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Civil Procedure in Low Earth Orbit: Science Fiction, American Indians and Federal Courts

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CIVIL PROCEDURE IN LOW EARTH ORBIT: SCIENCE FICTION, AMERICAN INDIANS AND FEDERAL COURTS

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Is it not immediately obvious that following the Columbus quincentennary more attention should be paid to what is written in science fiction novels? Perhaps not. Those of us who teach, study and write about American Indian law are famous for our over-developed ability to see Indian issues in all areas of the law, indeed in all areas of life. Indian law and science fiction? You bet.

Much of the literature of science fiction has always dealt with issues of legal relevance: Outsiders vs. insiders. Us vs. them. Discoverors vs. discoverees. Those in control vs. others thought inferior, non-human, even. Explorers vs. stayers-at-home. Colonists vs. natives. The center vs. the provinces. Sometimes, as in Melinda M. Snodgrass's novel *Circuit*,[1] insider-outsider legal issues are explicitly raised; more commonly they are found only incidently, between the lines, between blast-offs, if you will. Either way, such legal issues commonly inhabit the pages of science fiction. And, let it be noted, because these are the very issues dealt with by American Indians since Columbus showed up, they remain the issues of today, and of the next 500 years.

There are no Indians in *Circuit* and little—though some[2]—in the way of Indian law. Thus, the book is not, explicitly, "American Indian Law

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1. MELINDA M. SNODGRASS, CIRCUIT (1986). Other science fiction work by Ms. Snodgrass has been subject to law review commentary in Paul R. Joseph & Sharon F. Carton, *The Law of the Federation: Images of Law, Lawyers, and the Legal System in "Star Trek: The Next Generation,"* 24 U. TOL. L. REV. 43 (1992). Ms. Snodgrass was a screen writer for several episodes of that television series. *See infra* note 6.

Melinda Snodgrass was a classmate of mine at the University of New Mexico School of Law more than a decade ago. I, like she, as reported in the "Acknowledgments" section of the book, was a student of Fred Ragsdale and the late Jerrold Walden, who were beginning (Ragsdale) and ending (Walden) their law teaching careers during our tenure there. And finally, I am a science-fiction reader to whom the idea of batting around the notion of a 21st century legal system is a tasty idea indeed. So if you decide that you are dealing here with someone predisposed to liking this book, so be it. At least I warned you. That on several levels the book disappointed me is part of the essay that follows. That, in the end, Ms. Snodgrass has given people interested in Indian law something to think about, and vice versa, is the reason for the essay.

2. There actually is a fair amount of explicit Indian law in *Circuit*, in addition to the analogies mentioned in the text. There is certainly more than one would expect in a science fiction novel; one suspects that this is Fred Ragsdale's influence. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), are related by Jenny, partly to demonstrate "the innate powerlessness of the judiciary." SNODGRASS, *supra* note 1, at 120. The famous quotation of President Jackson that "John Marshall has made his decision; now let him enforce it" is given. *Id.* (Some think the story of that quotation apocryphal; I have always thought it unlikely that Andy Jackson ever spoke with semi-colons. See generally the classic and exhaustive work on these landmark cases, Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics and Morality*, 21 STAN. L. REV. 500 (1969)). Also, the so-called Insular Cases, in particular Hawaii v. Mankichi, 190 U.S. 197 (1903), are discussed. SNODGRASS, *supra* note 1, at 34-35. Finally, Judge Huntington lectures the President that "[g]reat nations like great men must keep their word." *Id.* at 131. This changes only slightly (from "should" to "must"). Federal Power Comm'n v. Tuscarora

in Space."[3] Rather, *Circuit* is a story about life, love and federal courts in the next century. Nonetheless, it leads to some thoughts about today's law, and the role that American Indians play in it. In the end, the quincentennary, the body of American Indian law and Ms. Snodgrass's novel are all about the toleration, or not, of diversity. About the ability, or not, and the underlying wisdom, of the dominant society's control of the subordinate ones. About whether, or not, and how, if at all, the center governs the provinces.

This essay is not, exactly, a book review. The book has been out too long for that. Furthermore, *Circuit* is only the first third of a trio of science fiction books.[4] I find the other two less interesting, jurisprudentially speaking, than the first, and will not be discussing them here. Some of the essay will surely be review-like, but my purpose here is beyond that of the usual book review. An author who writes of 21st century law writes as much, I think, about now as then. And the audience is wide. And young. And unsuspecting that a lesson in the law of today is being taught. Such lessons are often well-learned and deserve serious inspection here, on these otherwise scholarly pages.

Professors Carolyn Heilbrun and Judith Resnik have written of the idea of law and literature, and they identify three different aspects of the study: (1) Law *in* literature; (2) Law *as* literature and (3) Canonicity.[5] This essay is of the first kind, premised on Heilbrun and Resnik's notion that what is written about the law in literature becomes, in fact, part of *the law*.

Ms. Snodgrass herself downplays the influence that screenwriters and other writers of popular fiction have on the law, lawmakers, and law

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Indian Nation, 362 U.S. 99, 142 (1960). The idea may be Holmesian in origin, as Ms. Snodgrass suggests, SNODGRASS, *supra* note 1, at 131, but I got it from Justice Black; it is the last sentence of his dissent in *Tuscarora*. Black does not attribute it to Holmes.

3. There is a large body of science fiction dealing explicitly with the very essence of American Indian law, to wit the cultural interface between very different intelligent cultures. For a particularly disheartening discussion of this situation, see FREDERICK POHL, JEM (1980).

4. *See* MELINDA M. SNODGRASS, CIRCUIT BREAKER (1987); MELINDA M. SNODGRASS, FINAL CIRCUIT (1988).

5. Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature and Feminism*, 99 YALE L.J. 1913, 1936 (1990). "Canonicity" is defined by the authors as the study of "who is given voice, who cited, quoted, repeated, and who marginalized, ignored, submerged." *Id.* On the question of whether the "canon" should be opened to permit others, particularly women, or, instead, simply abandoned altogether, *see* Margaret Atwood, *Not Just a Pretty Face*, THE WOMEN'S REVIEW OF BOOKS, Jan. 1994, at 7:

> The use of the word "canon" for the list of works accepted as central by academia is no accident: "canon" is an ecclesiastical term, and to be canonized is to be sainted, ready for celebration at the hands of the priesthood. The drawback to membership in any priestly cult is that the circle tends to be a closed one—closed to the profane outer world, that is—and that it defines itself by its vocabulary, which leans toward specialization and jargon and shibboleth. That is, to be accepted by the priests you have to talk like them. Academic criticism, as practiced by both women and men, has tended to become in the last decade opaque to the general reader. Wonderful things get spoken about in there, no doubt, back behind the choir screen, but it would be nice for the rest of us to know what they are. Women have a lot of practice in the Emperor's Clothes department. They might well take a crack at cleaning up and simplifying the reverend vocabulary, and at getting some of the *con* out of deconstruction.

consumers. Writing in the magazine *Omni*, she criticized Gene Roddenberry, the creator of the *Star Trek* series, for getting too full of himself and his show: "The dreadful effect of all the [*Star Trek*] hype was that Roddenberry decided he could no longer just do a television show so he could make some money. Now he had to speak to the ages because this was serious shit, this was *philosophy*."[6] And, after comparing the two *Star Trek* series—and finding the second one lacking —she wondered: "Is it important? Does it matter? No. As I said while on *Star Trek: The Next Generation*, 'We ain't eradicatin' world hunger here. It's just a TV show.'"[7]

Of course, both she and the professors are right. She is right that writers of popular legal fiction by definition are writing popular fiction, not law reviews, and they shouldn't forget it. But Professors Heilbrun and Resnik are right, too, that the law as it is found in literature, even in popular fiction and TV, still has an enormous impact on the way the law is perceived by non-lawyers, and that much more so when it *doesn't* read like philosophy.[8] Is it important? Does it matter? Of course it is. Of course it matters. What is said in television shows like *Star Trek* and books like *Circuit* influences the way people, especially young people, think about the law. *Circuit* may not eradicate world hunger, but in its own very real way it shapes the law more than what is written on these scholarly pages.

I turn, then, to the story that is found in *Circuit*. Ms. Snodgrass's book contains quite a tale. It is, on various levels, an action-thriller, a political intrigue, a love story and a jurisprudential musing. *Circuit* is set in the middle of the next century.[9] The earth is overcrowded, hungry and energy poor,[10] still under the domination of the usual superpowers. (Ms. Snodgrass did not, in *Circuit*, anticipate the events of the last few years in the Soviet Bloc, but then, who did?) "The System," that is to say the body of Earthlings who live off the planet, is made up of folks living in Earth-orbiting satellites, miners and smelters on the Moon, Mars colonists and, on out, Asteroid miners.

The Western part of the System—groundling geo-politically speaking—is mostly run by corporate America, the government having shed all except military interest in space back in the 20th century.[11] It is an

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6. Melinda M. Snodgrass, *Boldly Going Nowhere?*, OMNI, Dec. 1991, at 52.

7. *Id.*; *cf.* David Freeman, *Shouts and Murmurs: A Hollywood Lexicon*, THE NEW YORKER, Feb. 28, 1994, at 102 (quoting Alfred Hitchcock to Ingrid Bergman: "[I]t's only a movie, Ingrid."). I seem to find myself suddenly surrounded by such professional self-deprecations, e.g., David A. Kaplan & Daniel Pedersen, *The Best Happy Ending*, NEWSWEEK, Feb. 28, 1994, at 44 (quoting Harry Jansen to his son, the ice skater: "Dan, there's more to life than skating in a circle.").

8. Professor Heilbrun is on both sides of this debate—if she sees it as a debate—for she also writes popular mysteries under the name "Amanda Cross."

9. The date of the events is never given precisely, but appears to be 2050. *See* SNODGRASS, *supra* note 1, at 29.

10. *Id.* at 10.

11. *Id.*

underpopulated land[12] of meritocracy and libertarianism. Alternative dispute resolution runs amuck.[13]

The American president, Tomas C. de Baca, wishes to reestablish governmental control over the resolution of these disputes, and through that to groundling domination of the System as a whole. He chooses as his vehicle the newly created 15th Circuit Court and he names as its judge a crony named Cabot Huntington, whose features are as patrician as his name. Huntington is a corporate and constitutional lawyer, with a heavy predisposition against alternate dispute resolution: when the President describes the colonists' corporate-run civil justice system, Huntington responds, immediately and without amplification, "[t]hose will have to go."[14] So the new judge departs for Enersun I, an earth-orbiting colony, with his junior partner, now his law clerk, Jenny McBride, intent upon doing away with corporate justice and instituting good old Anglo-American civil procedure.

Meanwhile, on the Moon, several Russian miners, dreaming of consumer goodies and free enterprise freedom, plan to sell the fruits of their collective's labor to U.S. Steel, instead of shipping it back home to the U.S.S.R.[15] This show of dissidence irks the Russian Premier, who persuades the U.S. President to bring suit in Judge Huntington's 15th Circuit, *U.S. v. U.S. Steel*, to enjoin the deal as a violation of some U.N. treaty.[16] The President is pleased to do this as the colonists are snubbing his new judge[17] and stubbornly continuing to resolve their disputes privately.[18]

The merits of the suit, we are led to understand, are just short of frivolous.[19] Nevertheless, the judge backs his friend the President and grants the injunction. Jenny, who is sharing quarters, but not beds, with the judge, moves out in protest, and in with the handsome young colonist she is dating.[20]

Thereafter, the Russian Premier, with a wink and a nod from the President[21] and permission to use U.S. airspace on the Moon,[22] nukes

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12. The space colony on which most of the action in Circuit takes place, Enersun I, is inhabited by ten thousand persons and is described as at "top capacity." *Id.* at 18. Still, this top capacity seems to have a comfortable roominess. *Id.* at 32. Of course, some immigration control must be exerted if Earth is over-crowded and space is roomy, and so it seems; there is a waiting list of twenty-thousand to settle in Enersun I. *Id.* at 18. Of course one need not look all the way into the 21st century to observe the situation in which the huddled masses are admitted only grudgingly through the golden door to breathe free in relatively wide-open spaces.

13. Professors Joseph and Carton note the informality of the dispute resolution system in *Star Trek: The Next Generation*. *See* Joseph & Carton, *supra* note 1, at 50, which may be Ms. Snodgrass's influence on the screenplay.

14. SNODGRASS, *supra* note 1, at 12; *see also id.* at 19, 33, 69.

15. *Id.* at 1-3.

16. *Id.* at 52-56.

17. *Id.* at 41.

18. The first private civil law suit is not brought in the 15th Circuit until more than halfway through the book and not until after the judge begins to show a little independence from the Earth. *Id.* at 124.

19. *Id.* at 61-62.

20. *Id.* at 109.

21. *Id.* at 87.

22. I know, I know, but what is the alternative? "Vacuumspace?" "Spacespace?" "Airspace"

the offending collective, nipping lunar capitalism in the bud.[23] One family escapes death.[24]

The judge then has a change of heart. He double-crosses the President and, when a survivor of the attack sues the U.S.S.R. and the U.S. for reparations—where else? in the 15th Circuit—the judge returns to Earth and digs up the evidence of U.S. complicity. He eventually decides the case against the governments and also saves the life of the plaintiff from the President's goons, who are under instructions to ice the poor guy and deprive him of standing.[25]

In the end, the colonists and the judge gain mutual respect, Jenny moves back in, and there looms ahead Huntington's impeachment trial and C. de Baca's reelection bid, the outcomes of both of which we can anticipate with some certainty.[26] And there are two sequels lying ahead. In the end, the last sentences of the trilogy suggest where libertarians and patriots must flee to get away from the rest of us and our governments: "Cab walked to the window, considered the million million suns burning beyond the snow-filled sky. Turned back, and raised his glass. 'To freedom.'"[27]

As an action-thriller, *Circuit* has much to recommend. There is a gunfight at Enersun corral made more interesting by high tech, self-propelled bullets and indistinguishable cowpokes in identical space suits.[28] There is some Saul Alinski-style nonviolent resistance, ultimately disrupted

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it will have to be.

23. *Id.* at 93-94. Twelve people die. *Id.* at 94-97, 126. The Gulf War has shown us, post-*Circuit*, that such uses of force are often subject to vigorous debate; I think it fair to say that Ms. Snodgrass intends the retribution in *Circuit* to be seen as far exceeding that deserved. Judge Huntington clearly does: "Among those freedoms [which Franklin Roosevelt enumerated in his famous Four Freedoms speech] was the freedom from want, which was all that the inhabitants of the Garmoneya Collective were pursuing." *Id.* at 226-27. As to what the Russian neo-entrepreneurs wanted: "Each member of the collective had purchased some new and frivolous object in addition to the desperately needed equipment." *Id.* at 57.

24. This is the family of the original Russian instigator of the capitalist scheme, the Renkos. SNODGRASS, *supra* note 1, at 57.

25. *See generally id.* at 124-232. This, of course, is nearly half of the book. I have collapsed the story severely so that there will still be some excitement for the reader.

I am not making up the part about standing, as the President, a lawyer, contemplates exactly that approach to the problem, *id.* at 205. In a related development, the government's lawyer makes an ex parte attack on the plaintiff's standing while he still is alive, on more traditional legal grounds. The argument, somewhat condensed:

> Mr. Malcomb: "Renko has no standing to bring this case. He has suffered no personal harm in this case. *He* wasn't killed at that collective and he lost no relatives in that attack. Therefore there is no justiciable controversy."
> The Court: ". . . I'm unmoved by your argument, and couldn't you come up with something better than a *standing* issue for God's sake?"
> Mr. Malcomb [stiffly]: "It's a valid issue."
> The Court: "You're right, I agree it is, but I'm not going to use it to deny Mr. Renko his day in court. This case is too important, and it touches on too many basic human rights to be avoided by a cheap trick like this. Legal technicalities have been used too often to deny justice to the people. It's not going to happen this time."

Id. at 126 (emphasis in the original).

26. *Id.* at 231-32.

27. SNODGRASS, FINAL CIRCUIT, *supra* note 4, at 244.

28. SNODGRASS, *supra* note 1, at 216.

by Rooski tear gas.[29] There is a capitalist-socialist barroom brawl to protect the honor of an harassed waitperson.[30] And, best of all, there is a Tae Kwan Do demonstration by the federal judge in a spaceport restroom, where the judge lays low an armed MP half his honor's age.[31]

As a love story, too, *Circuit* delivers. First, we have a beautiful, twentysomething dancer-turned-lawyer-turned-law clerk: the green-eyed, piquant-faced, red-haired Jenny McBride.[32] Jenny is seriously disenchanted with life, is bored with lawyers, if not the law, and is frustrated by Earthside practice.[33]

So, we have a pretty, disillusioned young lawyer. Next, we have a fortyish son of the Ambassador to the United Kingdom: the corporate lawyer and politico,[34] Cabot Huntington. And we have a young, extraordinarily handsome and slightly revolutionary off-worlder: Peter Traub. Jenny and Cab share respect and an apartment on Enersun I, but, except for some law library shoulder rubbing[35] and seat switching body contact,[36] they begin the story platonically. Peter enters the picture initially as a mole for the colonial establishment, his mission to woo Jenny so that she might sway Cab to the off-world view.[37] They hit it off, initially in

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29. I recall from the 1960's a plan by the community activist mentioned in the text to make unpleasant a visit to Chicago by a massive sit-in in the pay toilets at O'Hare Airport. The scheme in reverse is found in *Circuit*, directed at the Earthside occupation forces. *Id.* at 180.

30. *Id.* at 162-64.

31. *Id.* at 200-01. It takes two blows.

32. *Id.* at 7. "Piquant" is Ms. Snodgrass's word and means "appealingly provocative" as well as its more common "pleasantly pungent." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 997 (1st ed. 1969).

33. "Out here I thought I might be able to finally put together what it is that the law is supposed to do, to represent." SNODGRASS, *supra* note 1, at 42. Her boss, the judge, finds it somewhat surprising that Jenny ever became a lawyer in the first place:

> In some circles her honesty would have been lauded, but in the world of the legal brotherhood it was a drawback. She had never learned how to close one eye, and go along to get along. . . . Sometimes Cabot wondered why she had become a lawyer and why she stuck with it now that she knew what the world was like. More to the point he wondered why he had ever hired her . . . .

Id. at 14.

This view of lawyers is none too attractive and, one suspects, it may be Ms. Snodgrass's own. The view of judicial ethics is no better, as the judge kowtows to the President, *id.* at 63-64, hobnobs with the counsel on one side of a pending case, *id.* at 70-71, and, later, sits to hear a case even after he has actively engaged in obtaining the evidence for one side, *id.* at 224-27. (Granted, the judge does first consider having himself replaced on the bench so that he can testify for the plaintiff, *id.* at 202-03, but later he abandons that plan and hears the case.)

It is true enough that *Circuit* embodies a certain respect for the law, but the legal profession itself takes something of a beating. An engineer, like Jenny's friend Peter Traub, seems just as familiar with the law as any lawyer, cites cases like a second year law student, *id.* at 34, and is a good deal more ethical than many of the law-trained people in the book.

I do not take the position, of course, either in this essay or more generally, that Ms. Snodgrass has an obligation to portray the legal profession in any particularly flattering light. I only note that *Circuit* makes a portrayal that many of us, I suppose, would find rather gloomy.

34. *Id.* at 86. Although the "politico" characterization is by one of the judge's early critics, a Systemite journalist, *id.*, the characterization does seem apt for the friend of the President whose family is actively political. *See id.* at 205.

35. *Id.* at 110.

36. *Id.* at 7.

37. *Id.* at 26-27.

the *de rigueur* weightless tryst.[38] I will not reveal the resolution of this cosmic love triangle, only to note that 20th century readers will find 21st century romance comfortably familiar.

Jurisprudentially, though, if not romantically, *Circuit* is about *difference* and the role that a federal court plays in the control, or not, of that difference. And in the book, these legal differences are sharply drawn. At the center, the Earth-bound Americans are corrupt, disingenuous and wimpish toward the Russians.[39] The Earth-bound Russians are cold-blooded and heavy-handed and unrepentant of it. President C. de Baca and Premier Tupolev are a matched set: walking, telephoning embodiments of how the maxim "Power Corrupts" translates into English and Russian.

In contrast to the Earthsiders, the Systemites represent the best hope of humankind. The Russian miners are sturdy, loving, hard-working stock, exploited by their masters. As for the Americans in space, they are free-wheeling individualists, living in a libertarian utopia, as Peter explains to Jenny:

> Peter: We are free from what I consider real vices, such as slums, pollution and over-crowding, [although alcohol distribution is pretty much unregulated].
> Jenny: I see your point.
> Peter: This is part of what I meant about freedom up here. People basically do what they want just so long as they don't do any physical or financial damage to anyone else.[40]

Libertarians Unite: You have nothing to lose but gravity! It is in this libertarianism that the System contrasts so dramatically with the central government of the groundlings, and it is here that the Systemites feel themselves most threatened by federal court authority. It is here, then, that the analogy to American Indian law begins to take shape, so I must pause to make clear the extent of Systemite libertarianism.

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38. It would, I think, be indiscreet to give a citation to this page, as it would be in poor taste for a reader to turn immediately to the episode.

Ms. Snodgrass adds a certain kinkiness to the event by placing it in a well-mirrored and, one would think, rather public dance/exercise room in the satellite's hub. The dance room, we are told, doubles, with the mirrors retracted, as a handball court. There is no greater shortcoming to *Circuit* than its failure to give us an idea of the rules of such a fascinating game as weightless handball; as this is a failure to spell out rules and regulations, I might even call this omission a jurisprudential shortcoming.

I should note that the sex in *Circuit* is neither explicit nor gratuitous, putting Ms. Snodgrass in the minority of modern writers; were it a movie, *Circuit* would be rated PG. It is clear that while Cab and Jenny sleep near one another, they do not sleep together, nor do they do that for which "sleep" is a common enough English euphemism. Jenny and Peter do, relatively regularly, but Ms. Snodgrass leaves the details to our imaginations. The sequels to *Circuit* are more nearly X-rated and demand less imagination.

39. Throughout *Circuit*, the United States is shown to lack the gumption to stand up to the Soviet Union. Ms. Snodgrass recites a little future history: "In the early days of lunar exploration, the Soviets had bullied through their claims to some of the richest mineral deposits on the Moon, and as was usually the case in the dealings between the superpowers, the United States had quietly acquiesced." *Id.* at 58; *see also id.* at 55, 59. All of this, of course, was written before either the Gulf War or the "collapse of communism."

40. *Id.* at 32.

As an example of the libertarianism of *Circuit*, so-called "victimless" acts are non-criminal in space. For example, prostitution is not only legal, but has lost both its immorality and any stigma that it exploits women. It has become just good natured and friendly free-enterprise in short-term bodily easements; mercantilism in genital usufructs.[41] The madam of a prominent bordello is a well-respected citizen and one of the non-judicial dispute resolvers.[42] The madam, Artis Barnes, characterizes Jenny as "a perfectly sensible woman who understands that what occurs between two or more consenting adults is nobody's business" and offers her employment as a whore.[43] Jenny declines with a smile; if she isn't exactly flattered, neither is she shocked nor offended.[44] To have sex with strangers for cash seems to be part of what every girl might consider a career move. Not since television's "Gunsmoke" have I seen such an optimistic portrayal of the charms of prostitution.

It is unclear to me why such libertarian nonsense is so attractive to science fiction writers,[45] but it serves our law review purpose here by presenting a sharp contrast with Earthside communitarianism. Perhaps its science fiction popularity is because the doctrine appears to advance the interests of the free spirits that the writers assume will initially explore the planets.[46] But, of course, libertarianism—at least Ms. Snodgrass's fictional variety—answers none of the hard questions. One wonders if smoking is permitted in public places on Enersun I? Is there a minimum wage? An income tax? Is sexual harassment permitted in the workplace?[47]

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41. *Id.* at 69-70.
42. *Id.*
43. *Id.* at 36.
44. *Id.*
45. The late Robert A. Heinlein is the classic science fiction libertarian. The writer Spider Robinson, a fellow traveller, wrote in his gushing homage to Heinlein, "I know it sounds crazy, but I've heard 'libertarian' used as a pejorative a few times lately." Spider Robinson, *RAH RAH R.A.H.!*, *in* TIME TRAVELLERS STRICTLY CASH 103 (1981). It is difficult to imagine that adherents to any other political philosophy would have the arrogance to be surprised to learn that there are those unpersuaded by their version of what's right.
46. And vice versa. *See* 1992 NATIONAL PLATFORM OF THE LIBERTARIAN PARTY 23 (1991):
> Space Exploration. We oppose all government restrictions upon voluntary peaceful use of outer space. We condemn all international attempts to prevent or limit private exploration, industrialization, and colonization of the moon, planets, asteroids, satellite orbits, Lagrange libration points, or any other extra-terrestrial resources. We specifically call for the repudiation of the U.N. Moon Treaty. We support the abolition of the National Aeronautics and Space Administration and the privatization of all artificial satellites.

47. I mentioned above a barroom fight in *Circuit*. *See supra* text accompanying note 30. Given the anti-PC mood in the country today, it is probably necessary to point out that the groundlings were the harassers and the Systemites rally to the defense of the waitress. With libertarianism rampant on Enersun I, it is a little surprising that the anti-PC Systemites didn't in fact fight to defend the harasser's right to speak freely, and didn't tell the waitress to chill out and can't she take a little joking around? Today's-style libertarianism is certainly of the view that white guys should get to speak their minds, and girls and colored people should be taught to have thicker skins. *See, e.g.*, 1992 NATIONAL PLATFORM OF THE LIBERTARIAN PARTY 6 (1991): "Language that is deemed offensive to certain groups is not a cause for legal action." Enersun-style libertarianism, on the other hand, allows punching someone whose speech offends. Perhaps this is what is meant by the "marketplace of ideas." *See generally* Taylor, *Are You Politically Correct?*, N.Y. TIMES, Jan. 21, 1991, at 32.

Is creation science taught in school? Are there public schools? Compulsory education? These matters are never raised, though I note that in one odd sentence Ms. Snodgrass suggests without amplification that practitioners of fundamentalist religions and other believers in creation science might never venture into space at all.[48]

Even with respect to prostitution, which *is* raised, there is no pause to consider that women might be forced into the trade by poverty or pimps, or that something might happen once the curtain is pulled that would be beyond the ability of the woman to control. *Circuit* in this regard is "Pretty Woman in Space"; a deal's a deal, as if that were the most fundamental principle of law.[49]

Circuit leaves little room for hesitation in choosing between the political and legal systems represented by East, West and Sky. The corporate moguls of space and their lawyers are the true and admirable patriots, not the Earth-bound elected officials or their appointees and certainly not the Commie totalitarians. U.S. Steel's attorneys, an inscrutable Japanese man and a radical Chicana,[50] outshine the government's in both skill and grace. Enersun I's chief administrative officer is a straight-talking, quick-thinking Asian-American woman who oozes competence. The Enersun I cabal that resists the Earthside Americans tempers its revolution with a good measure of respect for law and order.[51]

In *Circuit*, the good guys prevail. Right conquers both left and wrong. And, as the *coup de grace* of that conquest occurs in Judge Huntington's federal courtroom, we come at last to the explicit jurisprudence of *Circuit*.

Thus, the basic tenets of System life are: libertarianism, the right to be left alone and the notion, so common in science fiction writing, that the best government is the one that lets the cream rise to the top. Rewards in space go to the smart, the hard-working, the strong. Smart people get ahead, unhindered by such irrational and unsavory aspects of human nature as discrimination, greed, bigotry or intolerance. These characteristics seem bound to Earth by gravity. Left to themselves, Systemites believe, the best will get ahead, and those with lesser talents will have the good sense to be satisfied with smaller rewards.

The United States Constitution is respected as the bulwark of such a meritocracy; the Bill of Rights is, at any rate. That document is revered by the Systemites even to the extent of the Third Amendment.[52] But

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48. SNODGRASS, *supra* note 1, at 30.

49. *But see* Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987).

50. SNODGRASS, *supra* note 1, at 71-73. Angela Martinez, junior attorney for U.S. Steel, has a memorable exchange with the judge at a pre-trial social event. She glowers and refuses to shake the judge's hand, calls the suit "harassment" and suggests that the judge recuse himself. Huntington responds: "Nonsense! It's ridiculous to pull someone off another bench just to hear this case. It's not that important." *Id.* at 73.

51. *See id.* at 172-78.

52. One of the few post-1986 cases Ms. Snodgrass discusses, Van Clive v. Odell, is one to be decided by the Supreme Court under that amendment. Assuming that you need to be reminded, as I did, that amendment states: "No soldier shall, in time of peace be quartered in any house,

Peter Traub calls the body of the Constitution "baggage."[53] The Interstate Commerce Clause, at least in our late 20th century view as empowering Congress to do pretty much anything it likes,[54] would probably be the most offensive part of that baggage.[55]

If the modern Commerce Clause of the Constitution is the Systemites' worst federalist nightmare come true, the Just Compensation Clause of the Fifth Amendment should be their best friend. That clause is not mentioned in the book, but one guesses that its shield against grasping government and socialist reform would be especially dear to the colonists. Free enterprise reigns supreme.

Into this paradise of justice, fairness and profit comes the federal court system, unwanted by the colonists, and for just cause, as we who are privy to the President's thoughts know, for he is out thereby to shorten their leash. And it is exactly here that *Circuit* takes a fascinating jurisprudential turn and makes one confront the place that federal courts hold in a federal government. It is exactly here that *Circuit* becomes something more than a futuristic, libertarian potboiler and becomes worthy of law review commentary. For it is here that the center attempts to control the provinces, using the federal courts as the tool.

Defending centralized authority to the provinces is rarely an easy task, and Jenny's initial attempt meets with little success. After Peter Traub explains to her that there are no victimless crimes in the System, she responds:

> "I think I could get used to that idea, but I'm not sure how the authorities Earthside would regard it."
>
> . . .
>
> "Frankly," Peter said, . . . , "what business is it of theirs?"
> "It's best to have as uniform a legal system as possible."
> "Why?"

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without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." In the year 2020, during what Ms. Snodgrass calls, with some prescience, the "Kuwait Emergency," the U.S. Air Force occupied a privately owned Earth satellite "[i]n an effort to monitor Soviet/Saudi action both on the ground and in space." Such a decision might have required the Supreme Court to interpret the word "war" in the amendment and perhaps a narrow definition kept the "Kuwait Emergency" from being one, but we aren't given any details.

53. *Id.* at 34.

54. Oh, I don't know. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964).

55. *Circuit* has a short discussion of the Commerce Clause in the context of the arguments in United States v. U.S. Steel. Counsel for U.S. Steel, Mr. Furakawa, argues that the injunction should fail because it would be beyond the Commerce Clause power of the Congress to regulate such a transaction between a Russian collective and an American corporation. If correct, the Commerce Clause in 2050 will have a much narrower application than it does in 1993. The judge remarks in his decision that "this case does not fall within the traditional boundaries of the commerce power," but grants the injunction in any case.

To a lawyer, United States v. U.S. Steel does not look like a Commerce Clause case. No statute of Congress is being attacked; no Systemite rule is argued to be repugnant to the so-called "dormant Commerce Clause" which reserves the regulation of certain activities to Congress. Nevertheless, I do not criticize Ms. Snodgrass for her mention of the Commerce Clause for I know that her audience lies elsewhere than with lawyers, and that United States v. U.S. Steel rings true enough for that audience.

> Startled, Jenny [said], "Well, because, . . . , because . . . ." She stopped, realizing she didn't have a satisfactory answer.
> "Look Jennifer, most of the blue laws are on the books because a handful of people with rigid religious or moral beliefs want them there. And why they should be allowed to impose their attitudes on everyone else is beyond me. The other reason for blue laws is because the government finds them highly lucrative. Take a look at the drug laws."
> "I'd rather not. I know what you're going to say and, frankly, I haven't got a single argument that would successfully rebut it."[56]

Jenny's initial notion that uniformity should control at diversity's expense could have been defended, if she had tried. She might have countered Peter's "blue laws" example with her own examples of localized race discrimination or religious intolerance. She might have mentioned Governor Faubus's attempts to keep Little Rock's schools segregated,[57] or Texas's attempt to restrict Ms. Roe's abortion,[58] or Pawtucket, Rhode Island's attempt to construct a public display of religion,[59] or Richmond, Virginia's attempt to set aside certain contracts for minorities.[60] Different people feel differently about the outcomes of these cases, but together they suggest the legitimacy of Jenny's call for uniformity governed by the center: about certain matters, we would all agree, we *are* in this together, and the federal courts have a role to play in ensuring that.

But recall Peter's speech, given above, which begins "We are free from what I consider real vices, ..."[61] Peter and the other libertarians aboard Enersun I find themselves in political heaven, where nothing as unsavory as bigotry or intolerance exists. Of course, it is generally true that the majority of local folk find the problems that central authorities set out to solve as no problems at all.

Apropos of Indian law, the idea of the insertion by the dominant society of a legal system into the frontier in order to subjugate the frontier society is a new one in neither fact nor fiction. The twist in *Circuit* is the emphasis on the civil, rather than the criminal, side. The conversation between Jenny and Peter quoted immediately above might suggest that the colonists fear the imposition of a code making criminal some actions their libertarianism finds acceptable and protected.[62]

A comparison can be drawn to the real events of American expansion into Indian country and the ways in which Congress came to impose

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56. SNODGRASS, *supra* note 1, at 32-33. Peter's point about the drug laws is less clear to me than it is to Jenny, but it appears that the "just say 'no'" approach to drug abuse survives in *Circuit*'s future. This attitude is of a piece, I think, with Ms. Snodgrass's optimism about the future of racism and prostitution, and seems in tune with the Republican notion, caught best by the "just say 'no'" slogan, that the best solution to a problem is the simplistic one, and the one that requires the least attention and resources from the government.

57. *See* Cooper v. Aaron, 358 U.S. 1 (1958).

58. *See* Roe v. Wade, 410 U.S. 113 (1973).

59. *See* Lynch v. Donnelly, 465 U.S. 668 (1984).

60. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

61. SNODGRASS, *supra* note 1, at 32.

62. Like harassing waitresses? *See supra* note 47 and my short tirade against anti-correctness.

criminal sanctions on Indian behavior.[63] For example, compare *Ex Parte Crow Dog*[64] with *United States v. Kagama*.[65] In *Crow Dog*, the Supreme Court granted the habeas corpus petition of an Indian convicted in federal court of committing murder in Indian country. This was no federal crime, the Court said, unless Congress makes it one.[66] Congress quickly did so, enacting the Major Crimes Act, now codified at 18 U.S.C. § 1153. The Supreme Court upheld the validity of that act in *Kagama*, which is unsurprising, given the invitation in *Crow Dog*. Since that time the scope of the Major Crimes Act has been broadened and other statutes have been added,[67] so that most criminal activity by Indians on Indian reservations is regulated by the federal government and most prosecutions are in federal court. This, in turn, means that today's Indians will bear the enormous brunt of any federal death penalty, but they have little representation in the bodies that will enact that law. As with the American Indians, the Systemites might be understandably concerned about such dilution of their sovereignty and threat to their lives.

This is not the trail that Ms. Snodgrass follows; it is Earthside imposition of civil, not criminal, law that the Systemites find most threatening. But the American Indian analogy does not break down here; the Commerce Clause and the Just Compensation Clause, mentioned above, have been interpreted in Indian country much as the colonists fear for the System. The Indian Commerce Clause[68] has come to be pretty much a carte blanche for Congress to deal with the Indian tribes as it sees fit.[69] As Professor Newton has written, "Whatever Congress wants, Congress gets . . . ."[70] And the Just Compensation Clause does not protect aboriginal land from federal takings.[71]

But it is not something as elegant as constitutional law that scares the Systemites; it is the mundane matters of civil procedure: the major Earthside intrusion is the very establishment of the federal court itself, with its ability to resolve *private* disputes. The two cases upon which the plot turns are a suit for an injunction with the government as the plaintiff, and one for damages with the government as the defendant.

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63. *See generally* ROBERT N. CLINTON, NELL JESSUP NEWTON & MONROE EDWIN PRICE, AMERICAN INDIAN LAW 137-64 (3d ed. 1991) ("The Uneven History of Federal Indian Policy: Politics, Assimilation and Autonomy").

64. 109 U.S. 556 (1883).

65. 118 U.S. 375 (1886).

66. *Crow Dog*, 109 U.S. at 556.

67. *See, e.g.*, 18 U.S.C. §§ 13, 1152 (1988).

68. U.S. CONST. art. I, § 8, cl. 3.

69. *See, e.g.*, United States v. John, 437 U.S. 634 (1978). *See generally*, Robert A. Williams, Jr., *The Algebra of Federal Indian Law*, 1986 WISC. L. REV. 219; *see also* Robert Laurence, *Learning to Live with the Plenary Power of Congress Over the Indian Nations*, 30 ARIZ. L REV. 413 (1988).

70. Nell J. Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195, 285 (1984).

71. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). The Fifth Amendment, or something like it, does give some protection against the abrogation of Indian treaties. *See* United States v. Sioux Nation, 448 U.S. 371 (1980).

Still the Indian law analogy holds, for the question of the proper resolution of reservation disputes in the white man's courts is an active one.[72]

Professor Judith Resnik has explored these issues in great richness in her article *Dependent Sovereigns*.[73] As she notes:

> The task for federal courts' jurisprudence is to understand what might be meant by a claim of allegiance to more than one sovereign and what meaning, if any, inheres in the idea of states as "sovereigns." In an array of circumstances, federal courts' jurisprudence must question whether shared and concurrent jurisdiction remains viable and must explore whether to embrace or resist the pressure towards nationalization and homogenization. Are the states really coherent descriptions of viable political entities, or are they a fiction left over from an earlier era? Will and should the federal government tolerate sustained deviation from its norms? Are the forces of centralization and assimilation so great that the only laws that matter, ultimately, are national laws? Should the country strive to have a central government (with some measure of decentralization or delegation) or try to preserve some form of distinction between governments and encourage multiple sovereignties, multiple court systems, and multiple norms?[74]

In *Dependent Sovereigns*, Professor Resnik uses the existence of American Indian tribes to explore the answers to these questions, on the theory that it is with respect to these old, vulnerable governments that the dominant society's tolerance for difference is most tested. It is when Indian governments act and the federal courts react that we learn the most, in Professor Resnik's insightful view, about federalism and the role the federal courts play in it.

In 20th century America, these issues are raised by conflicting legal choices made by the dominant society and the much older tribal societies now within its boundaries. In *Circuit*, Ms. Snodgrass has created a future when the same questions are raised by the existence of a new Systemite society outside the borders of the center. The government aloft is physically an "outside" one; one, in fact which is so libertarian that it is hard

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72. For an analysis of federal court jurisdiction over reservation matters, see Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (no federal jurisdiction exists over claims under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-03); Hot Oil Serv., Inc. v. Hall, 366 F.2d 295 (9th Cir. 1966) (no federal diversity jurisdiction exists when Williams v. Lee, 358 U.S. 217 (1958), would prevent state court jurisdiction); Poitra v. DeMarrias, 502 F.2d 23 (8th Cir. 1974) (the opposite); Annis v. Dewey County Bank, 335 F. Supp. 133 (D.S.D. 1971) (enforcement of judgment by federal marshall on the reservation is permitted).

With respect to suits in state courts over reservation transactions, see *Williams*, 358 U.S. 217 (state court has no subject matter jurisdiction of a suit by a non-Indian plaintiff over a reservation debt owed by an Indian defendant); Joe v. Marcum, 621 F.2d 358 (10th Cir. 1980) (garnishment may not proceed in state court against a non-Indian, reservation employer of the Indian defendant); Three Affiliated Tribes v. Wold Eng'g (I), 467 U.S. 138 (1984); Three Affiliated Tribes v. Wold Eng'g (II), 476 U.S. 877 (1986) (together holding that state court has jurisdiction of a suit by a tribe as plaintiff against a non-Indian defendant over a reservation transaction).

73. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989).

74. *Id.* at 689-90.

even to call it a "government." In the System, it appears that only the individual is sovereign[75]—well, and the individual's private, voluntary organization called the "corporation." Nevertheless, for the purpose of establishing its independence from Earth, the System constitutes itself a "government," which comes into direct confrontation with the federal court over one aspect of governance, the resolution of private disputes.

But, in *Circuit* the conflicts are drawn so one-sidedly that Professor Resnik's questions become easy, which does them no justice. For reasons that are not entirely clear, except innate conservatism and the exercise of power for its own sake, the president and judge alike see the need to replace the private dispute resolution panels with federal courts. In fact, all the Earthsiders seem positively obsessed with the notion that the non-judicial dispute resolution scheme in existence in the System must go:

> Judge Huntington, to one of the private "judges": "I take it you were on the hearing board, too?"
> Artis, the prostitute: "Yes, ..."
> Huntington: "Well, I'm sorry I had to deprive you of your counseling, but it really was necessary to get a coherent legal system out here."[76]

Jenny at first equivocates,[77] but finally, with some disquiet, she decides, like the judge, that the hearing boards must go.[78] Later she defends that position:

> Peter: "You've disbanded our courts, and most of us believe that you threaten our institutions."
> Jenny: "But we represent institutions that have worked well for almost three hundred years. We bring you a level of continuity and precedent that your ad hoc hearing boards could never provide."[79]

Notice how, from the Indian law perspective that I am urging, the tables are neatly turned. In 20th century America it is the younger central government with its federal courts that is called on to instruct—and more—the older tribal governments on the correct way of governing. In *Circuit* it is the opposite: the newer government of the sky resists the stultifying influence of the dominant center on the ground. But either way, Professor Resnik's questions are relevant and difficult: "Will and should the federal government tolerate sustained deviation from its norms? Are the forces of centralization and assimilation so great that the only laws that matter, ultimately, are national laws?"[80]

Most of the characters in *Circuit* accept the notion that the mere existence of the federal court as an agency of the central government is

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75. *Compare* the preamble to the 1992 NATIONAL PLATFORM OF THE LIBERTARIAN PARTY (1991): "[W]e seek . . . a world in which all individuals are sovereign over their own lives . . . ."
76. SNODGRASS, *supra* note 1, at 69.
77. *Id.* at 28-29.
78. *Id.* at 30.
79. *Id.* at 33.
80. Resnik, *supra* note 73, at 690.

a dominating threat to local autonomy. Most of the characters, that is to say, find Professor Resnik's questions to be easily solved by the notions of local perfection and central depravity. In the sky, libertarian freedom rules. On the ground there is this: the President confides to the judge that the best cure for the colonists' restiveness is "an old-fashioned dose of big government."[81] Premier Tupolev explains his government's acquiescence in this scheme: "Why else did you introduce [Judge] Huntington into the System if not to reassert control? And why do you think our Ministry of Justice agreed to be bound by his decisions over major U.N. treaty problems? I know and understand your efforts and totally approve of them."[82] When the lines are drawn as clearly as in this near-Earth neighborhood, the answers to questions concerning the intrusion of federal courts on local sensibilities become trivially obvious.

It is no surprise that President C. de Baca's theory of the oppressive power of big government and federal courts proves to be correct in *Circuit*. The 15th circuit gains a place in System society and the federal court is used by private litigants. True, both the court and its judge come to stand as protectors against Washington; Huntington enters a money judgment against the federal government in the second law suit without a single sovereign immunity concern.[83] But all this is only because the President failed to name a judge loyal enough to old-style Federalist ways. Huntington is no John Marshall and, once freed of the corrupting influence of gravity, he becomes Jeffersonian faster than you can say "*Marbury v. Madison.*" Assuming he survives his impeachment by the Senate, Huntington looks to be every bit as much a thorn in C. de Baca's side as Marshall was in Jackson's. Nevertheless the federal court, in theory, retains the potential for domination and, had the President been more careful selecting the judge and his term,[84] the colonists might have been made to toe the Earthside line. In this regard, then, *Circuit* seems very much a book of the late 20th century. The lessons it tries to teach, that centralized government, social democracy, and federal court limitation of local power are equally the enemies of individual liberty, are very palatable lessons indeed to many Americans these days. For those out of step with these beliefs, *Circuit*, if nothing else, shows just how self-evident they appear to their adherents.

As is so often the case, and as Professor Resnik has so artfully made plain, it is from the Indian law perspective that things begin to look non-self-evident. If one, reading *Circuit*, likens the System to the state of, say, Arkansas in the 1950's, then the fear of the establishment of a federal court seems real only from a position of extreme conservatism.

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81. SNODGRASS, *supra* note 1, at 11.
82. *Id.* at 54.
83. *Id.* at 227.
84. Since the System is not a state, *see id.* at 19, the Constitution (at least the Constitution as we know it in 1994) would permit non-Article III federal judges with less than life tenure. *See* American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511 (1828) (upholding the legitimacy of a four-year term for a federal judge in the Florida territory).

With the evil ways of President C. de Baca so overdrawn, the federal court looks inherently threatening, but we in this state know otherwise. We, of course, have seen the federal courts use their substantial powers to escort young black children into Little Rock Central High,[85] and it is only the most die-hard states-righters or conservative revisionists who think that the federal courts did not ultimately advance the interests of justice and humanity in that case.

But if the System reminds one of, say, the Jicarilla Apache Tribe, with the white federal judge seeking to impose outsider norms on the weaker, but older, sovereign as it goes about the business of governing itself, then the Systemites' fears seem better founded.

All of this is my quite cursory application to *Circuit* of Professor Resnik's analysis in the article cited above.[86] Ms. Snodgrass, I suspect, finds this all quite an amusing exercise; to paraphrase, "We ain't eradicatin' world hunger here. It's just a science fiction story." My only point is this one, made above: *Circuit*'s audience lies, generally, among non-lawyers, and it does not serve them—and ultimately us—well, to give the impression that the Resnik analysis of federal court jurisprudence is either easy to apply or that its conclusions are obvious or that its use is irrelevant to the readers of science fiction, or commemorators on the quincentennary and American Indian law.

Take, for instance, the well-known case of *Martinez v. Santa Clara Pueblo*,[87] the most interesting case ever litigated in English.[88] There the federal court was made to ponder whether the tribe's sex-discriminatory membership regulation should survive inspection under the congressionally-mandated Indian Civil Rights Act (ICRA).[89] The federal district court in New Mexico took jurisdiction and found for the tribe, even while acknowledging that such discrimination would not be tolerated if done by a state or federal government. However, the tribe being the older sovereign, the court felt itself not constrained to make the tribe toe the Anglo-American line, and gave judgment for the defendant. The Tenth Circuit Court of Appeals in Denver agreed that federal court jurisdiction existed, but reversed and held for the individual plaintiffs. The tribe, the Tenth Circuit thought, was not following old and traditional ways in its discrimination against Julia Martinez and her family, but was rather departing from those ways illegally, under the Indian Civil Rights Act. The Supreme Court reversed both courts on jurisdictional grounds and held that the ICRA created no federal civil cause of action.

From *Circuit*'s too-unclouded perspective, the Supreme Court was right: the federal trial judge was seriously interfering with local autonomy, just

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85. Cooper v. Aaron, 358 U.S. 1 (1958).

86. Resnik, *supra* note 73.

87. 402 F. Supp. 5 (D.N.M.), *reversed*, 540 F.2d 1039 (10th Cir. 1975), *reversed*, 436 U.S. 49 (1978).

88. *See* Robert Laurence, *A Quincentennial Essay on Martinez v. Santa Clara Pueblo*, 28 IDAHO L. REV. 307 (1992).

89. 25 U.S.C. §§ 1301-1303 (1988 & Supp. IV 1993).

by inspecting the tribe's practice. His *ability* to enjoin the membership rule as violative of dominant-society norms contained in the ICRA destroyed local self-determination, even if he, in fact, magnanimously agreed to permit the practice in this instance. The Tenth Circuit's fist is always inside the District Court's velvet glove, ready to crush, in the proper case, local insistence on being different from central edict.

Professor Resnik recognizes that in any federal republic a conflict between the center and the provinces will inherently endure, and federalists will have to struggle with the issue of when, and in what circumstances, the center will exercise the power that exists to bring the provinces into line with the majority. The novel, of course, makes the issue easy, for there is nothing at all benign about the Earthsiders' motives; C. de Baca aims at subjugation for subjugation's sake. It's as if, in *Martinez*, the suit were seeking, not the elimination of sex discrimination, but the destruction of the Santa Clara Pueblo's traditional religion.

Some Indian law commentators would say that such destruction *exactly* is what the Indian Civil Rights Act is all about: Professor Robert A. Williams, Jr. calls it "a highly efficient process of legal auto-genocide."[90] Professor Milnar Ball speaks of "judicial George Custers to the rescue": federal judges and their friends bringing the Bill of Rights—or something like it—to the reservation.[91] It is federal Indian law dogma that the Constitution itself does not bind the activities of Indian tribes,[92] but the ICRA is the statutory response to this state of affairs. The statute does not replicate the Bill of Rights in its entirety; it contains no Establishment Clause, for instance, nor any guarantee of free legal representation in criminal cases. Nor does the ICRA contain a 19th amendment analog. Nevertheless, the federal courts enforcing the ICRA represent just the kind of centralized subjugation of the provinces that the Systemites fear in *Circuit*. Again, the tables are nicely turned: the "judicial George Custers," armed with the ICRA, invade Indian country with exactly those individualized freedoms that the Systemites are fighting to protect from destruction at the hands of the communitarian Earthlings. But either way, the Resnik analysis remains the same and the existence of federal courts requires us to decide if and when the center controls. Again it can be seen that the most interesting Indian law analogy in *Circuit* is the one that is never mentioned.

Professor Resnik and others find the *Martinez* case "difficult,"[93] and here, then, is the jurisprudentially significant part of my classmate's work in *Circuit*. The heavy-handed attempt by the federal authorities to get

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90. Robert A. Williams, Jr., *The Algebra of Federal Indian Law*, 1986 WIS. L. REV. 219, 274; *see also* Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989).

91. Professor Ball's speech is quoted in Mary Ann Dadisman, *Native Americans Find Bill of Rights Not for Everyone*, BARRISTER MAGAZINE, Fall 1991, at 36.

92. Talton v. Mayes, 163 U.S. 376 (1896).

93. *See, e.g.*, Resnik, *supra* note 73; CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND THE LAW 65-66 (1987).

the Systemites to stop resolving their disputes so alternatively looks at first glance to be almost melodrama, 200 miles high. But, with a mind prepared by the *Martinez* case to see the inherent clash between the dominant society and those who identify themselves as "outsiders,"[94] and prepared by Professor Resnik to appreciate how that clash is often played out in federal court jurisprudence, one can see in *Circuit* an idea worth reading about.

In a crystalline universe, the role for the federal courts in the control of "difference" seems entirely benign in *Cooper v. Aaron*, and entirely malignant in *Circuit*. *Martinez* is the case that makes the analysis non-obvious and important. Sadly, but not really surprisingly, in *Circuit* the grand quandary of *Martinez* is buried under a lot of foolishness about libertarianism and litigation.[95]

All of this brings me back to Ragsdale and Walden, mentioned in Ms. Snodgrass's acknowledgment and by me early on, for the issues raised by *Circuit* and by this article would, I guess, have captured the attention of those two. I can imagine them in the forum at U.N.M.'s law school, this academic odd couple, these two historians with such different views of history, these two teachers with such different classroom manners. Walden with his white sleeves rolled up, his plain tie loose, eating an Eskimo Pie. Ragsdale in a three piece suit, hair gone awry, chainsmoking and pacing. They both knew history, so the talk might begin with the Norman Conquest and the *Doomsday Book*,[96] or the *Spanish Requirement*[97] and the subjugation of the Indians. From there—

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94. On the problems presented by self-identification of the "outsiders," P.S. Deloria & Robert Laurence, *What's an Indian? A Conversation about Law School Admissions, Indian Tribal Sovereignty and Affirmative Action*, 44 ARK. L. REV. 1107 (1991).

95. With all this talk of libertarianism, we should pause to note the 20th century Libertarian Party's position on Indian law:

> We favor the following remedies, respectively: (1) individual Indians should be free to select their citizenship, if any, and tribes should be allowed to choose their level of autonomy, up to absolute sovereignty; (2) Indians should have their just property rights restored, including rights of easement, access, hunting and fishing; (3) the Bureau of Indian Affairs should be abolished and tribal members allowed to decide the extent and nature of their government, if any; and (4) negotiations should be undertaken to exchange otherwise unclaimed and unowned federal properties for any and all remaining governmental obligations to the tribes.
>
> We further advocate holding fully liable those responsible for any and all damages which have resulted from authorization of, or engagement in, resource development on reservation lands, including damages done by careless disposal of uranium tailings and other mineral wastes.

1992 National Platform of the Libertarian Party (1991) at 10. Most interesting of these positions is the right of tribes to assert "absolute sovereignty" and, apparently, to secede, a right shared by the states. *See id.* at 22.

96. The *Domesday*, or *Doomsday Book* was William the Conqueror's survey of most of the lands in England and aided greatly in the subjugation of the conquered land to Norman feudalism. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *49, *99; 3 WILLIAM BLACKSTONE, COMMENTARIES *331. Professor Williams has written on the relationship between the Norman Conquest and American Indian law in Robert A. Williams, Jr., *Jefferson, the Norman Yoke, and American Indian Lands*, 29 ARIZ. L. REV. 165 (1987).

97. The *Requirement* was a document that Spanish explorers were required to read when they came across natives in the New World. It is translated in all of its ethnocentric glory in WILCOMB E. WASHBURN, THE INDIAN AND THE WHITE MAN 306 (1964).

who knows?—except far-ranging, for sure. No matter the direction, what a converstion that would have been to eavesdrop upon!

Alas, it is never to be; Walden is fifteen years dead. But a final historical point is made in his stead by Professor Richard Collins of the University of Colorado. He has observed that: "[Indian t]reaties after [1814] . . . reflected the general assumption that the United States had the power to impose any terms it wished. . . . [T]reaty terms were only as fair as the Government's benevolence decided to make them."[98] The need for this benevolence grates, but appreciating its role is necessary to an understanding of American Indian law today, long after treaty-making has stopped. Even in ultimately deciding the *Martinez* case for the tribe, the Supreme Court showed itself ready to uphold both the legitimacy of the ICRA as a congressional enactment and its civil application to tribes.[99] The holding of the case was that the Congress had not intended to exercise its power so clearly as the Martinez family sought, but the case seems premised on the understanding that, if Congress wanted to forbid tribal sex discrimination, the Court would permit it to do so. Benevolence toward tribal sovereignty is seen twice, then: once in the Court's unwillingness to read the ICRA broadly to attack the tribe's right to make its own laws, and again in Congress's failure, more than a decade later, to change that result. But, as Professor Collins might put it, the ICRA defers to tribal ways only as far as the Government's benevolence decided to defer.

In *Circuit* there is no benevolence at all from the center. And, it is the distrust of the real, 20th century government's ultimate benevolence that drives some Indian law scholars to seek international protection of tribal sovereignty.[100] In the end *everything* comes back to Indian law, *Martinez* and the quincentennary. The presence of the federal courts in our federal system engages a non-trivial issue, bringing into question both the dominant society's tolerance for diversity and its desire that, to some extent, we should all be in this enterprise together. *Circuit*'s structure causes these issues to seem easy and there is more dogma in the book than wonder. But it's there for the reader who sees it, perhaps the most important question for the United States in the next century: how much diversity will we tolerate when we have the power to make there be none?

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98. Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365, 375-76 (1989).

99. *Martinez*, 436 U.S. at 65.

100. *See, e.g.*, Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L. J. 660.