "Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right." Reid v. Covert, 354 U.S. 1 (1957)).
[39] *Duro*, 495 U.S. at 694.
[40] *See id.*

to United States v. Rogers,[41] a case involving a white citizen of the Cherokee Nation adopted under codified procedure through his marriage to a Cherokee woman. In Rogers, the defendant argued the United States lacked jurisdiction over his murder of another Cherokee adoptee under an exception for Indian-Indian crimes in the General Crimes Act.[42] Rogers essentially argued both he and the victim were "Indian" under the statutory language. The court rejected his contention, holding a white man adopted by a tribe could not escape federal criminal authority by affiliating himself with Indians.[43] However, the Court did recognize that a non-Indian adoptee could "become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages."[44] The implication of the last sentence is unclear, but could suggest concurrent federal/tribal criminal jurisdiction over individuals who "voluntarily" join an Indian tribe. What constitutes "voluntary" affiliation or political participation is unclear.

As Kennedy's discussion is properly dicta it is difficult to predict how a future court would interpret these references. However, it is somewhat clear that mere marriage to an Indian and residence on the reservation would be insufficient to indicate "consent."[45] In holding that Indian nations lack criminal jurisdiction over non-member Indians, the Court overruled the Ninth Circuit's holding in the Duro case. Interestingly, the Ninth Circuit held that Duro, the alleged offender, was subject to the jurisdiction of the Salt River Pima-Maricopa government because of his "contacts" with the tribe.[46] Specifically, Duro was considered "closely associated" with the community by virtue of living with his member girlfriend and her family on the Salt River reservation and his employment with a tribal construction company.[47] The court's conclusion appears exclusively based on principles of "contacts," with no indication that the Pima-Maricopa community would or would not have considered him a "member" under their traditional laws.

The United States Supreme Court explicitly rejected the Ninth Circuit's "contacts" analysis, contending the rationale would "apply to non-Indians on the reservation as readily as to Indian nonmembers."[48] Significantly, Kennedy noted that "[m]any non-Indians reside on reservations and have close ties to tribes through marriage or long employment."[49] Ultimately Kennedy considered the "contacts" test to be "little more than a variation of the argument that any person who enters an Indian community should be deemed to have given implied consent to tribal criminal jurisdiction over him."[50]

C. The "Duro Fix" and Non-Member Criminal Jurisdiction

[41] 4 How. 567 (1846).
[42] *Id.* at 569.
[43] *Id.* at 572.
[44] *Id.* (emphasis added).
[45] *See Duro*, 495 U.S. at 695-96.
[46] *Duro v. Reina*, 851 F.2d 1136, 1144 (9th Cir. 1988).
[47] *Id.*
[48] *Duro v. Reina*, 495 U.S. 676, 695 (1990).
[49] *Id.*
[50] *Id.*

After the *Duro* decision Congress subsequently reaffirmed the inherent sovereign authority to prosecute non-member Indians through passage of the so-called "*Duro* fix"- a 1991 amendment to the Indian Civil Rights Act.[51] The plain language of the *Duro* fix effectively overrules the Supreme Court's decision in *Duro* by reaffirming the inherent sovereignty of tribes to prosecute "Indians" who fit within the meaning of that term in the Major Crimes Act.[52] Interestingly Congress chose not to recognize any inherent authority to prosecute non-Indians to overrule *Oliphant*. The end result is inherent tribal misdemeanor jurisdiction over tribal members and Indians who are members of other tribes, but no jurisdiction over non-Indians.

II. The *Means* Decision and Navajo Nation Development of *Hadane* as Consent to Jurisdiction

In motions before the Chinle District Court of the Navajo Nation, Means argued for dismissal on several grounds under federal law.[53] He mainly argued that the "*Duro* fix" was unconstitutional as a violation of the equal protection clause of the Fifth Amendment of the Constitution.[54] He alleged that *Morton v. Mancari*[55] and *United States v. Antelope*[56] did not apply, as Congress' use of the category of non-member Indian constituted a "racial" as opposed to "political" distinction.[57] He also argued that the *Duro* fix violated legislative/ judicial separation of powers, as Congress purported to overrule the Supreme Court on an issue of constitutional law, usurping the authority of the Court as the ultimate arbiter of the Constitution.[58] In addition, he contended that the 1868 Treaty between the Navajo Nation and the United States[59] explicitly divested Navajo from prosecuting "bad men" who were non-member Indians.[60]

A. The *Hadane* Doctrine

[51] 25 U.S.C. § 1301(2) (1994).
[52] *Id.* § 1301(4).
[53] *See* Navajo Nation v. Means, No. CH-CR-2205/ 2207-97, slip op. at 1—2 (Chinle Dist. Ct. July 20, 1998).
[54] *See* Transcript of Navajo Nation v. Means Proceedings 32 (April 14, 1998) (on file with the Chinle District Court) [hereinafter Transcript].
[55] 417 U.S. 535 (1974) (holding Indian employment preference was a political not a racial classification).
[56] 430 U.S. 641 (1977) (holding Major Crimes Act applied a political and not a racial classification).
[57] *See* Transcript, *supra* note 53 at 33.
[58] *See id.* at 37—38. The Ninth Circuit has recently held that Congress indeed reaffirmed the inherent sovereignty of the tribe and did not delegate the authority to prosecute non-member Indians. *See* United States v. Enas, 204 F.3d 915 (9th Cir. 2000). The case concerned a double jeopardy claim that both the White Mountain Apache Tribe and the United State could not prosecute a non-member Indian for actions on the reservation. However, the question of whether the "*Duro* fix" violates the equal protection clause was not at issue in the case. As Russell Means' federal case has been filed in Arizona, within the ninth circuit, it appears that portion of his argument has been answered.
[59] Treaty with the Navajo Indians, June 1, 1868, U.S.-Navajo, 15 Stat. 667.
[60] *See* Transcript, *supra* note 53 at 38.

After a hearing, the Chinle District Court denied Means' Motion to Dismiss.[61] Addressing Means' main arguments, Judge Gilmore held the "Duro fix" did not violate equal protection and the Treaty did not divest the Nation of jurisdiction.[62] However, more significant for our purposes, the court also held under Navajo common law that Russell Means' "contacts" with the Navajo Nation justified criminal jurisdiction over him.[63] Specifically, the court held that a non-member who affiliates himself with a Navajo is "admitted to the Navajo Nation as an in-law to the Navajos," and, having "assumed tribal relations with the Navajo Nation" was subject to the tribe's criminal jurisdiction.[64] Importantly, such power was inherent due to Means' in-law status, and not derived from or dependent upon federal legislation. The authority to prosecute Means derived from a wholly different source (i.e. consent) than any reaffirmation in the "Duro fix." Should a federal court declare that the "Duro fix" was indeed unconstitutional and non-member Indians were free of tribal jurisdiction, Navajo jurisdiction over in-laws as supported by Navajo common law might then survive.

The Navajo Nation Supreme Court further articulated this Navajo theory of consent when Russell Means sought a writ of prohibition against the Chinle court to prevent it from continuing to hear the case. In *Means v. District Court of the Chinle Judicial District _the Navajo Supreme Court affirmed the district court, concluding that Means had consented to jurisdiction through his marriage and activities within the Navajo Nation.*[65] *The Court, per Justice Yazzie, noted that while a formal enrollment procedure existed for Navajo membership, there existed other kinds of "membership" under Navajo law.*[66] *The Court described Means' status under Navajo common law as hadane*, or a Navajo in-law.[67] The Court described the responsibilities of an in-law, stating that a *hadane*

> assumes a clan relation to a Navajo when an intimate relationship forms, and when that relationship is conducted within the Navajo Nation, there are reciprocal obligations to and from family and clan members under Navajo common law. Among those obligations is the duty to avoid threatening or assaulting a relative by marriage (or any other person).[68]

In support of the Supreme Court's conclusion, Justice Yazzie noted that the origin of several of the Navajo clans derived from the intermarriage of *hadane* with Navajos.[69] Citing a dual-language dictionary,[70] Yazzie noted such "foreign nation" clans as the "Ute people clan," the "Zuni clan," and the "Mexican

[61] *See Navajo Nation v. Means*, No. CH-CR-2205/ 2207-97 (Chinle Dist. Ct. July 20, 1998).
[62] *Id.* at 2-5, 8.
[63] *Id.* at 6.
[64] *Id.*
[65] *See Means v. District Court of the Chinle Judicial District*, 2 Navajo Appellate Rep. 528, 535, 26 ILR 6083, 6087, No. SC-CV-61-98 (Nav. Sup. Ct. 1999).
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] MARTHA A. AUSTIN, SAAD AHAAH SINIL: DUAL LANGUAGE (Martha A. Austin ed., Navajo Curriculum Center Press 1974).

clan." [71] Though not directly stated, Yazzie infers that hadane clanspeople historically submitted themselves to the authority of their local Dine headmen, and by implication, to the authority of the modern Navajo Nation. As now part of the Navajo Nation, *hadane* subjected themselves to the jurisdiction of the centralized Navajo tribal government. Therefore, even though Russell Means was not "adopted" in a formal sense, his affiliation similarly constituted consent to the jurisdiction of the Navajo Nation.[72]

Taken as a definitive statement of Navajo criminal law, the case presents some unanswered practical questions for future prosecutions. It would appear the criminal prosecution of non-member Indians and non-Indians within the Navajo Nation under the *hadane* theory necessarily creates new and difficult threshold evidentiary issues. Is mere cohabitation without marriage sufficient to establish the necessary clan obligation? Is casual sexual contact without evidence of a more serious relationship enough? Must the couple live together? Must the couple live within Navajo Nation territory or is mere presence without residency sufficient? How is affiliation or non-affiliation with a Navajo to be proven? Does the potential defendant possess the burden of proof to show he or she indeed is not involved with a Navajo? Is there a need for proof that a non-Navajo defendant actually maintains a relationship with his or her Navajo partner's clan relatives?

The articulation of a theory of jurisdiction based on the traditional law of familial ties presents a provocative challenge to federal notions of membership and classification. As Russell Means is an enrolled member of the Oglala Sioux, he already possesses the status of non-member Indian. However, if the Navajo Nation Supreme Court theory of jurisdiction is upheld under federal law, even those Indians enrolled in other tribes can theoretically be considered "members" dependent on Navajo law. Perhaps even more significant, the *hadane* theory of consent would appear to apply to non-Indians, implicating not only *Duro* but *Oliphant* as well. Though not specifically at issue in this case, non-Indians married or even intimately involved with Navajos would appear to also be subject to criminal jurisdiction as *hadane* under the court's reasoning.

Where *Duro* would have allowed a non-Indian married to a Navajo to escape tribal jurisdiction, the *Means* opinion attaches legal jurisdiction as a condition of intimate relations. Indeed, those who choose to affiliate themselves with Navajos face criminal jurisdiction while those who merely live and work on the reservation do not. Choosing a partner on the reservation dependent upon his or her Navajo status could alter the personal choices of non-Navajos and perhaps chill Navajo-non-Navajo contact. While perhaps unlikely, the *Means opinion may have the effect of altering the social interaction of Navajos and non-Navajos, assuming future hadane* object to the criminal jurisdiction of the Nation applying to them.

However, outside the rarified world of federal Indian law, the Navajo Supreme Court's decision may appear somewhat unremarkable. As a practical matter, only the peculiarities of federal common law notions of tribal sovereignty expressed in *Duro*, and, to a lesser extent, *Oliphant*, suggest this is an anomalous outcome. For any other sovereign in the American system, mere presence within

[71] *Means v. District Court of the Chinle Judicial District*, 2 Navajo Appellate Rep. at 535, 26 ILR at 6087.
[72] *Id.*

that sovereign's territory suffices to establish responsibility to its laws. Jurisdiction over those who choose to enter into the social structure of that society through romantic affiliation then could appear clearly appropriate. Even beyond the Navajo traditional notion of *hadane*, general fairness (in subjectively non-Navajo terms) may dictate that those who enter into a particular social structure and cultural worldview with their eyes open should not be heard to complain that that society possessed no ability to control their conduct.

B. Navajo Interpretation of Federal Case Law

Established federal law presents some perhaps-unwarranted comfort for non-members (especially non-Indians) who possess the very real ability to flout the laws of the government of a people he or she has willingly affiliated with through its members within its territory. As a policy matter, federal common law protection of non-Navajos who willingly enter the reservation and, more importantly, willingly affiliate themselves with members of that society breeds contempt for Navajo Nation authority. While perhaps unlikely, the very inability of the Nation to prosecute non-Navajos in a *Duro/Oliphant* universe may inspire criminal acts within the Nation's territory.

Aware that the Navajo common law theory of consent is ultimately dependent on federal law, the Court justified its conclusion by referencing the "consent" discussion in *Duro*.[73] Additionally, the Court cited several older United States Supreme Court decisions, *United States v. Rogers*,[74] *Nofire v. United States*,[75] and *In re Mayfield*[76] as federal precedent supportive of the Navajo theory of consent. All three cases involve federal jurisdiction over whites adopted into the Cherokee Nation.

In *Nofire* two full-blood Cherokee defendants alleged the federal court lacked criminal jurisdiction over them.[77] They were charged with murdering a white man adopted into the Cherokee Nation through marriage to a Cherokee woman.[78] Like *Rogers* they argued the victim in this case was an adopted Cherokee. However, in 1866 the Cherokee Nation signed a treaty with the United States, which under Article XIII explicitly reserved exclusive criminal and civil jurisdiction over "members of the Nation, *by nativity or adoption*" in the Cherokee Nation.[79] The provision appears to effectively nullify the result in *Rogers* for the Cherokee Nation, and allow criminal jurisdiction over those biologically non-Indian that consented to citizenship through marriage.

Importantly, the Court noted that the Cherokee Constitution explicitly included such white men in its definition of "citizen" of the Nation.[80] Apparently such men became citizens merely by virtue of their marriage to Cherokee women

[73] *Id.* at 534.
[74] 4 How. 567 (1846).
[75] 164 U.S. 657 (1897).
[76] 141 U.S. 107, 11 S. Ct. 885 (1891).
[77] *Nofire*, 164 U.S. at 657-58.
[78] *See id.*
[79] Treaty with the Cherokee Indians, July 19, 1866, U.S.-Cherokee, 14 Stat. 799, 803 (emphasis added).
[80] *Nofire*, 164 U.S. at 658.

and residence within the Nation.[81] To become a citizen, any white man seeking to be married had to acquire a license from a Cherokee district clerk.[82] Interestingly, to obtain a license, the white man had to present a "certificate of good moral character" to the clerk signed by at least 10 "respectable citizens" of the Nation.[83] In addition, the white man had to take an oath of allegiance to the Nation.[84] The Court then looked to tribal law to discern the victim's status under federal law.

The *Nofire* court built upon another Cherokee case, *Alberty v. United States*.[85] In that case a black citizen of the Cherokee Nation stood trial for the murder of a mixed Choctaw-black man who had been married to a Cherokee woman.[86] The Supreme Court looked to the status of the victim under Cherokee law to decide whether he was a citizen of the Nation.[87] According to the Court, a black man marrying a Cherokee woman would not thereby become a citizen of the Nation, as marriage only allowed him to live in the Nation and hold property.[88] Significantly, the Court noted that he could not have voted in Cherokee elections.[89] The Court concluded that he carried the status of a "colored citizen of the United States."[90]

The potential effect of these cases on *Means* is unclear. On the one hand, the existence of a treaty and statute explicitly recognizing exclusive jurisdiction over adopted citizens may distinguish them from *Means*. However, the Supreme Court's examination of Cherokee law as controlling over the status of the non-Indians as nonetheless citizens of the Nation suggests the Court should defer to the Navajo conclusion that *Means* is indeed a "member" for jurisdictional purposes. Though the Cherokee law appears in *Nofire* as codified in their constitution and written code, the Court quotes no such provision concerning blacks in *Alberty*. Ultimately, these cases might be read against the backdrop of their discussion in Kennedy's *Duro* opinion. They appear to represent examples of consent, but should not be looked upon as defining the exact parameters of tribal jurisdiction over non-Indians, or in this case, non-member Indian citizens.

III. *Hadane* and Kennedy's Theory of Consent

Given the subordination of tribal law when federal jurisdiction is at issue, the main question is: Can Navajo common law theories of consent fit within Kennedy's narrow conception of voluntary submission? Lacking the ability to exert jurisdiction by mere presence within the Navajo Nation, federal law obliges the Navajo courts to articulate a more significant demonstration of consent, though not necessarily precisely in line with *Nofire* or *Alberty*. Under Kennedy's construction,

[81] *See id.*
[82] *See id.*
[83] *See id.*
[84] *See id.*
[85] 162 U.S. 499 (1896).
[86] *See id.* at 501.
[87] *See id.*
[88] *See id.*
[89] *See id.*
[90] *See id.*

two elements appear to be required: (1.) voluntary affiliation and (2.) the right to participate in the political process of the tribe.

But what constitutes voluntary affiliation? The *Means* case is problematic as, unlike *Rogers* and *Nofire*, Means is contesting tribal jurisdiction by denying his consent instead of admitting consent to contest federal jurisdiction. Indeed the "consent" in this case constitutes a kind of consent by adhesion, as the one who supposedly gave consent challenges that very conclusion. No reported federal case appears to recognize consent when the defendant himself has not argued it. Also, unlike the individuals in the Cherokee cases, no provision of the Navajo Code sets up a procedure by which non-Navajos could be recognized as "members" or "adopted citizens" of the Nation. Indeed the Code states flatly that no non-Navajo could ever be adopted into the Nation.[91]

Under a federal theory of voluntary affiliation the main question might be: Can voluntary entrance into the familial and clan system of a tribe constitute sufficient "consent"? Consent may very well depend on the extent of notice to an in-law of the potential ramifications of entering into familial obligations with a Navajo person on the reservation. Such notice may indeed be considered implied consent. One potential issue is then whether Russell Means was aware of his status as a *hadane* and was or should have been on notice of the tribe's criminal jurisdiction by virtue of his marriage. At an oral hearing on the motions to dismiss, Means' attorney, John Trebon, put Means on the stand to establish several facts in support of the motions.[92] On cross-examination Navajo prosecutor Donovan Brown inquired into Russell Means' knowledge of Navajo custom involving marriage. Specifically he asked Means whether he was familiar with the Navajo concept of "chardoney" [sic].[93] Means claimed not to have any knowledge. Brown then translated "*hadane*" and asked whether he was aware of the importance of the "in-law". Means again stated he had no knowledge.[94] If Means is to be believed, Means' consent could only be unconscious- that is without specific knowledge of his status in the community under traditional Navajo principles.

Even assuming he knew of his *hadane* status, prior to the incident in question, Navajo courts had not applied traditional or customary law to a non-member for purposes of criminal jurisdiction. However, the Navajo Supreme Court strongly suggested it would so hold if such a situation arose. In *Navajo Nation v. Platero*[95] the Court held that it would construe the Navajo Nation Criminal Code in light of Navajo common law. Indeed in *Platero*, the Court applied traditional notions of leadership to hold that a Navajo police officer could not be convicted of battery unless he knew he did not have the right to act as a police officer.[96]

In *Navajo Nation v. Hunter*[97] the Court suggested in dicta that a non-Navajo may "assume tribal relations" and would be considered a statutory "Indian" under the Navajo Criminal Code. The Court asserted that "marriage or cohabitation" with a Navajo was one method of tribal affiliation constituting

[91] 1 NNC § 702 (1995).
[92] *See* Transcript, *supra* note 53 at 23.
[93] *See id.*
[94] *See id.*
[95] Navajo L. Rep. Supp. 278, 280, 19 ILR 6049, 6050, No. A-CR-04-91 (Nav. Sup. Ct. 1991).
[96] *See id.*
[97] Navajo L. Rep. Supp. 429, 431 (Nav. Sup. Ct. 1996).

consent to jurisdiction.[98] Importantly, such individuals could be non-member Indians or non-Indians; either could be affiliated and therefore subject to such jurisdiction. The Navajo Nation Supreme Court suggested this despite the Navajo Code provision explicitly forbidding adoption of non-Navajos into the Nation.[99] The *Hunter* case predated the Means incident.

Therefore, Russell Means was theoretically "on notice" that affiliation with a Navajo could possibly subject him to Navajo criminal jurisdiction. Specific knowledge of the Navajo conception of *hadane* was not necessary, as *Hunter* premised its conclusion on affiliation through marriage or cohabitation. He arguably should have known that Navajo law considered his marriage to be implied consent to jurisdiction.

A. Consent and Navajo Common Law

Assessing the *Means* case under federal notions of voluntary submission may be further complicated due to the nature and development of Navajo common law. This may be especially true given Justice Kennedy's expression of discomfort with applications of custom and "unwritten usages" to non-members. Though certain Navajo traditions are codified in statutory law, the application of custom comes almost exclusively through common law precedent. The Navajo court system presents a fascinating example of an Anglo-American style judiciary re-infusing its choice of law principles with the application of unwritten pre-existing customs and traditions. Former Chief Judge Tom Tso referred to the application of such traditional principles as Navajo common law, emphasizing that Navajo tradition is indeed law in the Navajo Nation.[100]

The Judicial Reform Act of 1985 declares that Navajo courts shall apply Navajo common law in all cases not prohibited by federal law.[101] Through Anglo-American style precedent, the former Navajo Court of Appeals, and now the Navajo Supreme Court has articulated and developed its own indigenous form of common law jurisprudence by incorporating customs and traditions pre-dating the formation of the modern Navajo government. Analogizing Navajo common law with English principles of "custom"[102], groundbreaking Justices Tso and Yazzie have constructed a judicial mechanism to apply traditional Navajo notions of harmony and unity to modern legal issues.[103] The United States Supreme Court recognized the use of Navajo traditional principles in *United States v. Wheeler*.[104] However, *Wheeler* also began the explicit use of the term "member" to describe the extent of tribal jurisdiction.[105]

One of the difficult issues for non-traditional Navajos and non-Navajos appears to be locating sources and correctly applying traditional principles to their specific cases. Indeed the custom and traditions applied as law come primarily

[98] *See id.*
[99] 1 N.N.C. § 701 (1995).
[100] *See Dawes v. Yazzie*, 5 Nav. R. 161, 164—65, 5 Navajo L. Rep. 82, 84 (Nav. Sup. Ct. 1987).
[101] 7 N.N.C. § 204(a)(2).
[102] *See id.*
[103] *See e.g., id.*
[104] 435 U.S. 313 (1978).
[105] *See id.* at 322.

from unwritten sources and may reflect local or familial ways not broadly applicable to a greater Navajo context. As the former Court of Appeals articulated in *Lente v. Notah*:

> The danger in using Navajo custom and tradition lies in attempting to apply customary principles without understanding their application to a given situation. Navajo custom varies from place to place throughout the Navajo Nation; old customs and practices may be followed by the individuals involved in the case or not; there may be a dispute as to what the custom is and how it is applied; or, a tradition of the Navajo may have fallen so out of use that it cannot any longer be considered a "custom".[106]

The Navajo courts have then indicated that even if discoverable, not all customs and traditions will automatically be incorporated into a modern Navajo jurisprudence. Indeed, local customs may not be applicable and customs not generally followed may also fall out of usage. Discovering which traditions still exist and how pervasive their applications are may present great difficulty for outsiders potentially subject to Navajo law. Such considerations may affect a non-Navajo court's view of consent through custom.

How do persons not cognizant of traditional Navajo law present their arguments for or against its use? Aware of this issue, the Navajo courts have developed guidelines for discovering and implementing Navajo customs and judicial procedure by which to bring them before the court. A litigant may demonstrate the common law principle to be applied through recorded Navajo court opinions, learned treatises on the Navajo way, judicial notice, or the testimony of expert witnesses who have substantial knowledge of Navajo common law.[107] When custom is presented in one of these ways it appears the ultimate decision to apply them to the facts of the specific case lies in the district court judge's discretion. If traditional law is not argued at the district court level, it appears the ability to do so before the Navajo Supreme Court has been waived.[108]

Judicial notice of Navajo common law is appropriate "where no question arises regarding custom or usage… if a custom is generally known within the community, or if it is capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned, it is proven."[109] If a district court takes judicial notice of a particular custom as Navajo common law, the court is required to clearly indicate the custom upon which it relied.[110] Clear references facilitate examination of an order by the Supreme Court.[111]

If expert witnesses are required, the courts have developed a unique procedure under the laws of evidence. In cases where Navajo custom is disputed the trial court is to hold a pre-trial conference with two or three expert witnesses appointed by the court.[112] The parties to the litigation may only ask clarification

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[106] 3 Nav. R. 72, 79—80, 3 Navajo L. Rep. 40, 45 (Nav. Ct. App. 1982).
[107] *Dawes v. Yazzie*, 5 Nav. R. at 165, 5 Navajo L. Rep. at 84.

[108] *See id.* at 164, 5 Navajo L. Rep. at 83-84.
[109] *Id.* at 165, 5 Navajo L. Rep. at 84.
[110] *See id.* at 165-66, 5 Navajo L. Rep. at 84.
[111] *See id.* at 167, 5 Navajo L. Rep. at 85-86.
[112] *Dawes v. Yazzie*, 5 Nav. R. at 167, 5 Navajo L. Rep. at 85.

questions.[113] The experts can discuss how a particular Navajo custom should be applied in the case, and should reach a consensus on the issue.[114] The trial court then has discretion to allow the testimony of an expert on the relevant custom.[115] Similar to the federal rules of evidence, to qualify an expert the trial judge must be satisfied that an individual is in indeed an expert on Navajo common law. An expert may be qualified through reading or practice, through "familiarity with Navajo traditions acquired by oral education, or his adherence to a traditional way of life, or through his long-term interest in deepening his knowledge of Navajo custom, or through his status within the community as a person with a special knowledge of custom."[116]

The *Lente* case presents another relevant consideration to *Means*: How do Navajo courts evaluate the applicability of uniquely Navajo customs to cases involving non-Navajo litigants? In *Lente*, a Comanche mother sought custody of her child by a Navajo father.[117] As part of her argument she appealed to Navajo traditional law on matrilineal descent.[118] The Court faced the question of whether to apply Navajo custom that children live with the mother.[119] The Court concluded that

> [t]he solution to this problem lies in the courtroom. Whether the parties expect tradition will be applied will come out in testimony, and the Navajo Tribal Council has very wisely provided that judges may take care of any doubts they have in using custom and tradition by requesting the advice of 'counsellors'… on the matter.[120]

The question appears even more complicated when one of the litigants is the Navajo government seeking to justify its exertion of jurisdiction over a non-Navajo. Indeed Russell Means appears not to have argued Navajo common law at all, relying almost exclusively on the unconstitutionality of the *Duro* fix along with the Treaty of 1868. However, the Navajo Prosecutor's Office appears to have argued for the application of traditional familial principles of reciprocal obligations regardless of whether Means had knowledge of them or experience with them.

The *hadane* theory of consent in Navajo jurisprudence appears to have been developed primarily through judicial notice and the court's reading of *Duro* and *Oliphant*. Indeed, in *Navajo Nation v. Hunter*, the Supreme Court appears to primarily rely on Kennedy's citations to *U.S. v. Rogers* and *Nofire v. United States*.[121] However, Judge Gilmore cites no federal cases in support of his theory of in-law consent, and therefore appears to have taken judicial notice of the existence of the in-law relationship and its application to Navajo government prosecutorial authority. The Supreme Court in *Means* appears to have combined the two, along with referencing a learned treatise. As in his opinion in Hunter, Justice

[113] *See id.*
[114] *See id.*
[115] *See id.*
[116] *Id.*
[117] 3 Nav. R. 72, 3 Navajo L. Rep. 40 (Nav. Ct. App. 1982).
[118] *See id.* at 79, 3 Navajo L. Rep. at 45.
[119] *See id.* at 79-81, 3 Navajo L. Rep. at 45-46.
[120] *Id.* at 81, 3 Navajo L. Rep. at 46.
[121] Navajo L .Rep. Supp. 429, 431, No. SC-CR-07-95 (Nav. Sup. Ct. 1996).

Yazzie asserts consistency with Kennedy's *Duro* opinion.[122] However, his discussion of *hadane* cites no external authority in support and therefore appears to originate through judicial notice. He did bolster his discussion with reference to the dual language dictionary when discussing the relation of previous hadane to the Navajo clan system.[123]

B. Political Participation

The other prong of Kennedy's requirement for consent, the right of political participation, is also problematic. Indeed Russell Means' primary complaint about potential Navajo jurisdiction appears to be that he lacks the ability to vote or run for office in the Navajo Nation.[124] Also, though a *hadane*, Means asserts he was denied the opportunity to get a job on the reservation or start a business due to his outsider status as a non-member Indian.[125] If a kind of "member" of the Navajo Nation, Means indeed is a member with fewer rights than those officially enrolled under the Navajo Code. Though he is protected by both the Indian Civil Rights Act[126] and the Navajo's own Bill of Rights,[127] he lacks equal ability to participate in official elections as a voter or a candidate.

However, his status as a *hadane* appears to have allowed him the opportunity to participate in Navajo political discussions in other ways. In cross-examination during the Chinle hearing, Means did state he attended local Chapter meetings.[128] Assisted by an interpreter, he followed the discussions though held in the Navajo language.[129] However, when asked why he didn't attempt to participate he stated that as a guest he didn't impose himself.[130] He also had involved himself in Navajo politics during the Peter McDonald controversy, leading a march in Window Rock concerning McDonald's removal.[131]

In the end, the meaning of the sparse language in *Duro* regarding political participation is unclear. However, given Kennedy's emphasis on constitutional principles of authority being derived from "consent of the governed" the ability to vote may very well be essential. Therefore, Mean's inability to vote in tribal elections may very well defeat Navajo jurisdiction under their theory of consent, even if his status as a *hadane* constitutes "consent" to membership in the community. His participation in Navajo politics and his ability to attend Navajo meetings appears insufficient under Kennedy's theory of citizenship.

IV. Conclusion

[122] *See Means v. District Court of the Chinle Judicial District*, 2 Navajo Appellate Rep. 528, 534, 26 ILR 6083, 6087, No. SC-CV-61-98 (Nav. Sup. Ct. 1999).
[123] *See id.* at 535, 26 ILR at 6087.
[124] *See* Transcript, *supra* note 53 at 6—7.
[125] *See id*. at 4-6, 23—24.
[126] 25 U.S.C. §§ 1301-02 (1994).
[127] 1 N.N.C. §§ 1-9 (1995).
[128] *See* Transcript, *supra* note 53 at 25—27.
[129] *See id.* at 27.
[130] *See id.*
[131] *See id*. at 25—26.

The *Means* case represents a clash between two legal cultures with differing sources of law and differing beliefs in the origin of prosecutorial power. The Navajo Supreme Court has premised criminal jurisdiction on familial affiliation. The obligations owed in-laws under Navajo custom justify criminal jurisdiction of the central political authority in the Navajo Nation. Justice Kennedy of the United States Supreme Court premises such authority on voluntary submission and the "right to participate" in the political processes of the centralized authority.

For those that favor an extension of tribal sovereignty to its widest extent within its territory, the use of custom represents a bold and noteworthy step towards that goal. For those who favor the revival or at least greater utilization of indigenous law derived from a tribe's customs and traditions, the use of *hadane* represents a strong expression of perhaps true jurisprudential sovereignty. Not only do tribes possess the authority to implement their own laws, but tribes also have the power to define the origin, sources, and application of their indigenous laws to the modern context.

However, for those who reject the authority of government not based on Anglo-American political notions of "consent of the governed," the *Means* case represents the potential for a shocking abuse of power. Under the present political organization of the Navajo Nation, Means cannot vote, cannot run for election, and has no ability to alter it. For those dedicated to the protection of individual rights under the constitution against any government "within " the United States, the Navajo Nation's assertion of jurisdiction represents the antithesis of legitimate authority.

After the Navajo Supreme Court rejected his request for a writ of prohibition, Russell Means filed a writ of habeas corpus in the Federal District Court for the Northern District of Arizona.[132] Such a writ allows a federal action under the protections of the Indian Civil Rights Act.[133] There, the federal court will have direct authority to revisit the issue of consent if argued before it.

Only the dominance of federal law in questions of criminal jurisdiction within Indian Country allows second-guessing of the Navajo Nation in the *Means* case. As a matter of sovereignty, tribal courts should have the authority to decide important questions under their own laws based on their own customs. However, when non-members are involved, the fear of unfettered "extra-constitutional" power of tribal courts non-Indian judges do not accept may eventually compel reversal. No matter how sophisticated a structure a tribe may implement to establish clear guidelines for the use of custom, the very application of that custom to those not born and bred within them appears to worry the federal judiciary. It may then be that the jurisprudential sovereignty of Indian tribes may survive, but only in those cases that do not implicate federal law.

[132] *See Means v. Navajo Nation*, Verified Writ for Writ of *Habeas Corpus* and/or Writ of Prohibition.
[133] *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 70 (1978).