BACK TO THE FUTURE: NATIVE AMERICAN SOVEREIGNTY IN THE 21ST CENTURY*

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This article is dedicated to the memory of my brother, Christopher Michael McSloy, B.A., 1988, Johns Hopkins University; J.D., 1991, Fordham Law School, who heard this speech and in a sense inspired it, as he always said that "the only battles worth fighting may be the losing ones."

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INTRODUCTION

Over one hundred years ago, Austin Abbott, a prominent New York lawyer, wrote that "[t]he American student could select few single subjects the survey of which would bring under view a greater variety of important general principles . . . than the law relating to Indians."[1] Abbott's statement remains true, for no area of American law is more distinct, anomalous, or confused than that relating to Native Americans.[2] The Supreme Court each year decides a disproportionate number of cases relating to Native American sovereignty, land, water, taxes, jurisdiction, regulation, religion, and a host of other issues,[3] and in so doing, it weaves, along with Congress and numerous federal agencies, a "patchwork quilt"[4] of case law, statutes, and regulations resembling more a "checkerboard"[5] than a "seamless web." The reasons for this are many, including the United States' historically vacillating policies toward Indians,[6] the "closing" of the "frontier,"[7] and the impact of the New Deal[8] and the Civil Rights Movement,[9] but the fundamental reason for the chaos that is

1. Austin Abbott, *Indians and the Law*, 2 HARV. L. REV. 167, 167 (1888).

There is no appropriate collective noun or phrase for the indigenous people of North America. While one point of this Article is that Native peoples should not be treated collectively in either a legal or semantic sense, it is true that both Western culture and American law do not generally distinguish among individual Indian nations. *Indian* is the notorious Columbian misappellation, though widely accepted by indigenous as well as nonindigenous people. *Native* and *Native American* are not completely acceptable substitutes. *Native* retains pejorative connotations, and *Native American* falsely connotes the assimilative implications of similar phrases like *Irish-American*. This Article will use *Indian*, as well as *Native* and *indigenous*, interchangeably, purely for stylistic purposes. More substantively, the terms *nation* and *people* will be used deliberately in their international law sense and not merely as stylistic substitutes for the Eurocentric and primitivizing *tribe*, although this usage is not broadly accepted by non-Indians.

2. *See* Nathan R. Margold, *Introduction* to FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW at xxi, xxviii (1942) ("[I]f the laws governing Indian affairs are viewed . . . without reference to the varying times in which particular provisions were enacted, the body of the law thus viewed is a mystifying collection of inconsistencies and anachronisms.").

3. *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 2 (1987) ("[T]he Court has become more active in Indian law than in fields such as securities, bankruptcy, pollution control, and international law.").

4. Rennard Strickland, *The Absurd Ballet of American Indian Policy or American Indian Struggling with Ape on Tropical Landscape: An Afterword*, 31 ME. L. REV. 213, 220 (1979).

5. "Checkerboard" is the term often used to describe the variegated legal status of lands within Indian reservations which were opened to white settlement by the 1887 Indian General Allotment Act, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 382 (1988 & Supp. IV 1992)).

6. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 47-206 (rev. ed. 1982) (noting six different eras in Indian law); ROBERT N. CLINTON, NELL J. NEWTON & MONROE E. PRICE, AMERICAN INDIAN LAW 137-65 (3d ed. 1991) (listing nine eras).

7. *See* Frederick J. Turner, *The Significance of the Frontier in American History*, *in* THE FRONTIER IN AMERICAN HISTORY 1 (Univ. of Ariz. Press 1986) (1893). The closing of the frontier for America is coincident with the beginning of the "assimilation era" for Indians. *See* COHEN, *supra* note 6, at 127-43; *see also infra* text accompanying notes 220-25.

8. The New Deal found its Indian parallel in the Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified at 25 U.S.C. §§ 461-79 (1988 & Supp. IV 1992)), often referred to as the "Indian New Deal." *See* discussion *infra* text accompanying notes 226-31.

9. The passage of the Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 77

American Indian Law is that the law has been made to serve ends incompatible with its original founding principle.

That principle, recognized by the Supreme Court under Chief Justice John Marshall,[10] codified in international law,[11] implicit in the Constitution,[12] and borne out by over three and a half centuries of colonial and early American history,[13] is that Native American peoples are independent, sovereign nations with international legal status.[14] The logical consequence of this principle, however, is that nearly every law made by Congress and nearly every case decided by the Supreme Court over the last two centuries seeking to impose or sanctioning the imposition of power over Native Americans is invalid because it conflicts with the inherent and recognized sovereignty of Native nations.[15]

Despite the enduring and deleterious effects of laws and decisions allowing the exercise of power over Native peoples, Congress, the executive branch, and the Supreme Court have each repeatedly affirmed their respect for

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(codified as amended at 25 U.S.C. §§ 1301-41 (1988 & Supp. IV 1992)), was a product of the Civil Rights Movement, even though it may have been merely a cynical attempt by Southern members of Congress to direct attention away from Southern treatment of African-Americans.

10. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823). *See also* discussion *infra* parts I.B-C.

11. *See generally* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT (1990); S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective*, *in* 1989 HARVARD INDIAN LAW SYMPOSIUM: PAPERS PUBLISHED IN CONJUNCTION WITH A CONFERENCE 191 (1990); Rachel S. Kronowitz, Joanne Lichtman, Steven Paul McSloy & Matthew G. Olsen, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 513-22 (1987); *see also* discussion *infra* parts I.A-C.

12. *See generally* Curtis G. Berkey, *United States-Indian Relations: The Constitutional Basis*, *in* EXILED IN THE LAND OF THE FREE 190 (Oren R. Lyons & John C. Mohawk eds., 1992); Mark Savage, *Native Americans and the Constitution: The Original Misunderstanding*, 16 AM. INDIAN L. REV. 57 (1991). Indians are mentioned only twice in the United States Constitution, once in excluding "Indians not taxed" from census enumeration, art. I, § 2 (reiterated in the Fourteenth Amendment), and once with respect to placing commerce with "Indian tribes" within federal, as opposed to state, purview. Art. I, § 3, cl. 3; *see also infra* part I.C.

13. *See* COHEN, *supra* note 6, at 47-98 (describing early treaties and legislation); FRANCIS P. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 142-43 (1962); ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 1-149 (1970); STEPHEN CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE 11-50 (1988); Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 511-14; *see also infra* parts I.A-C.

14. *See* Nell J. Newton, *Federal Power over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195, 200 (1984) ("The absence of a general power over Indian affairs in the Constitution is not surprising . . . [since] the framers regarded Indian tribes as sovereign nations."); *see also* Worcester v. Georgia, 31 U.S. (5 Pet.) 515, 559-60 (1832) (quoted *infra* text accompanying note 533); Howard R. Berman, *Perspectives on American Indian Sovereignty and International Law: 1600 to 1776*, *in* EXILED IN THE LAND OF THE FREE, *supra* note 12, at 125; CORNELL, *supra* note 13, at 46-47; COHEN, *supra* note 6, at 55.

15. The statutes are collected generally under Title 25 of the U.S. Code. For bibliographies of the Supreme Court's Indian cases, see H. BARRY HOLT & GARY FORRESTER, DIGEST OF AMERICAN INDIAN LAW: CASES AND CHRONOLOGY 21-116 (1990); WILKINSON, *supra* note 3, at 123-32.

the principle of Indian sovereignty and have been consistently unwilling to overtly repudiate the basic aspects of the international status of Indian nations.[16] This fundamental contradiction in United States law, coupled with the long-standing resistance of Native nations to the imposition of power over them, leave us with the chaotic juxtaposition of sovereignty and subjugation we now have.

The contrast between the ancient and recognized sovereignty of Native Americans and the contemporary breadth of the federal imposition of power over them is striking. For the greater part of American history, Native nations were treated by the United States as separate nations with whom treaties must be made.[17] Today, Indian peoples are subject to a broad "plenary power,"[18] pursuant to which their sovereignty exists "only at the sufferance of Congress and is subject to complete defeasance"[19] and their lands are held subject to the " 'paramount power' "[20] of Congress. Congress may even decide whether an Indian nation exists and, if so, who its members are.[21]

In comparing the respect of the past with the power of the present, the first consideration must be the United States' long history of treaty-making with Indian nations. Obviously, a nation does not make a treaty with its own

16. *See, e.g.,* Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 450a (1988 & Supp. IV 1992)) ("Congress hereby recognizes the obligation . . . to respond to the strong expression of the Indian people for self-determination . . . ."); President Reagan's Statement on Indian Policy, 1 RONALD REAGAN, PUB. PAPERS 96, 96 (Jan. 24, 1983) ("[United States] policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes."); President Bush's Proclamation 6407—Year of the American Indian, 28 WEEKLY COMP. PRES. DOC. 384, 385 (Mar. 2, 1992) ("This year [of the American Indian] gives us the opportunity . . . to affirm the right of Indian tribes to exist as sovereign entities . . . . [We express] our support for tribal self-determination . . . ."); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987) ("[The Supreme Court has] repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government.").

17. PRUCHA, *supra* note 13, at 142 ("Treating with the Indians . . . gave foundation and strength to the doctrine that the Indian tribes were independent nations with their own rights and sovereignty . . . ."). By 1871, the putative end of treaty-making, Appropriations Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (1988)), the number of treaties had reached 666. *See* Marks v. United States, 161 U.S. 297, 302 (1896). Other estimates reach 800. *See* Curtis G. Berkey, *International Law and Domestic Courts*, 5 HARV. HUM. RTS. J. 65, 66 n.4 (1992). The treaties are generally collected in Volume 7 of U.S. Statutes at Large.

18. *See* National Farmers Union Ins. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985) ("[T]he power of the Federal Government over the Indian tribes is plenary."); *see also* COHEN, *supra* note 6, at 89; Newton, *supra* note 14, at 199-236. In defining the term *plenary power* in the context of the Interstate Commerce Clause, Chief Justice Marshall stated that a "plenary" power was one that "may be exercised to its utmost extent, and acknowledges no limitations." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).

19. United States v. Wheeler, 435 U.S. 313, 323 (1978); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.").

20. United States v. Sioux Nation, 448 U.S. 371, 408 (1980) (quoting Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903)).

21. *See* United States v. Sandoval, 231 U.S. 28, 46-47 (1913); Cherokee Nation v. Hitchcock, 187 U.S. 294, 306-08 (1902).

citizens, nor with those it considers subjects.[22] A treaty is an international agreement between independent sovereign political entities.[23] The first treaty between the United States and an Indian nation, the 1778 treaty with the Delaware Nation, not only predated the Constitution but was styled "Articles of Agreement and Confederation," the same form of compact the states had adopted to cement their own alliance.[24] The United States-Delaware Nation treaty, as with a number of treaties with other Indian nations,[25] proposed that the Delawares send a delegation to become members of the Continental Congress.[26]

The long-standing refusal of the United States to consider Indians as citizens or even residents of the United States provides further evidence that Native Americans constituted separate nations distinct from the American polity. The Constitution, by expressly excluding "Indians not taxed" from census enumeration,[27] intended that they not be counted as part of "the People of the United States."[28] African-Americans, of course, were infamously counted at a three-fifths ratio.[29] Following the Civil War, the Fourteenth Amendment struck the three-fifth clause but retained the "Indians not taxed" language, affirming the policy of Indian exclusion.[30] Indian noncitizenship, accepted as

22. Wiggan v. Conolly, 163 U.S. 56, 60 (1896) (treaty with Indians would have been invalid if the Indians had been citizens).

23. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979) ("A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign Nations."). *See generally* OPPENHEIM'S INTERNATIONAL LAW § 11 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

24. Articles of Agreement and Confederation, Sept. 17, 1778, U.S.-Delaware Nation, 7 Stat. 13.

25. *See, e.g.*, Treaty with the Cherokees at Hopewell, Nov. 28, 1785, U.S.-Cherokee Nation, art. XII, 7 Stat. 18, 20.

26. Articles of Agreement and Confederation, *supra* note 24, art. VI, 7 Stat. 13, 14. *See generally* Annie H. Abel, *Proposals for an Indian State 1778-1878*, *in* ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1907, at 89, 94-102 (1908), *quoted in* CLINTON, NEWTON & PRICE, *supra* note 6, at 31-32. The existence of the Continental Congress had in fact been inspired in part by the confederated governments of the Iroquois nations. *See, e.g.*, letter from Benjamin Franklin to James Parker (Mar. 20, 1751), *quoted in* BRUCE E. JOHANSEN, FORGOTTEN FOUNDERS 66 (1982):

> It would be a very strange thing if Six Nations of Ignorant Savages should be capable of forming a Scheme for such an Union and be able to execute it in such a manner, as that it has subsisted Ages, and appears indissoluble, and yet a like union should be impracticable for ten or a dozen English colonies.

The question of Iroquois influence upon the Constitution has engendered a much larger debate. *See* Gregory Schaaf, *From the Great Law of Peace to the Constitution of the United States: A Revision of America's Democratic Roots*, 14 AM. INDIAN L. REV. 323 (1989); Eric M. Jensen, *The Imaginary Connection between the Great Law of Peace and the United States' Constitution: A Reply to Professor Schaaf*, 15 AM. INDIAN L. REV. 295 (1990). While historically the case has probably been overstated, in 1987 Congress passed a resolution recognizing the Iroquois contributions to American democracy. S. Con. Res. 76, 100th Cong., 1st Sess., 133 CONG. REC. 12,214 (1987) (enacted).

27. U.S. CONST. art. I, § 2.

28. U.S. CONST. pmbl.

29. U.S. CONST. art. I, § 2.

30. U.S. CONST. amend. XIV, § 2. The converse notion that some Indians might assimi-

a corollary to separate Indian sovereignty, presented neither a question nor a problem for the federal government until World War I, when the question was raised as to whether the United States could draft Indians.[31] The Iroquois Confederacy dealt with the issue in a manner consistent with their sovereign status by declaring a state of war between the Iroquois and Germany, and then deputizing their people to serve in the United States Army as allies.[32]

The United States' respect for separate Indian sovereignty is also reflected in the Supreme Court's long-standing position that the Bill of Rights does not apply to Native nations in governing their people.[33] This remained true even after the basic provisions of the Bill of Rights were "incorporated" into the Fourteenth Amendment and made applicable to the states.[34] Indian nations, therefore, need not separate church and state in their governments,[35] may

late, make themselves subject to taxation, and thus attain membership in white society was rejected by the Supreme Court in Elk v. Wilkins, 112 U.S. 94 (1884), decided after the ratification of the Fourteenth Amendment. The Court proclaimed a per se rule that "Indians were not part of the people of the United States." *Id.* at 99; *see also* Steven Paul McSloy, *American Indians and the Constitution: An Argument for Nationhood*, 14 AM. INDIAN L. REV. 139, 150 (1990).

31. *See* VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE 17-18 (1974).

32. *Id.* As Iroquois people note today, they won the war. Due in part to meritorious service by Native Americans in the armed forces, Congress in 1924 declared Indians to be citizens by birth. Act of June 22, 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (1988)). Veterans had been granted citizenship upon request in 1919. Act of Nov. 6, 1919, ch. 95, 41 Stat. 350; *see also* COHEN, *supra* note 6, at 640 n.7. Questions of Congress's power to impose this act, and whether Indian consent to citizenship is required, have never been resolved. *See* McSloy, *supra* note 30, at 184-87; Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989). Since passage of the act, conscription of Indians has been upheld. *See Ex parte* Green, 123 F.2d 862 (2d Cir. 1941), *cert. denied*, 316 U.S. 668 (1942).

33. *See* Talton v. Mayes, 163 U.S. 376 (1896); *see also* Native Am. Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959). The same is true of the Court's interpretation of the Reconstruction Amendments, with the only exception being the Thirteenth Amendment forbidding slavery. *See* United States v. Choctaw Nation, 38 Ct. Cl. 558 (1903), *aff'd*, 193 U.S. 115 (1904); *see also In re* Sah Quah, 31 F. 327 (D. Alaska 1886). This exception is due to the language of the amendment, which states that "[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction," mandating that slavery not be suffered in any form. U.S. CONST. amend. XIII. The other amendments speak of congressional or state action. It is arguable, however, whether Indian nations are properly considered to be "within the United States, or . . . subject to their jurisdiction" under the Thirteenth Amendment because Elk v. Wilkins, 112 U.S. 94 (1884), held that this was not the case for purposes of the Fourteenth Amendment.

34. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-2, at 772-74 (2d ed. 1988). The substance of the Bill of Rights was *statutorily* made applicable to Indian tribes in 1968 by the Indian Civil Rights Act, Pub. L. No. 90-284, 82 Stat. 77 (1968) (codified as amended at 25 U.S.C. § 1302 (1988)). Without this statutory enactment, the constitutional provisions of the Bill of Rights do not apply to Indian nations. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). A similar situation exists with respect to the statutory grant of Indian citizenship because *Wilkins*, 112 U.S. at 102-03, held that the Fourteenth Amendment did not make Indians citizens within the meaning of the Constitution. Congress's statutory grants of citizenship and civil rights, therefore, are potentially subject to repeal. *See* COHEN, *supra* note 6, at 645.

35. *Compare* 25 U.S.C. § 1302(1) (1988) *with* U.S. CONST. amend. I (the difference is the

allow procedures in criminal prosecutions that would be invalid as a deprivation of due process in a state proceeding,[36] they may discriminate by gender or ancestry in determining tribal membership and other rights,[37] and they are not subject to the double jeopardy prohibition in trying defendants previously tried by federal or state courts.[38] In general, Indian nations may act as sovereign governments unfettered by the restrictions on state action found in the Bill of Rights.

Consistent with their inherent sovereignty, Native nations have a long and continuing history of self-government, including powers incident to civil and criminal jurisdiction, sovereign immunity, law enforcement and public safety, regulation of trade, taxation, land, the environment, marriage, membership, and all other civil and governmental matters.[39] For the greater part of American history, the United States has not sought to interfere with the internal affairs of Native governments, but instead has respected their sovereignty and jurisdiction.[40]

This vision of the separate, sovereign status of Native nations no longer describes the place of Indian peoples in American law. In derogation of their long-recognized powers of inherent sovereignty, Native Americans are today subject to the unlimited legislative authority of Congress to pass any law it pleases, including those which restrict or eliminate the powers of Native governments. Due to the "plenary" nature of this power[41] and the Supreme Court's concomitant judicial deference,[42] the Court has rarely if ever limited the power of Congress since its first attempts to exert legislative power over Native people in the late nineteenth century.[43] The federal government is also

absence of the Establishment Clause, as many Indian nations have theocratic or spiritualist governments).

36. *See, e.g.*, Talton v. Mayes, 163 U.S. 376 (1896) (Bill of Rights inapplicable to Cherokee Nation criminal justice system); Indian Civil Rights Act, 25 U.S.C. § 1302(6) (1988) (defendant has a right to counsel "at his own expense"); *cf.* Gideon v. Wainwright, 372 U.S. 335 (1963) (appointment of counsel is a fundamental right).

37. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (upholding tribal ordinance which provided that children of women who married outside of the tribe were not members of tribe but children of men who did so were members).

38. *See* United States v. Wheeler, 435 U.S. 313, 330-31 (1978). In *Wheeler* the defendant had first been tried for a lesser included offense by the Indian nation and then sought to dismiss his indictment by the federal court on double jeopardy grounds, but the Court's holding would be applicable in the reverse case as well.

39. *See* COHEN, *supra* note 6, at 229-38; Berkey, *supra* note 17, at 67 (collecting cases discussing these powers).

40. *See, e.g.*, *Martinez*, 436 U.S. 49; *Talton*, 163 U.S. 376; *Ex parte* Crow Dog, 109 U.S. 556 (1883); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

41. *See supra* notes 18-21 and accompanying text.

42. Until recently, cases involving Indian-related legislation were deemed nonjusticiable "political questions." *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281 (1955); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903). The political question doctrine was ultimately held inapplicable to Indian affairs in Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977).

43. Milner S. Ball, *Constitution, Court, Indian Tribes*, AM. B. FOUND. RES. J. 3, 57 (1987) ("The Court has never limited Congress's will with the tribes."); *see also* Newton, *supra* note 14,

said to hold " 'paramount power' "[44] over Indian lands. It broadly regulates, administers, and in almost all cases holds title to Indian land, purportedly because Indian lands are held "in trust" by the United States.[45] Federal restrictions prohibit the alienation of Indian land without the consent of the federal government.[46] Similar laws bar Indian nations from executing contractual agreements without prior federal approval.[47] The 1934 Indian Reorganization Act[48] imposed federal control over the structure of Native governments,[49] and the 1968 Indian Civil Rights Act[50] imposed federal control over their procedures.[51] As a result of these statutory impositions, and Supreme Court decisions similarly limiting Indian governmental authority,[52] the inherent powers of Native nations have been steadily and gradually reduced.

Yet despite this erosion and the broad sweep of plenary power, all three branches of the federal government continue to proclaim their respect for the

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at 195. A minor exception was Hodel v. Irving, 481 U.S. 704 (1987), which regarded certain statutory escheat provisions for Indian lands as a taking and therefore invalid.

44. United States v. Sioux Nation, 448 U.S. 371, 408 (1980) (quoting *Lone Wolf*, 187 U.S. at 565).

45. *See generally* COHEN, *supra* note 6, at 220-28; Reid P. Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975); Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 547-51.

46. An Act to Regulate Trade and Intercourse with the Indian Tribes (Trade and Intercourse Act), ch. 33, 1 Stat. 137 (1790) (codified at 25 U.S.C. § 177 (1988)); *see also* 25 U.S.C. § 415 (1988 & Supp. IV 1992) (restricting leasing of Indian lands).

47. 25 U.S.C. § 81 (1988); *see also* 25 U.S.C. § 84 (1988) (restricting assignment of contracts).

48. 25 U.S.C. §§ 461-79 (1988 & Supp. IV 1992); *see also infra* text accompanying notes 226-31.

49. *See* Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972); Russel Barsh, *Another Look at Reorganization: When Will Tribes Have a Choice?*, INDIAN TRUTH (Indian Rights Ass'n), Oct. 1982, at 4-5, 10-12 (1982), *reprinted in* CLINTON, NEWTON & PRICE, *supra* note 6, at 362-66; COHEN, *supra* note 6, at 144-52, 247-48.

50. Pub. L. No. 90-284, 82 Stat. 77 (1968) (codified as amended at 25 U.S.C. §§ 1301-41 (1988 & Supp. IV 1992)).

51. The statutory imposition by the Indian Civil Rights Act (ICRA) of provisions approximating those of the Bill of Rights is, to many Native people, an imposition of alien procedures upon their traditional governments. Some restraint on ICRA's interference is provided, however, by limiting judicial review in United States courts to *habeas corpus* cases. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). The lack of non-Indian-administered remedies for some of the statutorily granted rights is a recognition of the sovereign right of Native nations to administer justice. Efforts have been made, however, to give federal courts jurisdiction over all ICRA cases. *See, e.g.*, S. 517, 101st Cong., 1st Sess. (1989), *discussed in* CLINTON, NEWTON & PRICE, *supra* note 6, at 424-27.

52. *See, e.g.*, Duro v. Reina, 495 U.S. 676 (1990) (Indian nation lacks inherent criminal jurisdiction over nonmember Indians), *rev'd statutorily*, Defense Appropriations Act for Fiscal Year 1991, Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892-93 (1990); Brendale v. Confederated Tribes of the Yakima Indian Nation, 492 U.S. 408 (1989) (Indian nation lacks power to regulate land use over portion of reservation "open" to white settlement); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (Indian nation held to lack inherent criminal jurisdiction over non-Indians). *See generally* Berkey, *supra* note 17, at 67-75; Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 561-83; *see also* discussion *infra* part II.D.

basic principle of Indian sovereignty.[53] This Article contends that the inherent, ancient, and unchanged sovereignty of Native nations must be fully recognized, endorsed, and respected. This is not only because such recognition is the "right" thing to do, given the tragic history of Native American relations with the white world,[54] but also because such recognition is legally compelled. The arrogation by Congress of plenary power over Native peoples is both unconstitutional[55] and in violation of international law.[56] International law, in both its ancient and contemporary formulations, upholds the rights of indigenous peoples to sovereignty.[57] In the end, Native nations' continuing existence as separate, independent, and unassimilated entities compels their recognition as such.

Interestingly, though Columbus' arrival in the "New World" is often argued to have been the first wave of five centuries of genocide,[58] the legal status of Native peoples in 1492 may have actually been preferable to the current state of the law. As a legal matter, Native American sovereignty was more respected by the European powers in 1492 and in the three centuries that followed[59] than it has been by the United States government in the last 150 years.[60] The proper path for the law, therefore, is to go "back to the future" and design a more moral, legal, and constitutional framework for respecting Native American sovereignty and re-recognizing Native nations. Relations with Native nations must be based upon a truly international, treaty-oriented system of diplomacy, which recognizes not only the inherent sovereign status of Native nations but also their inalienable powers of government, jurisdiction, and self-regulation.

This route is also compelled by the ongoing rebirth of conquered nations the world over, from the Baltics to the Caucasus, from Berlin to the Balkans.[61]

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53. *See supra* note 16.

54. Although citations would seem unnecessary, see generally FRANCIS JENNINGS, THE INVASION OF AMERICA: INDIANS, COLONIALISM AND THE CANT OF CONQUEST (1975); DEE A. BROWN, BURY MY HEART AT WOUNDED KNEE (1971); VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO (1969); Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713 (1986). As Ambrose Bierce wrote in his *Devil's Dictionary*, "Aborigines: Persons of little worth found cumbering the soil of a newly discovered country. They soon cease to cumber; they fertilize." AMBROSE BIERCE, DEVIL'S DICTIONARY 13 (World Publishing Co. 1941) (1911).

55. *See infra* part II.

56. *See infra* part III.

57. *See infra* parts I.A-C, III.

58. *See* RUSSELL THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492 (1987); KIRKPATRICK SALE, THE CONQUEST OF PARADISE: CHRISTOPHER COLUMBUS AND THE COLUMBIAN LEGACY (1990); M. Annette Jaimes, *Sand Creek: The Morning After*, *in* THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIALIZATION AND RESISTANCE 1 (M. Annette Jaimes ed., 1992); Lenore A. Stiffarm & Phil Lane, Jr., *The Demography of Native North America: A Question of American Indian Survival*, *in id.* at 23.

59. *See infra* parts I.A-C.

60. *See infra* parts I.D-F.

61. *See infra* notes 491-513 and accompanying text.

Even tiny San Marino, whose gross national product is based upon postage stamp sales,[62] has joined the United Nations.[63] The United States refused for decades to recognize the Soviet Union's attempted incorporation of the Baltic states[64] and welcomed their release from the U.S.S.R. and reentry onto the world stage after a half-century of captivity.[65] Given the ancient sovereignty of Native nations, the rules of international law, and the moral commands driving the contemporary re-recognition of oppressed nations, the only logical course for the United States is equal treatment of Native nations.

Part I of this Article reviews the history of relations between Native peoples and the Europeans and their American descendants. Both parties believed that the relationship was an international one, requiring all the formalities of diplomacy and embodying the fundamental international law principle of noninterference in the internal affairs of other sovereign states. Part I concludes with a review of United States history over the last century, when the "closing" of the frontier and the onset of Manifest Destiny worked to change the prior international relationship into one of power and subjugation.

Part II analyzes the legal bases upon which the arrogation of plenary power by the United States over Indian peoples in the last century is premised. The claimed constitutional bases for this power, the Commerce[66] and Treaty[67] Clauses, are found wanting, in that neither the original intent of the Framers nor any more modern constitutional jurisprudence can offer support to plenary power. Two other, judicially created, bases for federal power over Indian people are also considered in part II. The first, the purported "trust relationship"[68] between the United States and Native nations, provided support for federal authority in the absence of proper constitutional authorization during the Manifest Destiny era but was abandoned as a source of power in the twentieth century due to its extra-constitutional nature. The second judicial creation, a recent doctrine, holds that merely because Indian nations are "Indian" nations, certain powers of government are "implicitly divested" from them.[69]

62. DAVID WALLECHINSKY & IRVING WALLACE, THE PEOPLE'S ALMANAC 479 (1975) (listing "Nations Smaller Than Baltimore") ("Tourism and postage stamps provide 80% of the Gross National Product [of San Marino]. Whenever the nation needs money, it prints a new stamp for philatelists.").

63. KUMIKO MATSUURA, JOACHIM W. MÜLLER & KARL P. SAUVANT, CHRONOLOGY AND FACT BOOK OF THE UNITED NATIONS, 1941-1991, at 231 (1992) (admitted to United Nations Mar. 2, 1992).

64. *See, e.g.*, Statement of the Acting Secretary of State, July 27, 1940, DEP'T ST. BULL., 1941, at 48.

65. In equal derogation of de facto status in favor of de jure principle, the United States also refused for decades to diplomatically recognize the People's Republic of China, as it believed the only lawful Chinese government was that of Taiwan. *See, e.g.*, Statement by Secretary Acheson, Aug. 15, 1949, DEP'T ST. BULL., 1951, at 236-37.

66. U.S. CONST. art. I, § 8, cl. 3; *see infra* part II.A.

67. U.S. CONST. art. II, § 2, cl. 2; *see infra* part II.B.

68. *See supra* note 45; *infra* part II.C.

69. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1977); *see also infra* part II.D.

Part II argues that these doctrines violate precedent, history, and international law and concludes that the power exercised by the United States over Native peoples is completely insupportable under the Constitution and laws of the United States.

Part III argues that in the absence of United States power, Native nations must be seen as having retained their original status as international actors entitled to self-determination. This section analyzes the current status of international law with respect to the rights of indigenous peoples to self-determination, and discusses both the ongoing work of several international organizations in setting standards for recognizing such rights and the struggle of indigenous peoples to vindicate them. Part III concludes that under international law, the United States must bear the burden of proof in claiming that San Marino, a small, landlocked state in the heart of Italy covering 23 square miles and comprised of 22,791 people,[70] is a nation entitled to its seat in the United Nations,[71] but the Navajo Nation, which covers 15 million acres of land (an area larger than West Virginia and eight other states) and populated by 166,000 Navajo people,[72] is not.

I
FROM THEN TO HERE

A. International Law

Whether it was Leif Ericsson,[73] the Irish monk Saint Brendan the Navigator,[74] a Basque fisherman,[75] or in fact Christopher Columbus[76] who was the first European to arrive in the Western Hemisphere, there is no doubt that there were people here to meet the boat. Any notion of "discovery", therefore, must be reconceived as "contact" or at least "arrival." That these peoples were civilized, in the full sense of the word—having language, writing, economics, agriculture, political organization, religion, architecture, arts, and the like—is beyond cavil, even given variations among particular Native nations.[77]

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70. *See* NEW YORK PUBLIC LIBRARY, NEW YORK PUBLIC LIBRARY DESK REFERENCE 763 (1989).

71. MATSUURA, MÜLLER & SAUVANT, *supra* note 63, at 231.

72. *See* DAVID H. GETCHES & CHARLES F. WILKINSON, FEDERAL INDIAN LAW 4, 6 (2d ed. 1986).

73. *See generally* SAMUEL E. MORISON, THE EUROPEAN DISCOVERY OF AMERICA: THE NORTHERN VOYAGES, A.D. 500-1600, at 39-80 (1971).

74. *See generally id.* at 13-31.

75. Evan Hadingham, *Europe's Mystery People*, WORLD MONITOR, Sept. 1992, at 34.

76. *See* SALE, *supra* note 58; COLIN MCEVEDY, THE PENGUIN ATLAS OF NORTH AMERICAN HISTORY 22-27 (1988).

77. Given the Aztec, Inca, Iroquois, Cherokee, Anasazi, Pueblo, Hopi, Toltec, Olmec, and other civilizations, citation seems unnecessary. *But see, e.g.*, FRANCIS JENNINGS, THE AMBIGUOUS IROQUOIS EMPIRE (1984); HENRY MALONE, CHEROKEES OF THE OLD SOUTH: A PEOPLE IN TRANSITION (1956); DAVID J. WEBER, THE SPANISH FRONTIER IN NORTH AMERICA (1993). MCEVEDY, *supra* note 76, at 6-23, gives a clear presentation of the various North American civilizations at the time of contact.

Relations with Native peoples were thus perforce matters of international relations.[78] Despite the prejudicial Christian-centric and ethnocentric notions held by the Europeans,[79] preservation of their tenuous beachhead[80] in the Americas required good relations with the indigenous nations.[81] These relations were conducted in a diplomatic, international manner, with the corollary formalities of ambassadors and treaties.[82] Moreover, international law, developed mainly through the Catholic church,[83] recognized the legal rights of Native peoples to their lands, property, and systems of government, despite their status as "infidels."[84]

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78. *See* JENNINGS, *supra* note 54, at 15-31; FRANCIS P. PRUCHA, THE INDIANS IN AMERICAN SOCIETY: FROM THE REVOLUTIONARY WAR TO THE PRESENT 29-32 (1985); Anaya, *supra* note 11, at 193-97; Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 511-14.

79. *See* JENNINGS, *supra* note 54, at 15-16; 1 FRANCIS P. PRUCHA, THE GREAT FATHER 6-11 (1984); Irene K. Harvey, *Constitutional Law: Congressional Plenary Power over Indian Affairs—A Doctrine Rooted in Prejudice*, 10 AM. INDIAN L. REV. 117 (1982).

80. Witness the "lost" settlement of Roanoke and the decimation by disease of the Pilgrims. *See* 1 SAMUEL E. MORISON, HENRY S. COMMAGER & WILLIAM E. LEUCHTENBERG, THE GROWTH OF THE AMERICAN REPUBLIC 35, 53 (6th ed. 1969).

81. *See, e.g.*, COHEN, *supra* note 6, at 55.

82. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 531, 559-60 (1832); PRUCHA, *supra* note 13, at 142-43.

83. *See generally* WILLIAMS, *supra* note 11, at 13-121; Anaya, *supra* note 11, at 193-97; COHEN, *supra* note 6, at 50-52.

84. Francisco de Vitoria, the influential Church theorist and one of the founders of international law, propounded theories of fundamental human rights and group self-determination which formed the basic framework of the relationship between Indian peoples and the nations of Europe. Francisco de Vitoria, *De Indis et de Jure Bellis Reflectiones* [Reflections on the Indians and on the Law of War] (Ernest Nys ed. & John P. Bate trans., 1917) (Johann Simon rev. ed. 1696), *in* 7 CLASSICS OF INTERNATIONAL LAW (James Scott ed., 1917). Vitoria believed that "certain basic rights inhere in men *as men*, not by reason of their race, creed, or color, but by reason of their humanity." Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 11-12 (1942). Vitoria's work is discussed in Anaya, *supra* note 11, at 193-96; COHEN, *supra* note 6, at 50-52; and WILLIAMS, *supra* note 11, at 68-93. Vitoria's influence can be seen in the Papal Bull *Sublimis Deus* of 1537:

> [T]he said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and of no effect.

quoted in Cohen, *supra* note 6, at 12. Cohen notes that substantially similar language is found in the Northwest Ordinance enacted by the Continental Congress and reenacted by the first United States Congress. *Id.*; *see* (Northwest) Ordinance of July 13, 1787, art. 3, *ratified by* Act of Aug. 7, 1789, ch. 8, § 3, 1 Stat. 50, 52 n.(a). British respect for Indian Rights was similar, as evidenced by the Mohegan Indians' successful case against the colony of Connecticut, discussed in Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 512-14.

Many held a contrary view, and church and international law proved somewhat malleable. *See generally* Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Right of Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 51 (1991). One colonial author, ridiculing the result in *Mohegan*, wrote that Indians were "little superior in point of Civilization, to the Beasts of the Field." William Samuel Johnson, *quoted in* CLINTON, NEWTON & PRICE, *supra* note 6, at 16 (quoting JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 434-35 n.109 (1965)). For comprehensive histories of American attitudes towards Indian people, see RICH-

After learning how to survive from the Indians,[85] the English, French, and Spanish, the main contestants for influence in the "New World," depended critically upon alliances with Native nations to establish, defend, and expand their spheres of commerce and influence.[86] For example, the Haudenosaunee, or Iroquois Six Nation Confederacy, which controlled the eastern part of the continent between the Great Lakes and the Hudson River, for centuries held the balance of power in North America among the competing American, English, and French powers.[87] Though it may be argued that it was due more to an inability to interfere[88] than to respect for Indian sovereignty, for centuries after contact Native Americans occupied their own lands without interference other than the acquisition of territory through negotiated purchase or treaty. The internal affairs of Native nations were not questioned,[89] and Native peoples' jurisdiction over their lands was respected, even as to whites who ventured onto them.[90] Thus, both from a legal standpoint and in a *realpolitik* sense, Indian affairs were conducted as international relations between sovereign entities.[91]

ARD DRINNON, FACING WEST: THE METAPHYSICS OF INDIAN HATING AND EMPIRE BUILDING (1980); ROBERT F. BERKHOFER, JR., THE WHITE MAN'S INDIAN (1978).

85. The traditional story of the first Thanksgiving seems ample authority. *See* DEBO, *supra* note 13, at 44-45.

86. *See* CORNELL, *supra* note 13, at 11-32; DEBO, *supra* note 13, at 19-101; PRUCHA, *supra* note 13, at 5-25.

87. Had the Haudenosaunee not sided with the British, "people in the United States might speak French today." STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 3 (2d ed. 1992) (citing CADWALLADER COLDEN, THE HISTORY OF FIVE INDIAN NATIONS (Cornell Univ. Press 1958) (Pt. 1 1727 & Pt. 2 1747)).

88. *See, e.g.*, Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 590 (1823) (Indian nations "were ready to repel by arms every attempt on their independence.").

89. In Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), Chief Justice Marshall wrote:

> Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians .... The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self-government.

Id. at 547. The occasional instance of "conquest" was at least formally required to be on grounds of "just war," according to Henry Knox, the first United States Secretary of War:

> The Indians being the prior occupants, possess the right of the soil. It cannot be taken from them unless by their free consent, or by the right of conquest in case of a just war. To dispossess them on any other principle, would be a gross violation of the fundamental laws of nature.

Quoted in DOCUMENTS OF UNITED STATES INDIAN POLICY 12-13 (Francis P. Prucha ed., 2d ed. 1990) [hereinafter DOCUMENTS OF INDIAN POLICY].

90. *See* United States v. Rogers, 45 U.S. (4 How.) 567, 572-73 (1846); *Johnson*, 21 U.S. (8 Wheat.) at 593 ("The person who purchases lands from the Indians [without the discoverer's consent] . . . holds title under their protection and subject to their laws.").

91. *See* CORNELL, *supra* note 13, at 45-49; DEBO, *supra* note 13, at 1-149; PRUCHA, *supra* note 13, at 142-43; Newton, *supra* note 14, at 200.

B. Land

Though relations among the various Native nations and the European powers were primarily governed by international law and treaties, the intra-European competition for spheres of influence in the New World resulted in a major new legal theory aimed at systematizing European exploration. This theory derived from the unobjectionable "principle of universal law"[92] that in the case of "vacant land," title vested in the discovering country.[93] This principle, known as the doctrine of discovery,[94] was easily applied to uncharted, uninhabited islands,[95] but it was something else to apply it to lands populated by well-organized, well-armed indigenous nations.

The Europeans' motive in attempting to apply the doctrine of discovery in the Americas was, however, not to make claims against Indian sovereignty, but to demarcate among themselves their respective spheres of political and commercial influence. Their objective was to claim the right, to the exclusion of each other, to ally and trade with particular Indian nations.[96] To do so in an orderly and legal manner (though there was no lack of warfare),[97] the Europeans seized upon the doctrine of discovery as a method to establish and recognize claims of influence, exploration, and settlement. In order to apply the doctrine of discovery to the Americas, however, it was necessary to fundamentally mischaracterize the nature of Indian land tenure so that the Western Hemisphere could legally be considered "vacant land."

Drawing upon individualistic European concepts of title to land,[98] the Lockean theory that only by enclosing land and laboring on it does it become "property,"[99] and prejudicial views of Indians as "nomads" and "savages,"[100]

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92. *Johnson*, 21 U.S. (8 Wheat.) at 595.

93. *See, e.g., Johnson*, 21 U.S. (8 Wheat.) 543.

94. A modern exposition of the concept can be found in Western Sahara Advisory Opinion of the International Court of Justice, 1975 I.C.J. 12 (Oct. 16); *see also* Anaya, *supra* note 11, at 208-09; Erica-Irene A. Daes, *On the Relations Between Indigenous Peoples and States, in* 2 WITHOUT PREJUDICE: THE EAFORD INT'L REV. OF RACIAL DISCRIMINATION 41, 45-46 (1989).

95. *Johnson*, 21 U.S. (8 Wheat.) at 595.

96. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544 (1832); *Johnson*, 21 U.S. (8 Wheat.) at 573; COHEN, *supra* note 6, at 56; 1 PRUCHA, *supra* note 79, at 15.

97. *See Worcester*, 31 U.S. (6 Pet.) at 551-2:

> The general law of European sovereigns, respecting their claims in America, limited the intercourse of Indians, in a great degree, to the particular potentate whose ultimate right of domain was acknowledged by the others. This was the general state of things in time of peace. It was sometimes changed in war.

The continental wars of Europe were played out in North America as well, sometimes under different names. For example, the American French and Indian War was in Europe the Seven Years' War. *See* DEBO, *supra* note 13, at 70-71 (listing wars).

98. *See* Howard R. Berman, *The Concept of Aboriginal Title in the Early Legal History of the United States*, 27 BUFF. L. REV. 637, 644 n.31 (1978) ("The reality of a nation or community inhabiting territory cooperatively . . . was apparently beyond the scope of 17th century English thought. The result is an Anglo-American legal system with an inherent cultural bias that attributes an anomalous and inferior status to non-European forms of land tenure.").

99. JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 26 (Peter Laslett ed., Cambridge Univ. Press 1960) (1689) ("Whatsoever then he removes out of the State that Nature

the doctrine of discovery came to mean when lands were inhabited by "uncivilized" people, legal "title" vested in the European nation which first "discovered" it, as against all other European competitors.[101] This "title" conferred upon the European "discoverer" the exclusive rights to conclude treaties with the Indian nations inhabiting the land and to purchase lands from them.[102] It did not, however, confer possessory rights upon the discoveror or remove or disturb the Indian peoples living there until such time as they sold or ceded their land to the discovering sovereign.

Native nations, of course, did not recognize the Europeans as "owners" of their lands, and the Europeans quite prudently did not press such "extravagant and absurd"[103] claims for fear of military defeat.[104] Among the European powers, the doctrine of recognizing "exclusive title [in] the government by whose subjects, or by whose authority, [discovery] was made" meant only that "the nation making the discovery [obtained] the sole right of acquiring the soil from the natives . . . against all other European governments."[105] Simply put, the "discovery" and survey of lands previously unknown to Europeans gave the "discoverer" an exclusive option, respected by the other European powers, to purchase or treat for the lands, and thereby established spheres of exclusive influence among the European empires.[106]

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hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property.*"). This theory was rooted in the Biblical injunction to Adam to "[b]e fruitful and multiply, and replenish the earth, and subdue it." Genesis 1:28; *see, e.g.*, the 1630 sermon of John Cotton, "the greatest preacher of the Puritan era," to departing Pilgrims, *reprinted in* CHARLES M. SEGAL & DAVID C. STINEBACK, PURITANS, INDIANS AND MANIFEST DESTINY 51, 53 (1977). For a modern exposition of Lockean ideas, see Charles Biblowit, *International Law and the Allocation of Property Rights in Common Resources*, 4 N.Y. INT'L L. REV. 77 (1991).

100. *See Johnson*, 21 U.S. (8 Wheat.) at 573 ("[T]he character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency."). The Court found that the application of the doctrine of discovery to Indians could "find some excuse, if not justification, in the character and habits of the [Indians]." *Id.* at 589.

101. *Id.* at 572-73. A thorough examination of the opinion can be found in Robert A. Williams, Jr., *Jefferson, The Norman Yoke, and American Indian Lands*, 29 ARIZ. L. REV. 165 (1987); *see also* WILLIAMS, *supra* note 11, at 308-17.

102. *Johnson*, 21 U.S. (8 Wheat.) at 573; *see also* Berman, *supra* note 98.

103. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544-45 (1832) ("The extravagant and absurd idea, that the feeble settlements made on the sea coast . . . acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man.").

104. *See* CORNELL, *supra* note 13, at 26:

> Most of the major tribes of the eastern interior managed to resist substantial encroachment on their lands during much of this period through . . . military strength, European alliance and practical economics. The Iroquois and certain of the southern nations—Creeks, Choctaws, Chickasaws, and Cherokees—were potent military powers, and were recognized and respected as such by the Europeans, who could not afford, during much of this period, to confront them directly.

105. *Johnson*, 21 U.S. (8 Wheat.) at 573-74.

106. *See* Berman, *supra* note 98, at 644-45; Newton, *supra* note 14, at 208 n.69. A corollary can be seen in the later American Monroe Doctrine, which forbade European interference in North America but did not seek to undermine the sovereignty of the South and Central

While the perverted reformulation of the doctrine of discovery applied to North America would seem, in the first instance, to be greatly disempowering to Native nations, its effects were initially quite limited. The option to sell or cede lands remained with the Indian nations, and until such sale or cession, their occupancy was undisturbed.[107] The Indian nations also did not acknowledge that any particular European nation held an exclusive option, and they often sold or traded away land to competing parties regardless of which European country had "discovered" them first.[108] The doctrine of discovery therefore bound "the European governments but not the Indian tribes."[109]

It is unquestionable, however, that applying the doctrine of discovery to Indian civilizations could only have been rationalized on the basis of race and the alleged "superiority" of the Europeans.[110] This strategy of giving a gloss of legal respectability to dispossession on the basis of "otherness" had been seen before in European law. Most notably, the English justified their control of Irish lands through similar claims that the indigenous Irish were uncivilized, pagan nomads without a conception of property.[111] In addition to its clear racism, the application of the doctrine of discovery to North America was historically fallacious. If the Indians of North America were nomadic wanderers, how was it that, as every American child learns in kindergarten,

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American nations to which it applied. The Monroe Doctrine stood for the proposition that "the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to [be] considered as subjects for future colonization by any European power." James Monroe, Monroe Doctrine (Seventh Annual Message) Address Before Congress, Dec. 2, 1823, *in* 2 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1897, at 209 (Washington, Government Printing Office 1896). The same principle was applied to European interference with Indian nations with whom the United States had treaty relations: "any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory and an act of hostility." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17-18 (1831).

107. *See Johnson*, 21 U.S. (8 Wheat.) at 591, 603; *see also Worcester*, 31 U.S. (6 Pet.) at 547 ("The king purchased their lands, when they were willing to sell, at a price they were willing to take, but never coerced a surrender of them."); *id.* at 544 (European's right to purchase "could not affect the rights of those already in possession"). In a later case Chief Justice Marshall held that Indian possession of their lands was "as sacred as the fee simple of the whites." Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835); *see generally* Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 520-22.

108. *Johnson*, the principal case establishing the doctrine of discovery in American law, arose from such a case of competing claims of title, both originating from the same Indian nations. 21 U.S. (8 Wheat.) at 545, 571-72.

109. COHEN, *supra* note 2, at 292; *see also* Berman, *supra* note 98, at 650 ("With the single exception of the right of alienability of land, the original, indeed aboriginal, sovereignty of the Indian nations is unimpaired by, and not included in, the concept of discovery.").

110. *Johnson*, 21 U.S. (8 Wheat.) at 573, 589, discussed *supra* note 100; Steven T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Right of Discovery,* Johnson v. McIntosh, *and Plenary Power*, 20 N.Y.U. REV. L. & SOC. CHANGE 303 (1993); *see also* Harvey, *supra* note 79, at 117-50; 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, 247-50 (1989).

111. Nicholas P. Canny, *The Ideology of English Colonization: From Ireland to America*, 30 WM. & MARY Q. 575 (1973).

Squanto and Massasoit taught the Pilgrims how to grow corn?[112] Nomads do not farm.

Property, however, is a critical element of sovereignty,[113] and the doctrine of discovery, though initially leaving Indians unaffected while providing a means of regulating intra-European competition, became a pernicious threat to Indian lands after the United States emerged as the sole power between the Atlantic and the Pacific.[114] At that point, the doctrine of discovery had outlasted its initial justification of demarcating spheres of influence among the Europeans, and the notion that legal title to Indian lands was held by the European discoverers (and their successors, the Americans) was used to justify American political control over Indian nations.[115]

Nonetheless, the initial application of the doctrine of discovery to North America, though rooted in racism, did not affect the sovereignty of Native nations any more than would an embargo. The doctrine was merely a self-imposed limitation by the European nations, affecting only their interests, and did not disturb the politics, laws, or governments of the Indian peoples.[116] The practical effects of the doctrine in limiting the ability of Indian peoples to deal freely in the international arena did not affect the legal status of the Na-

112. *See* DEBO, *supra* note 13, at 44-45, 49.

113. Joseph W. Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991). Singer builds on the classic work of the Legal Realists. *See generally* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8 (1927); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (W. Cook ed., 1934). As summarized in a leading Indian law casebook:

> Hohfeldian [analysis] . . . emphasizes that property must be defined in terms of the relationship between . . . persons and governments. . . . Thus, to say that X owns a piece of land tells very little; it is much more important to know the extent of X's rights and powers against other persons and X's immunity from certain actions by the government.

CLINTON, NEWTON & PRICE, *supra* note 6, at 667.

114. *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 285 (1955) (citing *Johnson* in holding that the taking of Indian lands does not require compensation under the Fifth Amendment); United States v. Kagama, 118 U.S. 375, 379 (1886) (upholding political power over Indians because "Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States."); *see generally* 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, 672-76.

115. *See, e.g.*, *Kagama*, 118 U.S. at 379. Invocation of the doctrine of discovery was extremely result-oriented. Compare Chief Justice Taney's opinion in United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846) (to uphold federal criminal jurisdiction in Indian territory, Taney states "native tribes . . . have never been acknowledged or treated as independent nations") with his opinion in Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1857) (needing to distinguish Indian freedom from African-American servitude, Taney states, "Indian governments were regarded and treated as foreign Governments.").

116. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 546 (1832) ("Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown, to interfere with the internal affairs of the Indians. . . . [The king] purchased their alliance . . . by subsidies; but never intruded into the interior of their affairs, nor interfered with their self-government, so far as respected themselves only.").

tive nations as sovereign entities any more than the United Nations anti-apartheid boycott,[117] the United States embargo against Cuba,[118] or the OPEC embargo against the United States[119] affected the sovereignty of South Africa, Cuba, or the United States.

C. *Federalism*

The Europeans and their American successors recognized their legal and practical inability to interfere in the internal affairs of Native nations[120] and the Native nations' powers of government and jurisdiction over their lands.[121] The Europeans had also decided through law and war upon general spheres of influence among their various nations and colonies. The only remaining issue was a major question for all empires: Did power lie at the imperial center or out in the colonies?[122] With respect to Native nations, the question was, which branch of the European governments would control relations with Indians? In each empire it became necessary to decide who within those nations and colonies held the power to conclude treaties, trade with Indians, and administer taxes and customs upon those who traded.

The answer was critical, as acts taken by the colonies or individual settlers that violated the rights of Native nations would run the risk of justifiable hostilities in response and a consequent call upon the imperial army (and perhaps more importantly, upon the imperial treasury) to remedy the situation.[123] The European nations thus had a strong interest in orderly settlement and consequently negotiated agreements with Indian peoples so as to prevent war and expense and also to prevent Indian nations from becoming dissatisfied and trading or allying with a European competitor. The colonists, however, were land hungry, adventurous, and eager to take over Indian lands with little or no negotiation or compensation, often at the price of causing war.[124] In response

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117. International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1975 U.N.Y.B. 600.

118. *See, e.g.*, Cuban Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2575 (codified at 22 U.S.C. §§ 6001-6010 (Supp. 1993)).

119. *See* 29 CONG. Q. ALMANAC 867 (1973)

120. *Worcester*, 31 U.S. (6 Pet.) at 546. CORNELL, *supra* note 13, at 26.

121. *See, e.g.*, United States v. Rogers, 45 U.S. 567, 572-73 (1846); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 593 (1823).

122. *See* COHEN, *supra* note 6, at 56-58; Robert N. Clinton, *The Road: Indian Tribes and Political Liberty*, 47 U. CHI. L. REV. 846, 851-57 (1979-1980) (reviewing RUSSEL L. BARSH & JAMES Y. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY (1980)).

123. *See* Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs*, 69 B.U. L. REV. 329 (1989); *see also* Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 557 n.286; PRUCHA, *supra* note 13, at 5-25; Clinton, *supra* note 122, at 850-54.

124. As stated by George Washington,

> To suffer a wide extended Country to be over run with Land Jobbers, Speculators and Monopolisers or even with scatter'd settlers, is, in my opinion, inconsistent with that wisdom and policy which our true interest dictates, or that an enlightened People ought to adopt and, besides, is pregnant of disputes both with the Savages, and among ourselves . . . the People engaged in these pursuits . . . will involve [the government] by

to these problems, the English government demanded central imperial control over relations with Indians, and in a 1763 Royal Proclamation held void treaties and land purchases made by the colonies or individual settlers without approval of the Crown.[125]

After some confusion under the Indian-related provisions of the Articles of Confederation,[126] the Framers of the Constitution decided upon a similarly centralized Indian policy for the United States. The Constitution clearly stated that it was Congress, not the states, which held the power to conclude treaties with Indian nations[127] and regulate commerce "with the Indian Tribes."[128] Listing "Indian Tribes" along with "foreign Nations" and the "several States" in the Commerce Clause indicated that it was the federal government that was to be responsible for inter-sovereign and international matters.[129] Though the separate enumeration of Indian tribes and "foreign Nations" has been held to create a distinct category for Indians not equal to that of foreign states,[130] the better argument is that in order to guarantee recognition of central federal control over the hotly debated area of Indian affairs and to clearly remedy what Madison called the "obscure and contradictory"[131] provisions of the Articles of Confederation, Indians were distinctly enumerated to forestall any argument by the states that the regulation of Indian affairs was outside the powers delegated to the new federal govern-

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their unrestrained conduct, in inextricable perplexities, and more than probable in a great deal of Bloodshed.

Letter from George Washington to James Duane (Sept. 7, 1783), *in* DOCUMENTS OF INDIAN POLICY, *supra* note 89, at 1; *see also 1787 Report of the Committee on the Southern Department, in id.* at 10-11; *1787 Report on White Outrages by Secretary of War Knox, in id.* at 11-12.

125. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 548 (1832) (discussing 1763 Royal Proclamation); *see generally* Clinton, *supra* note 123.

126. ARTICLES OF CONFEDERATION art. IX, § 4. In Madison's words, the Indian-related provisions of the Articles of Confederation were "obscure and contradictory" and "absolutely incomprehensible." THE FEDERALIST No. 42, at 284 (J. Cooke ed., 1961); *see also Worcester*, 31 U.S. (6 Pet.) at 558; Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 557-60. In what is apparently the first case to construe the Articles of Confederation, Article IX was held to allow states to acquire Indian lands without the consent of the Continental Congress. Oneida Indian Nation v. New York, 860 F.2d 1145 (2d. Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).

127. U.S. CONST. art. II, § 2, cl. 2.

128. U.S. CONST. art. I, § 8, cl. 3.

129. The states were, prior to the Civil War and the "incorporation" doctrine, considered to be sovereign entities. *See* TRIBE, *supra* note 34, § 5-20, at 378-85; THE FEDERALIST No. 45, at 310 (James Madison) (J. Cooke ed., 1961).

130. In his famous opinion in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), Chief Justice Marshall declared that although the United States "plainly recognize[d] the Cherokee Nation as a state," and the Cherokee Nation had "been uniformly treated as a state from the settlement of our country," it nonetheless "may well be doubted whether [Indian] tribes . . . can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations." *Id.* at 16-17. Marshall did not define the content of his creation other than to hold that since the Cherokee were not "a foreign state in the sense of the constitution," they were unable to invoke the original jurisdiction of the Supreme Court to hear their claim against Georgia. *Id.*

131. THE FEDERALIST No. 42, at 284 (James Madison) (J. Cooke ed., 1961).

ment.[132] The history of federal treaty-making and the prohibition on state treaty-making[133] supports this interpretation. In any event, the constitutional provisions represented only the United States' plan for its own government. They did not affect, nor diminish, the sovereignty of Indian nations.

Under the Commerce Clause,[134] the states were barred from interfering with or regulating trade with Indians, just as they were with respect to trans-Atlantic trade. Among the first acts of the first Congress was the Trade and Intercourse Act of 1790,[135] which, like its English antecedents, codified this central federal power and held void any treaty or land purchase by a state or settler without the consent of the federal government.[136] The Commerce Clause and the Trade and Intercourse Act thus clearly indicated that relations with Indian nations were a national priority and not a domestic matter left to the states.[137]

Further indication of the international status of Indian nations, as viewed by the Framers, is the fact that treaty-making was the formal mode of conducting diplomatic relations with them, and like the regulation of trade, it was a solely federal power.[138] As with other foreign nations, no state has the power to conclude a treaty.[139] The Supreme Court has consistently held for two centuries that a treaty with an Indian nation is of the same dignity as any

132. *See Cherokee Nation,* 30 U.S. (5 Pet.) at 18. The only debate regarding Indian nations during the framing of both the Articles of Confederation and the Constitution concerned precisely this division of power between the state and federal governments. *See* 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 439, 462, 507, 560 (J. Elliot ed., Philadelphia, J.B. Lippincott & Co. 1845); PRUCHA, *supra* note 13, at 28-31, 41-43; W. MOHR, FEDERAL INDIAN RELATIONS: 1774-1788, at 176-77, 182-84 (1933). The only other debate during the Constitutional Convention in which Indians were discussed concerned the wording of the provision that Indians not taxed by the states would not be counted in the census. 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 181, 190, 192, 379, 559 (J. Elliot ed., 1845).

133. States are forbidden to make treaties or other agreements with Indian nations pursuant to the Constitution, art. II, § 2, the various Nonintercourse Acts, currently codified at 25 U.S.C. § 177 (1988), and numerous Supreme Court cases. *See, e.g.,* County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

134. U.S. CONST. art. I, § 8, cl. 3.

135. Ch. 33, 1 Stat. 137 (1790) (codified at 25 U.S.C. § 177 (1988)).

136. The 1790 act forms the basis of numerous land claims pressed by Indian nations in the Northeast. Their land in each case was ceded or sold to the states, often fraudulently, without the consent of the federal government, and the Supreme Court has held that without federal consent, such purchases or cessions are void. *See, e.g., Oneida Indian Nation,* 470 U.S. 226; *see generally* John E. Barry, Oneida Indian Nation v. County of Oneida: *Tribal Rights of Action and the Indian Trade and Intercourse Act,* 84 COLUM. L. REV. 1852 (1984). The states themselves had similar laws preventing land purchases from Indians by individuals without state government approval. *See* COHEN, *supra* note 6, at 56-58.

137. *See* PRUCHA, *supra* note 13, at 2-3.

138. U.S. CONST. art. II, § 2, cl. 2; *see also* U.S. CONST. art. VI, cl. 2 (Supremacy Clause). On the dominance of treaty-making with Indian nations in United States history, see PRUCHA, *supra* note 13, at 142.

139. U.S. CONST. art. II, § 2, cl. 2. This is paralleled by the Nonintercourse Act's prohibition against purchases of Indian land by states. 25 U.S.C. § 177 (1988). The Nonintercourse Act's prohibitions against purchases by individuals finds its treaty parallel in the Logan Act, 18 U.S.C. § 953 (1988), which prohibits diplomacy by private individuals.

foreign treaty of the United States, and all such treaties are "the supreme Law of the Land," superior to any state constitution or law.[140] Procedurally, Indian treaties were concluded in the same manner as treaties with other nations. An ambassador or emissary would be sent to negotiate terms, the President would sign the treaty along with the Indian head of state, and the treaty would be sent to the Senate for ratification.[141]

The first Congress also committed responsibility for Indian affairs to the War Department,[142] a clear recognition of the international and federal nature of such matters and a rejection of the notion that Indian affairs were a domestic or local concern. The War Department's jurisdiction was also due to the fact that several Indian nations allied with the British during the Revolution, most notably the Cherokee Nation, did not view the Treaty of Paris[143] between the colonies and England as ending their war with the United States. As a result they demanded and received separate peace treaties.[144]

Despite the clear language of the Constitution and the early acts of Congress, many states, particularly those whose original charters did not have Western boundaries, contested the exclusive federal power over Indian affairs, and sought to exercise their own jurisdiction and conclude treaties for the purchase of Indian land.[145] New York was a great offender in this regard, and its conclusion of numerous treaties in the eighteenth and early nineteenth centuries without federal consent has resulted in a modern avalanche of land claim litigation based upon the Trade and Intercourse Acts.[146] The critical test of federal authority, however, arose out of Georgia's attempts in the 1830s to impose its laws over the Cherokee Nation to its west.[147]

Georgia's attempt to assert its laws over the Cherokee Nation resulted in two landmark and much-chronicled decisions by Chief Justice John Marshall,

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140. U.S. CONST. art. VI, cl. 2; *see* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 548 (1832).

141. U.S. CONST. art. II, § 2, cl. 2; *see* PRUCHA, *supra* note 13, at 142; CORNELL, *supra* note 13, at 45-47.

142. Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 50.

143. Sept. 3, 1783, U.S.-Eng., 8 Stat. 80.

144. *See, e.g.*, Treaty with the Cherokees at Hopewell, Nov. 28, 1785, U.S.-Cherokee Nation, 7 Stat. 18; *see also* RUSSEL L. BARSH & JAMES Y. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 32 (1980); CORNELL, *supra* note 13, at 41.

145. The history of such attempts is recounted in the resulting cases. *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

146. *See, e.g., Oneida Indian Nation*, 470 U.S. 226 (1985); *see generally* Tim Vollmann, *A Survey of Eastern Indian Land Claims: 1970-1979*, 31 ME. L. REV. 5 (1979); Barry, *supra* note 136; Robert N. Clinton & Margaret T. Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17 (1979).

147. 1 MORISON, COMMAGER & LEUCHTENBERG, *supra* note 80, at 440. This conflict would be echoed throughout American history, from its origins in a struggle to gain control of lands rich in gold to the key issue of states' rights and federalism, which would return, often with Georgia as a protagonist, in the Nullification Controversy, the various compromises regarding slavery and decisively, though not finally, in the Civil War. *See id.* at 434, 440, 583.

Cherokee Nation v. Georgia[148] and *Worcester v. Georgia*.[149] In essence, Marshall held without qualification that Georgia's purported extension of its laws over the Cherokee Nation was void as "repugnant to the Constitution, treaties and laws of the United States."[150] Marshall proclaimed the federal government's supremacy in all matters relating to Indian affairs and forbade any exercise of power by the states to assert control or even to deal with Indian affairs without federal permission,[151] a rule that has admitted of little exception until the last twenty years.[152] Marshall also clearly recognized the sovereignty of the Cherokee people and their rights to their own government, laws, and lands.[153] Relying on international law,[154] Marshall stated that

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial . . . . The very term "nation," so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.[155]

Marshall's opinions were strongly influenced by international law, but his respect for Cherokee sovereignty found little political favor. President An-

148. 30 U.S. (5 Pet.) 1.

149. 31 U.S. (6 Pet.) 515; *see generally* Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 517-22; Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics and Morality*, 21 STAN. L. REV. 500 (1969); William F. Swindler, *Politics as Law: The Cherokee Cases*, 3 AM. INDIAN L. REV. 7 (1975); Newton, *supra* note 14, at 201-05.

150. *Worcester*, 31 U.S. (6 Pet.) at 561-62.

151. *Id.*

152. *See* Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 561-83; *compare* Rice v. Olson, 324 U.S. 786, 789 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.") *with* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331 (1983) ("We long ago departed from the 'conceptual clarity of Mr. Chief Justice Marshall's view in Worcester,' . . . and have acknowledged certain limitations on tribal sovereignty.") (quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973)).

153. *Worcester*, 31 U.S. (6 Pet.) at 546; *see also* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831). The only limitations on Indian sovereignty that Chief Justice Marshall recognized were that "the tribes could not convey their land to anyone other than the United States, and the tribes could not treat with foreign powers." William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 8 (1987). These two limitations proceed from the doctrine of discovery promulgated in Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

154. *Worcester*, 31 U.S. (6 Pet.) at 560; *see* Anaya, *supra* note 11, at 201-03.

155. *Worcester*, 31 U.S. (6 Pet.) at 559-60; *see also id.* at 556-57, 562.

drew Jackson, who favored westward expansion for settlers, was alleged to have said: "John Marshall has made his decision; now let him enforce it."[156] Regardless of the veracity of the quotation, the *Worcester* decision was not enforced. The Cherokee people were involuntarily removed from their lands and marched across the Mississippi along what has become known as the "Trail of Tears."[157]

D. The Frontier

In favoring western expansion, however, Andrew Jackson was neither unique nor particularly anti-Indian. Many of the Framers, most notably Jefferson, had seen America's future in the West.[158] They saw the ability to acquire land as a means to avoid classifying American society into the landed and the landless, as had happened in Europe.[159] Jefferson's ideal of yeoman farmer citizens constituting an agrarian republic[160] critically depended upon the continued availability of land.[161] Jefferson also thought the continual challenge and renewal of nation-building afforded by the frontier would provide a means to avoid the decay of republican institutions he had witnessed in Europe.[162] As epitomized by Daniel Boone's search for "elbow room," the ability to move west provided an alternative to revolution in the East and

156. 1 HORACE GREELEY, THE AMERICAN CONFLICT 106 (Chicago, G & C.W. Sherwood 1864-66), *quoted in* CLINTON, NEWTON & PRICE, *supra* note 6, at 28. *But see* COHEN, *supra* note 6, at 83 n.173. On Jackson, see MICHAEL P. ROGIN, FATHERS AND CHILDREN: ANDREW JACKSON AND THE SUBJUGATION OF THE AMERICAN INDIAN (1991); COHEN, *supra* note 6, at 80-84; CLINTON, NEWTON & PRICE, *supra* note 6, at 12-14.

157. *See* PRUCHA, *supra* note 13, at 213-73; COHEN, *supra* note 6, at 83-84, 91-92; CLINTON, NEWTON & PRICE, *supra* note 6, at 28-29.

158. *See* DREW R. MCCOY, THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA 9-10, 534-35 (1980); HENRY N. SMITH, VIRGIN LAND: THE AMERICAN WEST AS SYMBOL AND MYTH (1950); *see also* CORNELL, *supra* note 13, at 37 (discussing Jefferson, Madison, John Adams, George Mason, and Noah Webster).

159. Letter from Thomas Jefferson to M. Barre de Marbois (June 14, 1817), *quoted in* MCCOY, *supra* note 158, at 249 ("My hope of its [the Republic's] duration . . . is built much on the enlargement of the resources of life going hand in hand with the enlargement of territory, and the belief that men are disposed to live honestly, if the means of doing so are open to them."). Similarly, John Adams stated:

> The only possible way . . . of preserving the balance of power on the side of equal liberty and public virtue, is to make the acquisition of land easy to every member of society; to make a division of the land into small quantities, so that the multitude may be possessed of landed estates.

Letter from John Adams to James Sullivan (May 26, 1776), *in* 9 THE WORKS OF JOHN ADAMS 376-77 (Books for Libraries Press, 1969) (Charles F. Adams ed., 1850-56), *quoted in* CORNELL, *supra* note 13, at 37.

160. *See* CORNELL, *supra* note 13, at 37 (citing THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 157-58 (Harper Torchbooks 1964) (1853)); *see generally* MCCOY, *supra* note 158.

161. The Louisiana Purchase may be seen in this light. As regards the rights of Indian peoples, the Louisiana Purchase was merely the purchase from France of its rights as "discoverer," which it in turn had acquired from Spain. The Indian nations living in the purchase area were in no way affected by this distant change in "landlords," as is evidenced by the fact that they were later paid for the same land under treaties with the United States.

162. *See generally* MCCOY, *supra* note 158; CORNELL, *supra* note 13, at 37.

served as a pressure valve for a growing democracy.[163]

This vision of westward expansion, however, was not dependent upon the conquest or eradication of Native peoples. It was benignly, though no doubt Eurocentrically, thought by the Framers that Indian peoples would either assimilate into American society or move further and further west in search of their own "elbow room."[164] The continent, still largely unsurveyed by Americans,[165] seemed vast enough for all.[166] It was thought that the Indian nations would either cede their lands voluntarily and relocate or would sell their lands by treaty.[167] Order was to be imposed upon this gradual, consensual process through central federal control, while the law, through John Marshall's decisions, gave legal protection to Indian sovereignty and lands for those that did not wish to leave or sell.[168] Though in reality, westward expansion was often accomplished through treaties that were coerced,[169] state action without federal permission,[170] and studied neglect by the federal government of treaty promises,[171] as a matter of law, Indian sovereignty was recognized, respected, and continued to command the formalities of international diplomatic relations.

What changed all this was the discovery of gold in California in 1848,[172] just a few days before the Treaty of Guadalupe Hidalgo ceded Mexican authority north of the Rio Grande to the United States.[173] "Gold fever" in-

163. As Frederick Jackson Turner summarized his famous thesis, "[t]his, at least, is clear: American democracy is fundamentally the outcome of the experiences of the American people in dealing with the West." Frederick J. Turner, *Contributions of the West to American Democracy*, *in* THE FRONTIER IN AMERICAN HISTORY 243, 266 (Univ. of Ariz. Press 1986) (1903). In the same vein, Turner wrote that "[n]ot the constitution, but free land and an abundance of natural resources open to a fit people, made the democratic type of society in America." Turner, *The West and American Ideals*, *in id.* at 290, 293 (1914). On Daniel Boone, see SMITH, *supra* note 158, at 54-63.

164. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 590-91 (1823) ("[A]s the white population advanced, that of the Indians necessarily receded; . . . the game fled into thicker and more unbroken forests, and the Indians followed."). On the ecological effects of white settlement, see WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND (1983).

165. DEBO, *supra* note 13, at 101 ("The unexpected acquisition of Louisiana in 1803 was to white Americans what the discovery of the New World was to Western Europeans."); *see also id.* at 85-87 (discussing the Lewis and Clark expedition).

166. *See* Letter from George Washington to James Duane (Sept. 7, 1783), *in* DOCUMENTS OF INDIAN POLICY, *supra* note 89, at 1 ("As the Country, is large enough to contain us all, . . . we are disposed to be kind to [the Indians] and to partake of their Trade.").

167. *See Johnson*, 21 U.S. (8 Wheat.) at 574, 591, 603; Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544-45 (1832); COHEN, *supra* note 6, at 78-81.

168. *See Worcester*, 31 U.S. (6 Pet.) at 594-95.

169. *See* CORNELL, *supra* note 13, at 46-49; *see also* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289-90 (1955).

170. *See, e.g.*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 232 (1985).

171. This can be seen most clearly in the case of Andrew Jackson's outright defiance of the *Worcester* decision. *See supra* text accompanying notes 156-57.

172. 2 HERMANN KINDER & WERNER HILGEMANN, THE ANCHOR ATLAS OF WORLD HISTORY 95 (Ernest A. Menze trans., 1978).

173. Treaty of Guadalupe Hidalgo, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922; *see* DEBO, *supra* note 13, at 158; *see also* MCEVEDY, *supra* note 76, at 144-45.

creased not only the numbers of settlers moving west but the distance they traveled as well. Settlers were no longer merely advancing the line of settlement incrementally but were instead rushing clear across the continent to the Pacific.[174] California became so well populated that it entered the Union in 1850,[175] with Oregon following in 1859.[176]

To fully appreciate the significance of California's admission to the Union, one must look at a map of the United States at that time.[177] In 1860, when Lincoln was first elected, the westernmost states other than California and Oregon were those bordering the Mississippi River (Arkansas, Missouri, Iowa, and Minnesota) and Texas in the southwest. All the territory between those states on the Mississippi and the Pacific Ocean was not part of the Union.[178] The land that is now Arizona, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Washington, and Wyoming was almost completely free of non-Indians, and was instead inhabited by Indian nations that exercised powers of self-government and dealt with the United States by treaty.[179]

The admission of California had no direct effect upon the status of Indian nations, and legally, nothing had changed since John Marshall's clear articulation of Indian sovereignty in 1832. What did change, however, was the United States' view of itself and its future. The Pacific Ocean was now the goal of American continental expansion. With all European influence gone from the continent,[180] the United States began to see its "Manifest Destiny,"[181] its self-proclaimed providential mission to establish the Union on a continental scale.[182] The end of the line had been reached, both figuratively

174. COHEN, *supra* note 6, at 97 ("The discovery of gold in California transformed the non-Indian migration westward into a stampede."); *see also* DEBO, *supra* note 13, at 126-33 (describing ensuing wars with Indian nations).

175. Act for the Admission of the State of California into the Union, 9 Stat. 452 (1850).

176. Act for the Admission of Oregon into the Union, 11 Stat. 383 (1859).

177. *See, e.g.*, MCEVEDY, *supra* note 76, at 78-83.

178. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 462 (1988) ("At the close of the Civil War, the frontier of settlement did not extend far beyond the Mississippi River."); MCEVEDY, *supra* note 76, at 79 (containing map).

179. 2 MORISON, COMMAGER & LEUCHTENBERG, *supra* note 80, at 5. ("For 30 years [1840-70] the intervening territory [between the Mississippi and the Pacific] was practically uninhabited except by Indians and Mormons.").

180. The French "lost all their possessions on the continent" after losing the French and Indian (Seven Years') War in 1763. DEBO, *supra* note 13, at 80. The British were confined to Canada after the War of 1812, which had significant Indian participation. *See* 2 SAMUEL E. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 129-30 (1965); MCEVEDY, *supra* note 76, at 70-71; DEBO, *supra* note 13, at 109-12. Spanish and later Mexican influence diminished as Mexico lost Texas in 1836 and the rest of its possessions north of the Rio Grande in 1848 under the Treaty of Guadalupe Hidalgo, Feb. 2, 1948, U.S.-Mex., 9 Stat. 922. *See* MORISON, *supra*, at 311-29; MCEVEDY, *supra* note 76, at 72-77.

181. John Louis O'Sullivan, *quoted in* JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 552 (Emily M. Beck ed., Little Brown, 15th ed. 1980) (1845) ("Our manifest destiny is to overspread the continent allotted by Providence for the free development of our yearly multiplying millions.").

182. The first governor of the Colorado territory wrote in 1846 that "[t]he *untransacted*

and literally, with railroads and chains of forts along wagon trails.[183] Rather than approach expansion gradually, the whole process had been leapfrogged and the outer boundaries staked. It now became a matter of simply filling in the middle of the continent between the Mississippi and the Pacific, a process which would cause Frederick Jackson Turner to coin his famous phrase, "the closing of the American frontier."[184]

This era of Manifest Destiny is also known to Americans as the era of the Plains Wars, the heyday of the Seventh Cavalry, Geronimo, Chief Joseph, Sitting Bull, Crazy Horse, Buffalo Bill, General Custer and other such figures from the "cowboy and Indians" period.[185] In essence it was a "mopping up" operation, a vigorous campaign to confine Indian nations to reservations and clear the transcontinental trails and railroads of (justifiable) Indian interference.[186] Great areas of land, formerly Indian sovereign territory, were forcibly opened for settlement.[187] And it was not only the Indian nations who found themselves caught in the middle of the Union. The Mormons, who like the Pilgrims before them had sought religious freedom by charting a course westward to new land, also suddenly found themselves "within the boundaries of the United States."[188]

This new conception of American destiny, and the revised and greatly diminished role of the Indian in it, began to take hold as a legal matter as well. In 1849, responsibility for Indian relations, which had been the province of the War Department since the first Congress in 1789,[189] was transferred to the Department of the Interior.[190] This implied that Indian affairs, while still a

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destiny of the American people is to subdue the continent—to rush over this vast field to the Pacific Ocean . . . ." William Gilpin, *quoted in* SMITH, *supra* note 158, at 37.

183. *See* DEBO, *supra* note 13, at 150-67.

184. In 1893, Turner wrote, "now, four centuries from the discovery of America, at the end of a hundred years of life under the Constitution, the frontier has gone, and with its going has closed the first period of American history." TURNER, *supra* note 7, at 38.

185. *See generally* ROBERT M. UTLEY, THE INDIAN FRONTIER OF THE AMERICAN WEST, 1846-1890 (1984). On the mythology of the period, see RICHARD SLOTKIN, GUNFIGHTER NATION: THE MYTH OF THE FRONTIER IN TWENTIETH-CENTURY AMERICA (1992).

186. *See* BROWN, *supra* note 54; DEBO, *supra* note 13, at 150-67. "[T]he causes of the Indian wars still raging in the frontier were probably those continuous violations of treaties by the Government." *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs,* 73d Cong., 2d Sess., pt. 1, at 15, 32 (1934) (statement of John Collier, U.S. Commissioner of Indian Affairs).

187. "Every year's advance of our frontier takes in a territory as large as some of the kingdoms of Europe. We are richer by hundreds of millions; the Indian is poorer by a large part of the little that he has. This growth is bringing imperial greatness to the nation; to the Indian it brings wretchedness, destruction, beggary." Annual Report of the Commissioner of Indian Affairs, H.R. EXEC. DOC. NO. 1, 42d Cong., 3d Sess. 389, 398 (1872), *quoted in* DOCUMENTS OF INDIAN POLICY, *supra* note 89, at 141; *see* COHEN, *supra* note 6, at 138; *see also infra* text accompanying notes 220-25.

188. DEBO, *supra* note 13, at 160; MCEVEDY, *supra* note 76, at 76.

189. *See supra* notes 142-44 and accompanying text.

190. Act of Mar. 3, 1849, ch. 108, § 5, 9 Stat. 395 (codified at 25 U.S.C. § 1 (1988)).

federal matter, were no longer an international issue, but rather a function of United States' control and development of its "interior."

Another indication of the shift in the conception of the status of Native peoples was the abandonment of treaty-making by the United States in 1871.[191] For nearly a century of American national experience, and several prior centuries of European experience, treaties had been the formal mode of diplomatic relations with the Indians.[192] In the period after the Civil War, however, when the "interior" was vigorously being settled through wars and treaties, the House of Representatives, which constitutionally had no role in the treaty process,[193] grew tired of being forced to appropriate monies to fulfill obligations under treaties which it had no hand in making or ratifying. The House decided that unless it was given a role in Indian affairs, it would refuse to appropriate any monies for Indian-related matters, including payments to Indian nations pursuant to treaty obligations.[194] A compromise was struck which provided that both houses of Congress would have a say in Indian matters, and a rider was attached to an 1871 appropriations bill stating that thereafter "[n]o Indian Nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."[195] While the 1871 act was probably unconstitutional because it eliminated the constitutionally enumerated powers of the executive branch both to make treaties and to recognize foreign nations,[196] it has never been so held.[197]

The end of treaty-making signified a change in the national attitude to-

191. Appropriations Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (1988)).

192. *See supra* notes 22-26, 138-41 and accompanying text.

193. Art. II, § 2, cl. 2.

194. *See* Antoine v. Washington, 420 U.S. 194, 202 (1975); George W. Rice, *Indian Rights: 25 U.S.C. § 71: The End of Indian Sovereignty or a Self-Limitation of Contractual Ability?*, 5 AM. INDIAN L. REV. 239, 240 (1977); BARSH & HENDERSON, *supra* note 144, at 67-69.

195. Appropriations Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (1988)). Existing treaties were not affected. *Id.*; *see also* COHEN, *supra* note 6, at 27-28.

196. U.S. CONST. art. II, § 2, cl. 2 & § 3. The 1871 act arguably violated the separation of powers doctrine by eliminating the executive power to conclude treaties with Indians by legislative act rather than by constitutional amendment. *See* Rice, *supra* note 194, at 246; BARSH & HENDERSON, *supra* note 144, at 68, 70. The 1871 act also arguably violated the executive power to recognize foreign officials. *See* U.S. CONST. art. II, § 3. Supporters of the 1871 act argued that they were only defining the term "foreign nation" as used in the Constitution. BARSH & HENDERSON, *supra* note 144, at 68. Constitutional interpretation, however, is a judicial province, and thus another separation of powers issue is raised, particularly since the Supreme Court had already addressed precisely that constitutional definition in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). *See supra* note 130. That the House of Representatives sought to redefine its jurisdiction, not by explicitly seeking to include treaty ratification within its powers but instead by declaring that Indian nations could no longer be recognized, shows that Congress understood that it was changing the constitutional scheme and sought to handle the politically sensitive issue through semantic subterfuge.

197. *See, e.g., Antoine*, 420 U.S. at 203-04 (The 1871 Act "meant no more . . . than that after 1871 relations with Indians would be governed by Acts of Congress and not by treaty.").

wards Native peoples. They were no longer "independent nations" beyond the borders of the United States but rather some form of political entity, less than a nation, "within the territory" of the country.[198] The end of treaty-making was analogous to the doctrine of discovery in that its long term effect on the legal status of Indians was much more pernicious than its immediate effect.[199] Just as the discovery doctrine was initially only a limitation on European interrelations, the end of treaty-making was only a "self-limitation of contractual ability"[200] by the United States. The redefinition of their status by the United States did not affect Indian nations directly, and the United States continued the substance of the treaty-making process for decades by negotiating "Indian agreements" with Native nations. The only difference was that after 1871 both houses of Congress were called upon to ratify such agreements.[201]

In the long run, however, the move from diplomatic treaty-making to a legislative process involving both houses of Congress, and the corollary shift from executive to congressional power, worked to remove Native nations from the sphere of international relations.[202] With both houses of Congress involved, it did not take long for Congress to move from approving executive actions (the Indian "agreements" which now substituted for treaties) to initiating its own legislation.[203] This change in the balance of power between Indian nations and the United States, the shift from "negotiation with" to "legislation over," was greatly exacerbated by the fact that Indian people, not being citizens, had no say in the legislation passed over them. The entire consensual basis implicit in the negotiation of treaties had been stripped away and replaced with Congress's legislative power.

E. Plenary Power

For several decades, even after the end of treaty-making and the closing of the frontier, the Supreme Court held to John Marshall's vision of Indian peoples as separate, independent nations. The clearest example of this came in

198. Appropriations Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (1988)).

199. *See supra* notes 107-109 and accompanying text.

200. Rice, *supra* note 194, at 239.

201. *Id.* at 247; BARSH & HENDERSON, *supra* note 144, at 69 n.40; CLINTON, NEWTON & PRICE, *supra* note 6, at 713.

202. *See* BARSH & HENDERSON, *supra* note 144, at 68-69:

> The most serious consequence of the [1871] compromise amendment was never openly addressed. Treaties, like contracts, are unenforceable except against those agreeing specifically and expressly to be bound by them. Legislation, however, is presumed to be legitimate when enacted, and enforceable against all persons within the power of the legislature.

See also McSloy, *supra* note 30, at 155-57.

203. *See* United States v. Kagama, 118 U.S. 375, 382 (1886) ("[A]fter an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern [Indians] by acts of Congress."); *accord* Antoine v. Washington, 420 U.S. 194, 203 (1975); Rice, *supra* note 194, at 246.

1883 in *Ex parte Crow Dog*.[204] Crow Dog, a Brule Sioux, murdered a Sioux chief on Sioux land. Under Sioux law, he was required to make restitution to the family of the victim.[205] Not satisfied with this punishment, a federal district attorney for the Dakota territory arrested Crow Dog on a federal murder charge and obtained a conviction, and Crow Dog was sentenced to death.[206] Crow Dog argued that he was not subject to the jurisdiction of the United States because his crime was an entirely internal matter of Sioux justice.[207] By a special act of Congress, funds were appropriated to pay Crow Dog's legal fees so that the case could be pursued to the Supreme Court.[208]

The Supreme Court unanimously denied that the United States had any jurisdiction over the internal affairs of the Sioux and held that Crow Dog need answer only to the laws of his nation.[209] Indian sovereignty, even at the seemingly late date of 1883, was upheld, and consequently, the only proper power of the United States was the ability to conduct external political relations with the Indian nations.

The ruling in *Ex parte Crow Dog*, though correct as a matter of law and in keeping with Chief Justice Marshall's precedents, provoked an outraged response over the Court's sanction of "red man's revenge."[210] In reaction to this outcry, and likely emboldened by the implicit sanction of legislative power over Indians contained in the 1871 treaty-making compromise, in 1885 Congress passed the Major Crimes Act.[211] That act, for the first time since "discovery," sought to apply American law to the internal affairs of an Indian nation by making certain crimes committed by one Indian against another federal criminal violations.[212]

The constitutionality of the Major Crimes Act was challenged immediately, and in *United States v. Kagama*,[213] the issue reached the Supreme Court.

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204. 109 U.S. 556 (1883); *see generally* Sidney L. Harring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191 (1989).

205. *See Crow Dog*, 109 U.S. at 557; Harring, *supra* note 204, at 199.

206. *Crow Dog*, 109 U.S. at 557. This punishment, by the "superiors of a different race," was presumably more "civilized." *Id.* at 571.

207. *Id.* at 557.

208. Harring, *supra* note 204, at 214-17 (citing Sundry Civil Expenses Act, ch. 143, 22 Stat. 624 (1883)).

209. *Crow Dog*, 109 U.S. at 572. Felix Cohen described the case as "an extreme application of the doctrine of tribal sovereignty." *Quoted in* Harring, *supra* note 204, at 191.

210. 109 U.S. at 571; *see* Harring, *supra* note 204, at 192.

211. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified at 18 U.S.C. § 1153 (1988)). *But see* Harring, *supra* note 204, at 195:

> [A] closer analysis of *Crow Dog* reveals the extension of criminal law over reservation Indians was the product of a broad national movement toward an assimilationist Indian policy. We can see clearly that the 'popular outcry' does not explain either the decision to criminally prosecute Crow Dog at the outset (for under *Worcester* there should have been no prosecution), or the subsequent Major Crimes Act. Rather, . . . the Bureau of Indian Affairs cultivated *Crow Dog* as a test case . . . to gain precisely the end that was won: criminal jurisdiction over the Indian tribes.

212. *See* 2 PRUCHA, *supra* note 79, at 679.

213. 118 U.S. 375 (1886).

Kagama, an Indian accused of murdering another Indian on Indian land within the state of California, challenged the act as beyond the constitutionally enumerated powers of Congress. The Court agreed with Kagama that neither the Commerce Clause,[214] the Property Clause,[215] nor any other constitutional provision authorized Congress's act.[216] However, despite the lack of a constitutional basis, the Court upheld the act:

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection . . . . It must exist in [the federal] government, because it never has existed anywhere else [under *Worcester*, the states had no power over Indians], because the theater of its exercise is within the geographical limits of the United States [i.e., the "interior"] . . . and because it alone can enforce its laws on all the tribes.[217]

Having thus created a legislative power over Indians after admitting that no such power could be found in or implied from the Constitution, the Court justified its holding on the grounds that:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights . . . . From their very weakness and helplessness, . . . there arises the duty of protection, and with it the power.[218]

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214. U.S. CONST. art. I, § 8, cl. 3; *Kagama*, 118 U.S. at 378-79 ("we think it would be a very strained construction . . . that a system of criminal laws for Indians living peaceably in their reservations . . . was authorized by the grant of power to regulate commerce with the Indian tribes.").

215. U.S. CONST. art. IV, § 3, cl. 2; *Kagama*, 118 U.S. at 380. As Kagama's reservation was located within the state of California, the Property Clause could not be used to uphold the Act. In any event, the Court stated that the "power of Congress to organize territorial governments, and make laws for their inhabitants, [does not] arise[] . . . from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the Territory and other property of the United States. . . ." 118 U.S. at 380.

216. The tribe to which Kagama belonged had never concluded treaties with the United States. *See* Newton, *supra* note 14, at 214 n.96. The Court thus did not mention the treaty power.

217. *Kagama*, 118 U.S. at 384-85.

218. *Id.* at 383-84. The Court's holding is also based in part on a misreading of the discovery doctrine. The court stated, "[T]hese Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two." *Id.* at 379. Thus the notion of a "title" to Indian lands held by the European "discoverer," initially meant only to establish spheres of influence among Europeans, by 1886 had come to mean that the discoverer's successors held political control over "the soil and people." This is contrary to the holding in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 546 (1832). Despite this contradiction, the *Kagama* Court cited the *Worcester* holding that a state cannot exercise jurisdiction over Indians to support its assertion that the power to do so therefore "must exist in [the federal] government." 118 U.S. at 384. The Court's complete disregard of Indian sovereignty contradicts not only Chief Justice Marshall's holding in *Worcester* but the Court's own holding three years prior in *Ex parte* Crow Dog, 109 U.S. 556

The *Kagama* Court thus held that simply because Indians were Indians, it was not necessary to find an enumerated constitutional basis for the exercise of congressional legislative power over them. Even if one ignores the explicit racism and Eurocentricity of such a rationale, the bootstrapping illogic of the *Kagama* Court's holding would not satisfy many modern constitutional scholars, of whatever political stripe, nor would the blatant nature of the Court's activism. In recent years the Supreme Court has thus been forced to strive mightily to ground the alleged "plenary power" of Congress over Indians in the constitutional text,[219] but the modern Court has been unable to find anything in the Constitution overlooked by the *Kagama* Court that could justify such a power.

However wrongly decided, the *Kagama* decision explicitly sanctioned the legislative power of Congress, and Congress began to legislate quite broadly over Indian people. A year after *Kagama*, in 1887, Congress passed the General Allotment, or Dawes, Act.[220] Its stated goal was to break up traditional Indian political and social structure by allotting reservation lands to individual Indians in 160 acre parcels, in the hope of turning Indian people into homesteading farmers holding lands individually in fee simple, subject to the laws of the states.[221] An equally important goal of the Allotment Act, however, was to open all of the nonallocated reservation land to white settlement without regard to treaty promises.[222] Over the following decades, 80 percent

(1883). The only distinction between the factually similar *Crow Dog* and *Kagama* cases was the presence of explicit congressional action, the Major Crimes Act, 18 U.S.C. § 1153 (1988), in *Kagama*. *Crow Dog* upheld the inherent sovereignty of Indian nations, but *Kagama* made that sovereignty subject to an overriding federal (but not state) power.

219. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973); Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83 (1977); Morton v. Mancari, 417 U.S. 535, 551-52 (1974).

220. 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 382 (1988 & Supp. IV 1992)); *see generally* DELOS S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (1973); CLINTON, NEWTON & PRICE, *supra* note 6, at 148-51. As Professor Ball notes, "[t]he [Allotment] Act has no apparent legitimating basis." Ball, *supra* note 43, at 63.

221. *See* Indian General Allotment Act, §§ 5-6, 24 Stat. 388, 389-390 (1887) (codified as amended at 25 U.S.C. §§ 348-349 (1988 & Supp. IV 1992)).

> Towards the end of the century, however, Congress increasingly adhered to the view that the Indian tribes should abandon their nomadic lives on the communal reservations and settle into an agrarian economy on privately-owned parcels of land. This shift was fueled in part by the belief that individualized farming would speed the Indians' assimilation into American society and in part by the continuing demand for new lands for the waves of homesteaders moving west.

Solem v. Bartlett, 465 U.S. 463, 466 (1984) (footnotes omitted). Representative Skinner, the House sponsor of the Allotment Act, declared that "tribal relations must be broken up" and that the "example of the white people" would provide a model for Indian people. Allotment, Skinner argued, would force Indian peoples to "abandon [their] thriftless habits . . . and finally rise to the level of the civilization that surrounds [them]." 18 CONG. REC. 190-91 (1886). The policy had its assimilative roots in Jeffersonian agrarianism. *See, e.g.*, Jefferson's Jan. 18, 1803 Message to Congress, *quoted in* DOCUMENTS OF INDIAN POLICY, *supra* note 89, at 21-22.

222. Indian General Allotment Act §§ 1, 5, 24 Stat. 388, 389 (1887) (codified as amended at 25 U.S.C §§ 331, 348 (1988 & Supp. IV 1992)). Indian lands in excess of what was needed to

of Indian lands, totalling over 90 million acres, were lost to white settlement,[223] and the political and social structures of many Indian nations were almost completely destroyed.[224] At the turn of the century, there were less than 238,000 surviving Indian people left within the United States.[225]

The failure of the Allotment Act to assimilate the Indians, as well as its amazingly destructive effects upon Indian culture, society, and government, led to a reform movement often called the "Indian New Deal."[226] The centerpiece of the reforms was the Indian Reorganization Act of 1934,[227] which repudiated the Allotment Act and attempted to reconstitute Indian governments and reservations.[228] In re-recognizing Indian governments, however, the Reorganization Act forced upon the Indian nations a governmental model based upon the United States Constitution,[229] and no Indian lands lost under the Allotment Act were returned. More importantly from a legal perspective, no one questioned from where Congress, however well-intentioned, derived the authority to legislate over Indians. The *United States v. Kagama*[230] holding that legislative power over Indian people "must be somewhere" had become settled law, and Congress's complete about-face in dealing with Indian nations, and the all-encompassing power it assumed to "reorganize" them,

satisfy allotments were deemed "surplus" and opened to settlement. *Solem*, 465 U.S. at 467; *see also History of the Allotment Policy, 1934: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs,* 23d Cong., 2d Sess. 9 (1934) (statement of Delos S. Otis), *quoted in* GETCHES & WILKINSON, *supra* note 72, at 114 ("[T]he most powerful force motivating the allotment policy was the pressure of land-hungry western settlers.").

223. Cohen, *supra* note 6, at 138; DEBO, *supra* note 13, at 331. President Theodore Roosevelt in 1906 stated that the allotment process was a "mighty pulverizing engine to break up the tribal mass." 35 CONG. REC. 90 (1906), *quoted in* Cohen, *supra* note 6, at 143.

224. COHEN, *supra* note 6, at 131-32; CORNELL, *supra* note 13, at 44; DEBO, *supra* note 13, at 299-331. The contemporaneous creation of "Courts of Indian Offenses" aimed at punishing traditional religious and cultural practices aided in this destruction. *See, e.g.,* United States v. Clapox, 35 F. 575 (D. Or. 1888); CLINTON, NEWTON & PRICE, *supra* note 6, at 151.

225. PRUCHA, *supra* note 78, at 57. Pre-contract population estimates were in the millions. *See* sources cited *supra* note 58. In 1980 there were 1.4 million Native Americans. GETCHES & WILKINSON, *supra* note 72, at 6.

226. *See* BARSH & HENDERSON, *supra* note 144, at 96; Barsh, *supra* note 49, at 43. A major catalyst for reform was the publication in 1928 of the famous "Meriam Report." INSTITUTE FOR GOVERNMENT RESEARCH, STUDIES IN ADMINISTRATION: THE PROBLEM OF INDIAN ADMINISTRATION (Lewis Meriam ed., 1928).

227. Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 467-79 (1988 & Supp. IV 1992)).

228. *Id.*; *see generally* Comment, *supra* note 49; COHEN, *supra* note 6, at 144-52, 247-48.

229. In order to gain federal recognition of its government, an Indian nation had to enact a constitution and secure the approval of the Secretary of the Interior. Indian Reorganization Act, § 16, Pub. L. No. 73-383, 48 Stat. 987 (codified as amended at 25 U.S.C. § 476 (1988)). Many of these constitutions were derived from a single "model" form designated by the government as "approvable." *See* AMERICAN INDIAN POLICY REVIEW COMMISSION, TASK FORCE TWO: TRIBAL GOVERNMENTS, FINAL REPORT 213 (1976); *see also* CLINTON, NEWTON & PRICE, *supra* note 6, at 368 (discussing "boilerplate" constitutions and secretarial review requirements). Indian nations could elect not to be governed by the Act under § 18, codified at 25 U.S.C. § 478 (1988). *But see* Barsh, *supra* note 49, at 362-66 (discussing voting irregularities perpetrated by the federal government).

230. 118 U.S. 375 (1886).

seemingly raised no legal question.[231]

In the 1950s the assimilationist urge struck Congress again, allegedly because many tribes "did so well" under the Reorganization Act.[232] Congress began a program known as "termination,"[233] with the intention of turning those Indian nations which had successfully reconstituted themselves under the Indian Reorganization Act into county governments within the states in which they were located.[234] The federal responsibility for Indian affairs would "terminate," along with all federal protections and benefits, and the Indian people in "terminated tribes" would become subject to state laws and taxes.[235] States would obtain civil and criminal jurisdiction over Indian people and lands in the terminated tribes and pursuant to other contemporaneous legislation, even over tribes that were not being "terminated."[236] The termination program sought to accomplish the same radically assimilative goals as the Allotment Act and it was not only aptly named but also run by a bureaucrat named Dillon Meyer, whose most notable prior governmental experience was as director of the internment camps for Japanese-Americans during World War II.[237] Predictably, the termination program proved disastrous for Indian peoples, and it was explicitly repudiated by both the executive branch and Congress in the 1960s and 1970s.[238]

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231. The Reorganization Act also carried with it the sense that the existence of Native governments was dependent upon the permission of Congress, rather than being the expression of "distinct, independent political communities, retaining their original natural rights." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832); *see* Frederick J. Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?*, 51 NOTRE DAME L. REV. 600, 615 (1976) ("[T]ribal self-government exists through the authority of Congress.").

232. *See* COHEN, *supra* note 6, at 157.

233. *See* H.R. Con. Res. 108, 83rd Cong., 1st Sess. (1953), 67 Stat. B132; *see also* Michael C. Welch, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181 (1983); COHEN, *supra* note 6, at 152-59, 170-75.

234. *See* COHEN, *supra* note 6, at 170-75; Welch, *supra* note 233.

235. COHEN, *supra* note 6, at 170-75; Welch, *supra* note 233. There was also a determined federal effort to induce Indian people to move to cities. *See* PRUCHA, *supra* note 78, at 70-71.

236. The most important other piece of "termination legislation" was "Public Law 280," Act of August 15, 1953, Pub. L. No. 280, § 505, 67 Stat. 588 (codified as amended in part at 18 U.S.C. § 1162 (1988) and 28 U.S.C. § 1360 (1988)), which provided that five states (California, Minnesota, Nebraska, Oregon, and Wisconsin) would assume all criminal and civil jurisdiction over the Indian nations within their borders (Alaska was added later). A similar law had been passed in 1948 giving New York such powers. 25 U.S.C. §§ 232, 233 (1988). Though Public Law 280 continues in force, its expansion was limited in 1968 by requiring Indian consent to any new assumption of jurisdiction. 25 U.S.C. § 1321(a), 1322(a) (1988); *see generally* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1975).

237. *See* Brian Hudson, *The Big Wide River of American Racism*, *in* 2 WITHOUT PREJUDICE: THE EAFORD INT'L REV. OF RACIAL DISCRIMINATION 91 (1989) (reviewing RICHARD DRINNON, KEEPER OF THE CONCENTRATION CAMPS (1987)).

238. *See, e.g.*, President's Message to Congress Transmitting Recommendations for Indian Policy, H.R. DOC. NO. 363, 91st Cong., 2d Sess. (1970); Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 450a (1988 & Supp IV 1992)); DEBO, *supra* note 13, at 405-18; CLINTON, NEWTON & PRICE, *supra* note 6, at 158-164.

Since the end of the termination era, relations between Indian peoples and the United States are said to be in an era of "self-determination,"[239] and federal Indian policy is said to be conducted as a "government to government relationship."[240] Despite the end of the worst excesses of the allotment and termination eras[241] and the general vitality of Justice Marshall's proscription of state power over Indians and recognition of inherent Indian sovereignty,[242] the plenary power first assumed by Congress in passing the Major Crimes Act and upheld by the Supreme Court in *United States v. Kagama*[243] has been regularly exercised legislatively and consistently upheld judicially. Congressional legislation has reached into all aspects of Indian life, society, and government,[244] and the Supreme Court has never held that the Congress has exceeded its powers.[245] Federal approval is required before any Indian nation can sign a contract[246] and before any Indian individual or nation can sell or otherwise deal in their lands.[247] Indian governments are required to have their laws approved by the federal government,[248] and their governmental procedures and those of Indian courts are regulated by the federal government.[249]

F. The Road

The simplest way to sketch the long history of American Indian law and policy would be a long sine wave that gradually diminishes, a historical oscillation between recognition of Indian sovereignty and virulent assimilationist policies, with the highs and lows flattening out as time progresses. At contact in 1492 the curve began at a high point, with the European legal conception of Native nations as independent sovereign entities to be dealt with through trea-

239. *See* COHEN, *supra* note 6, at 180-206 (discussing era of "self-determination" in American Indian law, 1961 to present); *see also* sources cited *supra* note 16.

240. President Reagan's Statement on Indian Policy, 1 RONALD REAGAN, PUB. PAPERS 96 (Jan. 24, 1983), *quoted supra* note 16.

241. Many "terminated" tribes were restored by act of Congress. *See, e.g.,* Menominee Restoration Act, 25 U.S.C. § 903(a) - 903(f) (1988). On the representative experience of the Menominee Nation, see Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); Stephen J. Herzberg, *The Menominee Indians: Termination to Restoration*, 6 AM. INDIAN L. REV. 143 (1978); S. REP. NO. 604, 93d Cong., 1st Sess. (1973), *quoted in* CLINTON, NEWTON & PRICE, *supra* note 6, at 1186-89.

242. *See* COHEN, *supra* note 6, at 270-79. *But see* Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 561-83 (discussing encroachments by states).

243. 118 U.S. 375 (1886).

244. *See supra* text accompanying notes 18-21, 41-52.

245. Ball, *supra* note 43, at 57.

246. 25 U.S.C. § 81 (1988); *see also* 25 U.S.C. § 84 (1988).

247. 25 U.S.C. § 177 (1988); *see also* 25 U.S.C. § 415 (1988 & Supp. IV 1992).

248. 25 U.S.C. § 476 (1988) (provision of the Indian Reorganization Act requiring approval by the Secretary of the Interior of tribal constitutions); *see also* COHEN, *supra* note 6, at 247-48. Many of these constitutions in turn require secretarial review of tribal laws and ordinances. *See* CLINTON, NEWTON & PRICE, *supra* note 6, at 368 (noting prevalence of tribal constitutions including authority for Secretarial approval or review of tribal ordinances)

249. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 25 U.S.C. §§ 1301-41 (1988 & Supp. IV 1992); *see supra* text accompanying notes 226-31 (discussing Indian Reorganization Act).

ties and diplomacy. The high water mark in American law would be Chief Justice Marshall's ringing endorsement of Indian sovereignty in 1832,[250] which would last for half a century up to and including the *Ex parte Crow Dog*[251] decision.

The passage of the Major Crimes Act in 1885[252] and the *Kagama*[253] decision upholding it began a quick and precipitous decline to the disastrous policies of the allotment era. In 1934, the Indian Reorganization Act[254] turned the curve upward again toward recognition of Indian sovereignty, but it rose nowhere near the level of respect accorded Indian nations by the Marshall Court. For all its reforms, the Reorganization Act still had an implicitly assimilationist bent in requiring American governmental models.[255]

The termination era of the 1950s was again a turn downward toward forced assimilation. However, just as reorganization did not reach the heights of Marshall's recognition of Indian sovereignty, the termination era was not nearly as long nor as disastrous as the allotment era. The current upward trend in the purported era of self-determination has seen greater recognition of Indian sovereignty but also more federal legislation and erosion in the doctrine preventing state interference in Indian affairs.

Today we are somewhere between Justice Marshall's respect and the Allotment Act's destruction, paying homage to self-determination but permitting broad federal legislative power over Indian lands, peoples, and governments. Current policies, however benevolently intended,[256] do not contemplate anything near the real recognition of sovereignty and self-determination that were once accorded to Native nations.

The extent of the overall decline from the original international law model of Indian affairs to the present day imposition of congressional plenary power under the guise of self-determination perhaps can best be illustrated by contrasting the two notorious incidents at Wounded Knee. The first and infamous incident in 1890 between the United States Army and the Sioux Nation was an act of war, however one-sided, and was thus an international incident.[257] The second incident occurred in 1973, when Indian activists began an armed (re)occupation of the area.[258] In contrast to the earlier incident, the

250. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

251. 109 U.S. 556 (1883).

252. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified at 18 U.S.C. § 1153 1988)). *See supra* notes 211-12 and accompanying text.

253. United States v. Kagama, 118 U.S. 375 (1886).

254. Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. § 467-79 (1988 & Supp. IV 1992)). *See supra* notes 226-31 and accompanying text.

255. Representative Howard, House sponsor of the Indian Reorganization Act, stated that "[t]his program will pave the way for a real assimilation of the Indians into the American community." 78 CONG. REC. 11,732 (1934).

256. *See, e.g.,* Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 450a (1988)).

257. *See* BROWN, *supra* note 54; CORNELL, *supra* note 13, at 3.

258. CORNELL, *supra* note 13, at 3.

1973 action was seen by the federal government as an act of treason, a domestic crime against one's country.[259] In less than a century, Native peoples were transformed in the eyes of the United States from foreign soldiers to domestic traitors.

II
THE EMPIRE HAS NO CLOTHES

Though Congress has habitually assumed that it has the power to legislate over the internal affairs of Indian nations ever since the 1885 Major Crimes Act was upheld in *Kagama*,[260] there has never been an articulable basis for that assumption. In fact, though the *Kagama* Court upheld the first intrusion into Indian sovereignty in United States history and laid the groundwork for every federal law regarding Indians enacted since, it explicitly denied that there was any constitutional basis for its holding. The Court held the law valid on no more than the statement that as a matter of judicial notice, Indian people were "dependent," "helpless," and in need of the "protection" of the federal government.[261]

Such reasoning is not likely to persuade modern jurists, as notions of the "white man's burden"[262] do not make convincing constitutional argument. The Supreme Court has thus recognized in recent decades that the vast edifice of federal Indian law rests on a constitutionally, if not morally, tenuous foundation and has therefore tried to "constitutionalize" the plenary power of Congress. However, it was not until 1973, nearly a century after *Kagama*, that the Court clearly indicated its belief as to the constitutional source of congressional power, writing that though "the source of Federal authority over Indian matters has been the source of some confusion, . . . it is now generally recognized that the power derives from the federal responsibility for regulating commerce with Indian tribes and for treaty making."[263]

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259. *See* BARSH & HENDERSON, *supra* note 144, at 274-75 (The 1973 Wounded Knee Occupation was considered "merely criminal, perhaps treasonous."); *see also* CORNELL, *supra* note 13, at 3-4.

260. United States v. Kagama, 118 U.S. 375 (1886).

261. *Id.* at 383-84; *see supra* text accompanying notes 213-18; *see also* Newton, *supra* note 14, at 214 ("acknowledging that no existing constitutional provision granted Congress [the] right to govern Indian affairs, the [*Kagama*] Court found [such power] to be inherent [in the Federal government].").

262. RUDYARD KIPLING, *The White Man's Burden* (1899), *reprinted in* A CHOICE OF KIPLING'S VERSES MADE BY T.S. ELIOT 143 (1943).

263. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973); *see also* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83 (1976) (plenary power is "rooted in the Constitution"); Morton v. Mancari, 417 U.S. 535, 551-52 (1973) (plenary power is "drawn both explicitly and implicitly from the Constitution itself.").

The only other place Indians are mentioned in the Constitution is in the Apportionment Clause, U.S. CONST. art. I, § 2, cl. 3, as amended by the Fourteenth Amendment, both of which state that "Indians not taxed" are not to be counted for the purpose of determining the number of seats the states have in the House of Representatives. However, the Court has occasionally relied on other constitutional provisions. The Supremacy Clause, U.S. CONST. art. VI, cl. 2, has been cited as a source for federal power over Indians, *see* COHEN, *supra* note 6, at 211, despite

Ultimately, however, the reasoning of the *Kagama* Court is correct in explicitly rejecting the Commerce Clause and implicitly rejecting the treaty power and any other constitutional provision as sources of federal power over Indians. There is no power in the Constitution that permits Congress to legislate over Indian nations. Any attempt by the judiciary to uphold the plenary power of Congress, therefore, is either an exercise in judicial activism without constitutional basis, such as in *Kagama*, or an exercise in post hoc "constitutionalization" of Congress's historical arrogation of power, such as the modern Supreme Court has undertaken.[264] The former, even without the blatant racism and paternalism of the *Kagama* opinion, is repugnant to the doctrine of enumerated powers.[265] As to the latter, whether the constitutional analysis is based upon notions of original intent or upon more modern jurisprudence, it quickly becomes clear that "there is no there there." In a government of enumerated powers, Congress should not be able to exercise power not even implicitly delegated to it.

In the absence of a constitutional delegation of power to the federal government, however, the conclusion should not be that the states have power over Indian people.[266] One of the mistakes of the *Kagama* Court was to say that "[t]here exist[s] within the broad domain of sovereignty but these two,"[267] the states and the federal government. In so holding, the Court ignored the existence of Native nations entirely, despite its holding just three years prior that Native nations had inherent powers of government and jurisdiction.[268] This inherent sovereignty of Indian nations, long recognized by the federal government, and binding upon the states through their accession to federal power in the Constitution, prevents the exercise of power over Indian people by the states.[269] In the United States, there are three types of sovereigns, not two: the federal government, the fifty states, and each of the Indian

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the fact that the clause itself confers no power but simply provides a priority rule for federalism. The war powers, U.S. CONST. art. I, § 8, cls. 1-16, which "underlay much of the federal exercise of authority over Indians during the history of the Republic," COHEN, *supra* note 6, at 210, cannot provide a constitutional source of power outside the context of hostilities or military occupation and are therefore no longer applicable to Indian nations. Many Indian nations, however, argue that this is precisely the source of federal power.

264. *McClanahan*, 411 U.S. 164, 172 n.7.

265. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the States respectively, or to the people."); *see* Kansas v. Colorado, 206 U.S. 46, 87-88 (1907); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819); TRIBE, *supra* note 34, § 5-2.

266. As the Tenth Amendment might otherwise indicate.

267. United States v. Kagama, 118 U.S. 375, 379 (1885).

268. *Ex parte* Crow Dog, 109 U.S. 556 (1883); *see also* Talton v. Mayes, 163 U.S. 376, 384 (1896) ("[T]he powers of local self-government enjoyed by the Cherokee Nation existed prior to the Constitution.").

269. In making federal treaties the "supreme Law of the Land," U.S. CONST. art. VI, cl. 2, the states acceded to the many recognitions of Indian sovereignty found in treaties with Native nations. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); The Kansas Indians, 72 U.S. (5 Wall.) 737, 755 (1866); Fellows v. Denniston (The New York Indians), 72 U.S. (5 Wall.) 761, 770-71 (1867).

nations.[270]

The following two sections address in turn the Court's claimed sources of federal plenary power, the Commerce Clause[271] and the treaty power.[272] They argue that while both confer power upon the federal government in specific and limited ways, they cannot support, either alone or together, the doctrine of plenary power and the massive structure of contemporary Indian-related federal legislation and case law. Two further sections then consider and find wanting two other claimed bases for federal power over Indians. The first claimed source is the notion in *Kagama* that from "the duty of protection [arises] the power."[273] The second comes from a recent series of cases holding as a matter of history that Indian nations have been "implicitly divested" of certain aspects of their sovereignty.[274]

Before turning to these analyses, however, the question must be answered as to why federal plenary power has existed and consistently been upheld by the Supreme Court for so long if it so fundamentally lacks constitutional support? A first and somewhat easy answer may be that the Eurocentric notions held by the Justices of the Supreme Court[275] and even by John Marshall, the greatest judicial advocate of Indian sovereignty,[276] are to blame. Marshall himself had written that "the character and religion of [the Native] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency."[277]

A second and more direct reason for the lack of interest shown by the Court in enunciating the foundations, or discovering the lack thereof, of federal plenary power has been the Court's continued adherence to the political question doctrine, which requires the judiciary to defer and hold nonjusticiable questions concerning the nation's foreign and domestic policy choices.[278] For example, in 1903 in *Lone Wolf v. Hitchcock*,[279] the Court stated that the

270. *See* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States and Federal Courts*, 56 U. CHI. L. REV. 671 (1989); Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 959-60 (1990). *Contra* AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 573-83 (Comm. Print 1977) (separate dissenting view of Congressman Lloyd Meeds).

271. U.S. CONST. art. I, § 8, cl. 3; *see infra* part II.A.

272. U.S. CONST. art. II, § 2, cl. 2; *see infra* part II.B; *see also* U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

273. United States v. Kagama, 118 U.S. 375, 384 (1885); *see infra* part II.C.

274. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); *see also infra* part II.D.

275. *See, e.g.*, Beecher v. Wetherby, 95 U.S. 517, 525 (1877) ("It is to be presumed that in this matter [Indian land rights] the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race.").

276. *See* Anaya, *supra* note 11, at 201-03.

277. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573 (1823).

278. *See generally* TRIBE, *supra* note 34, § 313. In the Indian context, see, for example, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281 (1955); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846).

279. 187 U.S. 553 (1903).

power of Congress with respect to Indian affairs "has always been deemed a political one, not subject to be controlled by the judicial department."[280] Since it has declined for generations to review Congress's exercise of its purported plenary power, the Court has never had the occasion or need to explore the alleged underpinnings of such power.

In a sense, applying the political question doctrine to Indian matters is entirely appropriate, as the most frequent invocation of the doctrine is with respect to foreign affairs.[281] For example, in *Lone Wolf*, the Indian plaintiff claimed that an act of Congress violated a treaty between the United States and the plaintiff's Indian nation.[282] As it would in the more traditional sphere of international relations, the Court held that such matters were committed to the other branches of government and were thus nonjusticiable.[283] In denying the plaintiff a forum, the Court evinced respect for Indian sovereignty and the Indian nation as an independent international actor.[284] If the plaintiff's claim had simply been a domestic matter of civil or economic rights, the Court would have heard the case. Since it instead concerned relations between the political branches of the federal government and an alien power, the proper forum for adjudicating such a dispute would be the international diplomatic arena and not the federal judiciary.[285]

The problem for Indian nations was that even though the Supreme Court took Indian affairs out of the international context and made Indians subject to domestic jurisdiction in *United States v. Kagama*,[286] the Court nonetheless refused to subject the exercise of this new domestic power over Indians to judicial scrutiny because of the political question doctrine, applicable to international matters.[287] Because Indian people could not sue as nations, nor in most cases as citizens, in federal courts,[288] they became subject to an extraconstitutional power unreviewable by the "Courts of the conqueror."[289]

In recent years, however, the Court, in tandem with its efforts to "constitutionalize" plenary power, has sought to subject the exercise of federal power

280. *Id.* at 565.

281. *See* Baker v. Carr, 369 U.S. 186 (1962); *see also* Robert Coulter, *The Denial of Legal Remedies to Indian Nations under U.S. Law*, *in* RETHINKING INDIAN LAW 103, 104 (National Lawyers Guild ed., 1982) (citing Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918)) ("By far the greatest application and the principal thrust of the doctrine is in the field of foreign relations.").

282. 187 U.S. at 564.

283. *Id.* at 568.

284. *See* Coulter, *supra* note 281, at 104:

> The application of the political question doctrine to Indian affairs thus appears to be an implicit categorization of Indian matters within the field of foreign relations. [Thus] Indian nations are treated in certain fundamental and critical respects just as other nations of the world in the United States courts.

285. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 20 (1831) ("If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted.").

286. 118 U.S. 375 (1886).

287. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

288. *Cherokee Nation*, 30 U.S. (5 Pet.) 1; *see also* COHEN, *supra* note 6, at 162-64.

289. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 588 (1823).

over Indians to judicial scrutiny. In 1977, the Court finally repudiated the longstanding application of the political question doctrine to Indian affairs and permitted judicial scrutiny of Indian-related legislation.[290] The Court has not, however, seriously examined the alleged sources of federal power that the doctrine long cloaked, and for this reason, attacks upon the foundation of plenary power have come to the fore.[291]

A. The Commerce Clause

As Professor Clinton has noted, "it is a long, twisted path indeed from the framers' decision to give Congress the exclusive power to regulate commerce and other relations *with* the Indian tribes to the modern assertion of plenary power *over* them."[292] Chief Justice Marshall made clear, as did the Constitution itself, that the Commerce Clause was an expression of the Framers' clear desire to vest Congress, and not the states, with the power to regulate trade with Indian nations.[293] In fact, one of the first acts of Congress under the new Constitution was the Trade and Intercourse Act codifying this power.[294] In 1886, while upholding for the first time congressional power over the internal affairs of Indian nations, the *Kagama* Court stated, "[W]e think it would be a very strained construction of [the Commerce] clause, that a system of criminal laws for Indians living peaceably on their reservations, . . . was authorized by the grant of power to regulate commerce with the Indian tribes."[295] The Court nonetheless upheld the statute on the ground that Indian people were "helpless" and "dependent," but made clear that only such racial and paternalistic notions and no constitutional provision provided the justification for the power exercised.[296]

Though *Kagama* evidenced a departure from the prior de jure recognition of Indian sovereignty, it was consistent with then contemporary views about

290. Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84 (1976); *see also* United States v. Sioux Nation, 448 U.S. 371, 413 (1980).

291. See *supra* part I.E for a discussion of plenary power. Two of the strongest recent critiques of plenary power are Newton, *supra* note 14, and Ball, *supra* note 43. A broad range of critiques is presented by various authors in RETHINKING INDIAN LAW, *supra* note 281. *See also* Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11; McSloy, *supra* note 30. An interesting colloquy can be found in Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WISC. L. REV. 219; Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An essay in reaction to Professor Williams' Algebra*, 30 ARIZ. L. REV 413 (1988); Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia*, 30 ARIZ. L. REV. 439 (1988); Robert Laurence, *On Eurocentric Myopia, The Designated Hitter Rule and "The Actual State of Things"*, 30 ARIZ. L. REV 459 (1988).

292. Clinton, *supra* note 122, at 859.

293. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832); *see supra* text accompanying notes 127-37.

294. *See, e.g.*, An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790) (codified at 25 U.S.C. § 177 (1988)); *see also* COHEN, *supra* note 6, at 108 n.376 (listing subsequent reenactments).

295. United States v. Kagama, 118 U.S. 375, 378-79 (1886).

296. *Id.* at 378-84; *see supra* text accompanying notes 214-18.

the reach of the Commerce Clause. With respect to each of the three types of entities enumerated in the Clause (foreign nations, the states, and Indian tribes), the Clause only provided Congress with the power to regulate trade. Congress therefore had the power to establish customs and duties, to require and grant licenses, and, at the extreme, to embargo or prohibit commerce.[297] However, nothing in the Clause or elsewhere in the Constitution, for that matter, empowered Congress to interfere in the internal affairs of its European trading partners, and with the exception of the provisions of the Constitution delegating authority to the federal government, Congress also had no power to interfere with the internal affairs of the states.[298] Even after the end of the Civil War and the passage of the Fourteenth Amendment, federal authority even to apply the Bill of Rights to the states had not been judicially declared.[299] Certainly with regard to foreign nations there was no sense that the Commerce Clause empowered the federal government to make any law other than one respecting trade.

Kagama was thus consistent with the Commerce Clause jurisprudence of its day in that it held the Clause to provide no power, outside the realm of trade, among sovereign entities. Indian nations, like foreign nations and, at that point in American history, the several states,[300] were all similarly seen as sovereign powers over which the federal government had no power except that which had been delegated to it by such other sovereign.[301] The states delegated such power by means of the Constitution, while Indian and other foreign nations could delegate such power through treaty.[302]

This vision of the Commerce Clause has never changed with respect to other nations of the world. The United States in 1993 has no more power to pass a law affecting German citizens in their relations with other German citizens within Germany than it did in 1789, which is to say, none at all.[303] Since the New Deal, however, and the "switch in time that saved nine,"[304] the interpretation of the Commerce Clause regarding the states has changed fundamentally.[305] Congress today has a power over the states, judicially upheld on

297. *See generally* TRIBE, *supra* note 34, §§ 5-3 to 5-8, at 300-18.

298. U.S. CONST. amend. X; TRIBE, *supra* note 34, §§ 6-1 to 6-4, at 401-08.

299. This would later change with the incorporation doctrine. *See* TRIBE, *supra* note 34, § 11-2, at 772-74.

300. As is frequently noted, although the modern locution is that the United States *is* a Republic, for the greater part of American history it was said that the United States *are* a Republic. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM 859 (1988).

301. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 546 (1832); *see also Ex parte* Crow Dog, 109 U.S. 556 (1883).

302. *See* Berman, *supra* note 14, at 133 ("International law has always recognized the effectiveness of rights acquired by cession."); *see also* COHEN, *supra* note 6, at 67 (giving examples of treaty delegations); *infra* note 391 and accompanying text.

303. *See, e.g.*, SEC v. Myers, 285 F. Supp. 743, 746 (D. Md. 1968); United States v. Yunis, 681 F. Supp. 896, 907 n.24 (D.D.C. 1988), *aff'd on other grounds*, 924 F.2d. 1086 (D.C. Cir. 1991).

304. *See* TRIBE, *supra* note 34, § 5-4. On the quotation, see ROBERT H. BORK, THE TEMPTING OF AMERICA 56-57, 382 n.10 (1990).

305. *See* ARCHIBALD COX, THE COURT AND THE CONSTITUTION 156 (1987) ("The revo-

the basis of the Commerce Clause, so vast that it is virtually unlimited.[306] The Supreme Court has required only that a "rational basis"[307] exist for a "congressional finding that a regulated activity affects interstate commerce."[308] The federal government regulates business, the environment, labor, civil rights, and a host of other concerns through legislation based on the Commerce Clause,[309] often to what might appear to be doctrinal extremes.[310]

The Supreme Court's justification for its changing Commerce Clause jurisprudence has been widely discussed and debated.[311] At bottom, the Court's rationale for sanctioning the expansion of federal government powers is that the states already have a remedy in the national political process to address any grievances brought about by congressional overreach.[312] As James Madison argued in the *Federalist Papers*, although there were no explicit limitations upon the powers of Congress over the states under the Commerce Clause, the distribution of powers in the federal system would impose constraints upon its unbridled exercise.[313] Specifically, Madison argued that the exercise of federal power was limited by the local character and constituency

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lutionary turning point toward modern interpretation of the scope of congressional power to regulate interstate commerce" was the decision in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)).

306. COX, *supra* note 305, at 166 (Since 1937, the Court has recognized "virtually unlimited congressional power to regulate business activities under the Commerce Clause."); *see also id.* at 170-73; Wickard v. Filburn, 317 U.S. 111, 124 (1942) (" '[N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress.' ") (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)).

307. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981).

308. *Id.*; *see also* TRIBE, *supra* note 34, § 5-5 at 310-11. ("The Supreme Court has without fail given effect to such congressional findings.").

309. The doctrinal shift occasioned by the New Deal was actually twofold, encompassing not only an expansion of the Commerce Clause but also a reduced view of inherent state sovereignty. As recently stated by the Court:

> These questions can be viewed in either of two ways. In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I . . . . In other cases the Court has sought to determine whether [such] Act . . . invades the province of state sovereignty reserved by the Tenth Amendment. In a case . . . involving the division of authority between federal and state governments, [however,] the two inquiries are mirror images of each other.

New York v. United States, 112 S. Ct. 2408, 2417 (1992) (citations omitted). The Tenth Amendment is thus a "truism." United States v. Darby, 312 U.S. 100, 124 (1941).

310. The classic example cited by both Archibald Cox and Professor Tribe is Katzenbach v. McClung, 379 U.S. 294 (1964), which applied racial antidiscrimination laws to a diner in the South on the ground that meat served by the diner had come from out of state. *See* COX, *supra* note 305, at 165; TRIBE, *supra* note 34, § 5-5, at 311. This Article does not take issue with the holding in *McClung* or with the doctrinal expansion of the *Interstate* Commerce Clause. The point is simply to illustrate that, as between foreign nations and the states, the jurisprudence of the Commerce Clause has taken divergent paths, the former and narrower of which should be followed with respect to Indian nations.

311. *See generally*, TRIBE, *supra* note 34, § 5-4, at 308-10; JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); BORK, *supra* note 304; COX, *supra* note 305.

312. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985); *see* TRIBE, *supra* note 34, § 5-7, at 313-16, § 5-22, at 386-97.

313. THE FEDERALIST NOS. 45, 46 (James Madison). *Accord Garcia*, 469 U.S. at 550-52.

of each member of Congress;[314] the existence of congressional delegations by state;[315] the existence of equal representation by state in the Senate;[316] the control of state legislatures over the elections of the President, the Vice President,[317] and the Senate;[318] and the states' control over voting eligibility for elections of Representatives to the House of Representatives.[319] These procedural protections serve to limit the exercise of federal power and work to prevent the federal government from encroaching upon state sovereignty.[320]

Madison's analysis retains its vitality, and though superseded in some of its particulars by constitutional amendments reflecting moves toward greater popular democracy and suffrage,[321] it may actually be enhanced by amendments that, through increased popular representation, concomitantly increase the accountability of Congress to local and state interests. Because these structural aspects of the national political process act as a check to protect

314. THE FEDERALIST No. 46, at 318 (James Madison) (J. Cooke ed., 1961) ("A local spirit will infallibly prevail . . . in the members of Congress.").

315. *See generally* THE FEDERALIST No. 54 (James Madison); *see also Garcia*, 469 U.S. at 550-52.

316. THE FEDERALIST No. 62, at 416-17 (James Madison) (J. Cooke ed., 1961). The "Great Compromise," pursuant to which states are equally represented in the Senate, is found in U.S. CONST. art. I, §§ 2-3. Article V prohibits the divestment of a state's senatorial representation, even by constitutional amendment, without the state's consent. *See Garcia*, 469 U.S. at 551-52.

317. THE FEDERALIST No. 45, at 311 (James Madison) (J. Cooke ed., 1961) ("Without the intervention of the State Legislatures, the President of the United States cannot be elected at all."). The Electoral College, both a restriction on the popular vote and a forum for state interests, is established in the United States Constitution. U.S. CONST. art. II, § 1, cl. 2-3. The President and Vice President were originally to be those who received the two highest numbers of electoral votes, without regard to their personal political differences. U.S. CONST. art. II, § 1, cl. 2. The Twelfth Amendment changed this procedure but not state control over it. *See also Garcia*, 469 U.S. at 551.

318. THE FEDERALIST No. 45, at 311 (James Madison) (J. Cooke ed., 1961) ("The Senate will be elected absolutely and exclusively by the State Legislatures."). The Constitution originally provided for the indirect election of Senators. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1; *see also Garcia*, 469 U.S. at 551.

319. *See* U.S. CONST. art. I, § 2; THE FEDERALIST No. 52, at 354 (James Madison) (J. Cooke ed., 1961); *see also Garcia*, 469 U.S. at 551.

320. *See* THE FEDERALIST No. 45, at 313 (James Madison) (J. Cooke ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined."); THE FEDERALIST No. 39, at 256 (James Madison) (J. Cooke ed., 1961) ("[Federal] jurisdiction extends to certain enumerated objects only; and leaves to the several states a residuary and inviolable sovereignty over all other objects.").

321. The indirect election of Senators was repealed in 1913. U.S. CONST. amend. XVII. The President and Vice President are now elected together, U.S. CONST. amend. XII, from national political parties. The Electoral College, while still a partial restraint on direct popular election for the President, has ceased to be a viable forum for state debate. *See* ARNOLD M. PAUL, THE CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895, at 234 (1960). The franchise has been expanded at various points in the nation's history. *See* U.S. CONST. amend. XV (prohibiting racial bars to voting); U.S. CONST. amend. XIX (female suffrage); U.S. CONST. amend. XXIV (poll taxes prohibited); U.S. CONST. amend. XXVI (suffrage for those eighteen and older); *see generally* Reynolds v. Sims, 377 U.S. 533, 554-61 (1964).

state interests,[322] the Supreme Court has declined to impose any limits on congressional power pursuant to the Commerce Clause against state claims of infringement on their rights within the federal system.[323]

Indian nations, however, do not enjoy any of the political process protections available to the states. Because Indian nations do not have the same structural protections as states, the Supreme Court's "switch in time,"[324] allowing broad federal authority over the states under the Interstate Commerce Clause, should not be read as applicable to Indian nations under the Indian Commerce Clause.

For the greater part of American history, Indians have been explicitly excluded from any participation, as individuals or as groups, in any aspect of the national political process. This was not a denial of their rights, but rather a recognition of their status as separate sovereigns under international law. Indians were explicitly excluded from being part of the "people of the United States" by the provision of the Constitution that "Indians not taxed" should not be counted by the census,[325] "which, of course, excluded nearly all of that race."[326] This provision was reenacted by the Fourteenth Amendment in 1867.[327] Thus, in bringing African-Americans into the polity, the Fourteenth Amendment affirmed the policy of the United States to keep Indians out. The Supreme Court held in *Elk v. Wilkins*,[328] after the ratification of the Fourteenth Amendment, that even an Indian who voluntarily "severed his tribal relation . . . and fully and completely surrendered himself to the jurisdiction of

322. *See, e.g.*, Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); CHOPER, *supra* note 311, at 171-259. Both authors make this Madisonian argument in support of the thesis that judicial review of state challenges to federal acts made pursuant to Congress's enumerated powers is inappropriate, as the states should look to the political process for a remedy.

323. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985) ("State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."); *see also* Martha A. Field, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985). In the recent case of New York v. United States, 112 S. Ct. 2408 (1992), the Court did, however, review and strike a federal law upon challenge by a state. The challenged law, however, was admittedly "unique." 112 S. Ct. at 2429. In any event, the Court's willingness to intervene in such a federalism-based controversy does not affect the reach of the commerce power but instead merely addresses the role of the judiciary in policing the federalist design.

As distinguished from state claims, the Court has not refrained from limiting federal power over individuals who do not enjoy political process protections. *See* United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may . . . curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and [thus] may call for a correspondingly more searching judicial inquiry."); *see generally* JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73-183 (1980).

324. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 56-57, 382 n.10 (1990).

325. U.S. CONST. art. I, § 2, cl. 3; *see* Newton, *supra* note 14, at 238-39.

326. United States v. Kagama, 118 U.S. 375, 378 (1886).

327. U.S. CONST. amend. XIV, § 2.

328. 112 U.S. 94 (1884).

the United States" could not vote.[329] The Supreme Court stated that as a racial matter Indians "owed immediate allegiance to their several tribes, and were not a part of the people of the United States."[330]

Though Indians today have been granted the right to vote,[331] a "gift" often not accepted[332] and frequently not easily enjoyed,[333] this does not remedy the constitutional problem. The right to vote was not granted to Indian people generally until 1924, less than seventy years ago, and long after Congress was held to have unlimited plenary power over Indians. Thus, it cannot be said that any notion of "consent of the governed"[334] applies to the legislation pursuant to which the federal government exercises plenary authority.

More importantly, the protections available to the states in the national political process are protections for the states *as states*, as sovereign entities, and not merely as geographic locations.[335] Rhode Island, Hawaii, and other small states are deliberately protected as small states, most notably by their senatorial representation, and thus have rights above and beyond their proportion of the popular vote.[336] Indian nations, on the other hand, have no such procedural protections. They do not enjoy senatorial representation nor do they send delegations to the House of Representatives. They often do not even enjoy de facto protections, as congressional districts often cut across tribal lines and reservation boundaries,[337] states resist Indian voting rights,[338] and

329. *Id.* at 98.

330. *Id.* at 99; *see also id.* at 102 ("Indians born within the territorial limits of the United States . . . are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the . . . Fourteenth Amendment, than the children of subjects of any foreign government . . . or the children . . . of ambassadors."); McKay v. Campbell, 16 F. Cas. 161, 166-67 (D. Or. 1871) (No. 8840). Similarly, in 1870 the Senate Judiciary Committee concluded that Indian people were not subject to the jurisdiction of the United States within the meaning of the Fourteenth Amendment. S. REP. NO. 268, 41st Cong., 3d Sess. 9-10 (1870); *see also* BARSH & HENDERSON, *supra* note 144, at 62-74; McSloy, *supra* note 30, at 150 n.63; Mark Savage, *The Great Secret About Federal Indian Law—Two Hundred Years in Violation of the Constitution—and the Opinion the Supreme Court Should Have Written to Reveal It*, 20 N.Y.U. REV. L. & SOC. CHANGE 343, 350 (1993).

331. Indians formally received the right to vote when they were given citizenship, which was granted to certain Indian people under the Indian General Allotment Act of 1887, §§ 5-6, 24 Stat. 388, 389-390 (codified as amended at 25 U.S.C. §§ 348-349 (1988 & Supp. IV 1992)) and generally by the Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (1988)).

332. *See* VINE DELORIA, JR. & CLIFFORD M. LYTTLE, AMERICAN INDIANS, AMERICAN JUSTICE 218 (1982); DELORIA, *supra* note 31, at 18; BARSH & HENDERSON, *supra* note 144, at 71-73, 276 n.17; Collins, *supra* note 32.

333. *See, e.g.*, Porter v. Hall, 271 P. 411 (Ariz. 1928) (prohibiting Indians from voting), *overruled by* Harrison v. Laveen, 196 P.2d 456 (Ariz. 1948); Allen v. Merrel, 305 P.2d 490 (Utah 1956) (prohibiting Indians from voting), *vacated as moot*, 353 U.S. 932 (1957).

334. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

335. *See* THE FEDERALIST NO. 45, at 287 (James Madison) (J. Cooke ed., 1961) ("[T]he States will retain under the proposed Constitution a very extensive portion of active sovereignty . . . ."); *see also* THE FEDERALIST NO. 39 (James Madison); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547-52 (1989).

336. U.S. CONST. art. I, § 3.

337. *See, e.g.*, Voting Rights Act Amendments of 1992, Determinations under Section 203, 57 Fed. Reg. 43, 213 (Sept. 18, 1992); *see also* cases cited in COHEN, *supra* note 6, at 646 n.6.

language barriers inhibit the franchise.[339] This contrasts even with the much more favorable protections offered to the inhabitants of the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and American Samoa, all of which send representatives to Congress with all the privileges of members except voting.[340] The District of Columbia is even represented in the Electoral College.[341]

The states are still sovereign entities, with rights as states and broad power to make and be governed by their own laws. This fundamental principle of federalism has been revived in the proposals of recent administrations for a "New Federalism,"[342] building upon the idea that the states are "laboratories" for innovations in social policy,[343] and reinforcing the fundamental conception of state sovereignty affirmed in the Tenth Amendment.[344] The states thus are not only guaranteed political process protections, but have the wherewithal to enjoy them. Indian nations have neither.

The Supreme Court has recognized this distinction between the Interstate and Indian Commerce Clauses, though it has been blind to its implications. In 1989 the Court wrote:

> It is also well-established that the Interstate Commerce and Indian Commerce Clauses have very different applications. . . . The extensive case law that has developed under the Interstate Commerce Clause, moreover, *is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause.*[345]

The solution, however, is not to somehow incorporate Indian nations as states into the federal scheme, though there have been proposals to that effect, dating from some of the earliest treaties between the United States and Native

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338. *See* cases cited *supra* note 333.

339. *See* Voting Rights Act Amendments of 1992, Determinations under Section 203, 57 Fed. Reg. 43, 213 (Sept. 18, 1992).

340. *See* 2 U.S.C. § 25a (1988) (District of Columbia); 48 U.S.C. § 891 (1988) (Puerto Rico); 48 U.S.C. § 1711 (1988) (Guam and Virgin Islands); 48 U.S.C. § 1731 (1988) (American Samoa).

341. U.S. CONST. amend. XXIII.

342. This comports with those same administrations' avowals of a "government to government relationship" between Indian nations and the United States. *See* sources cited *supra* note 16; *see generally* TIMOTHY J. CONLAN, NEW FEDERALISM: INTERGOVERNMENTAL REFORM FROM NIXON TO REAGAN (1981).

343. New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

344. U.S. CONST. amend X; *see* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549 (1985) (" '[T]he Constitution . . . recognizes and preserves the autonomy and independence of the States.' ") (quoting Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-79 (1938)).

345. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (emphasis added) (citations omitted). Despite the acknowledged difference, the Court nonetheless stated that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs. . . . " *Id.*

nations.[346] The appropriate solution is to recognize that the Commerce Clause can in no way be seen to empower Congress to legislate over the lives, liberties, or property of Indian peoples. This is true whether the Commerce Clause is read through the lens of original intent,[347] as was done by the *Kagama* Court,[348] or in light of the modern jurisprudence concerning the structural safeguards of the national political process.[349] Since Indian nations as entities are not represented in the political process, they are not protected by it. They therefore should not be subject to a power premised upon the existence of precisely such protection.

The treatment of Indian peoples under the Commerce Clause should be no different than with respect to the people of other foreign nations: the United States may regulate trade, control entry, impose customs duties, and the like, but it has no power to interfere with the internal affairs of foreign nations. Viewing the Indian Commerce Clause in this manner would not be such a radical departure were it not for the fact that the Supreme Court has laid the foundation for congressional plenary power by relying most strongly upon the Commerce Clause.[350] Thus, if the argument were accepted, an entire title of the United States Code would be invalidated. Yet if the power cannot be found in the Constitution, in our government of enumerated powers, it should not be found at all.

B. The Treaty Power

The power of the federal government to conclude treaties with Indian nations has been cited as a justification in and of itself for the plenary authority of Congress to legislate over Indians.[351] This justification has continued

346. *See, e.g.*, Articles of Agreement and Confederation, Sept. 17, 1778, U.S.-Delaware Nation, art. VI, 7 Stat. 13, 14; Annie H. Abel, *Proposals for an Indian State 1778-1878*, *in* ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1907, at 89, 94-102 (1908), *quoted in* CLINTON, NEWTON & PRICE, *supra* note 6, at 31-32. For a modern proposal, see BARSH & HENDERSON, *supra* note 144, at 270-82 (proposing a system of "treaty federalism"). For purposes of several federal statutes and Supreme Court doctrines Indian nations are considered to be states. *See* COHEN, *supra* note 6, at 385 (discussing Full Faith and Credit doctrine); Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, 96 Stat. 2608 (1983) (codified as amended at 26 U.S.C. § 7871 (1988)) (treating tribes as states for certain tax purposes); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9607(a)(4)(A) (1988) (tribes treated as states under environmental statute).

347. *See* Savage, *supra* note 330, at 360-61.

348. United States v. Kagama, 118 U.S. 375, 378-79 (1886).

349. *See supra* notes 312-23 and accompanying text. Professor Clinton reaches a similar conclusion but argues that Indian nations' lack of political process protections requires "a considerably more aggressive judicial posture designed to protect the autonomy and sovereignty of tribes." Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 121 (1993).

350. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973).

351. *See* COHEN, *supra* note 6, at 207 ("The Treaty Clause . . . has been a principal foundation for federal power over Indian affairs."); *see also McClanahan*, 411 U.S. at 172 n.7; Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943).

long after the practice of treaty-making was halted by Congress in 1871,[352] causing one commentator to note the anomalous result that Congress "struck down or admitted to be false the chief constitutional basis of [federal] power [with respect to Indians]."[353] The Supreme Court's continued reliance upon the treaty power as a source of federal authority may in part be due to the fact that the 1871 act ending treaty-making explicitly provided that prior treaties not be affected.[354] Such treaties remain in force to this day, a great number of them having provided for payments in cash and goods in perpetuity or for permanent borders. Yet the Court has not limited its invocation of the treaty power as a source of plenary power to the narrow case of existing treaties and instead cites it generally as a font of federal authority.[355]

The law applicable to treaties with Indian nations is the same as would apply to any international obligation of the United States.[356] The same constitutional source provides for both Indian and other foreign treaties (without mentioning either distinctly) and subjects both to the same negotiation and ratification procedures.[357] A treaty concluded by an Indian nation was considered a contract between sovereign nations, and Indian cessions of land or jurisdiction were viewed as delegations of sovereign power.[358] As in international law generally, or even basic real property law, any rights not granted by one party to a treaty or contract to the other are reserved to the granting party and retained.[359] As stated by the Supreme Court in 1905, "[an Indian] treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[360] The modern understanding of the term Indian reservation, therefore, is directly contrary to the phrase's original meaning. An Indian reservation was not land that the United States reserved for the Indians, but rather a reservation by the Indians of their original rights to possession and jurisdiction.[361]

There is one cardinal difference between Indian treaties and those with other nations, though it works only to the advantage of the Indian parties. In interpreting the terms of treaties with Indian nations, the Supreme Court has held, based on the "unequal bargaining position" of the parties,[362] that treaty

352. Appropriations Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (1988)); *see supra* text accompanying notes 191-203.

353. George W. Rice, *The Position of the American Indian in the Law of the United States*, 16 COMP. LEGIS. & INT'L L. 78, 83 (3d Ser., 1934); *see also* COHEN, *supra* note 6, at 208.

354. Appropriations Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (1988)).

355. *See, e.g.*, *McClanahan*, 411 U.S. at 172 n.7.

356. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979); United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 197 (1876); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 548 (1832).

357. U.S. CONST. art. II, § 2, cl. 2.

358. *See generally* COHEN, *supra* note 6, at 62-70.

359. United States v. Winans, 198 U.S. 371, 381 (1905).

360. *Id.*, *cited with approval in* United States v. Wheeler, 435 U.S. 313, 327 n.24 (1978).

361. United States v. Winans, 198 U.S. 371 (1905).

362. COHEN, *supra* note 6, at 222.

provisions are to be given the construction most sympathetic to the Indian parties.[363] However, such sympathetic canons of construction are subject, as are international treaties generally, to the principle of "last in time." This principle holds that the most recent act of a nation, either in agreeing to a treaty or by enacting domestic legislation, abrogates any prior inconsistent treaties or statutes.[364] Thus an Indian nation, and more importantly, the United States, may unilaterally abrogate its treaty obligations—by declaration of war, refusal to honor the treaty's terms, or otherwise—and in doing so, is subject only to the force of international repercussions.[365] The federal judiciary may not enforce treaty rights in the face of congressional abrogation, as such matters are "political questions" beyond its purview.[366]

The power of the federal government to conclude treaties, to the exclusion of the states, is an explicit provision of the Constitution,[367] and the use of that power with respect to Indian nations was the dominant method of relations between Indians and the United States for the first century of national existence[368] and in modified form for decades after that.[369] Modern Indian

363. *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675-76 (1979); Antoine v. Washington, 420 U.S. 194, 199-200 (1975); Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); *see generally* Jill De La Hunt, *The Canons of Indian Treaty and Statutory Construction: A Proposal for Consolidation*, 17 MICH. J. L. REF. 681 (1984). Though based upon paternalistic notions, it is appropriate that the "courts of the conqueror," Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 588 (1823), "acknowledge[] the unequal bargaining position" of the Indian parties. COHEN, *supra* note 6, at 222. Such canons of construction are not, however, based upon civil rights notions, as they long predate Indian citizenship. Similar canons of construction apply to the interpretation of Indian-related statutes, *see, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62-65 (1978), and in some instances have been enacted statutorily. *See, e.g.*, Act of June 30, 1837, ch. 161, § 22, 4 Stat. 733 (codified at 25 U.S.C. § 194 (1988)) (in property disputes between an Indian and a white person, burden of proof is on white person).

364. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) ("[A]s with treaties made with foreign nations the legislative power might pass laws in conflict with treaties made with the Indians.") (citing Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 600 (1889)); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (1987); *see also* TRIBE, *supra* note 34, § 4-5, at 226; Jordon J. Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT'L L. 393, 398-419 (1988). On the abrogation of Indian treaties, see United States v. Dion, 476 U.S. 734, 738-40 (1986); Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: As Long as Water Flows or Grass Grows Upon the Earth—How Long a Time is That?*, 63 CAL. L. REV. 601 (1975); Mike Townsend, *Congressional Abrogation of Indian Treaties: Reevaluation and Reform*, 98 YALE L. J. 793 (1989).

365. *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 331-39 (1987); Townsend, *supra* note 364, at text accompanying n.24.

366. *See* Baker v. Carr, 369 U.S. 186, 211-26 (1962). In the context of treaties with Indian nations, see *Lone Wolf*, 187 U.S. at 568. Pursuant to the sympathetic canons of construction applicable to Indian treaties, the Court has demanded a clear expression by Congress of its intent to abrogate a treaty with an Indian nation. *See, e.g.*, Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968); *see generally* COHEN, *supra* note 6, at 221-24. The abrogation of Indian treaties does, however, give rise to just compensation claims under the Fifth Amendment. *See* United States v. Sioux Nation, 448 U.S. 371, 415 (1980).

367. U.S. CONST. art. II, § 2, cl. 2.

368. *See* PRUCHA, *supra* note 13, at 142 ("Treating with the Indians . . . gave foundation

law is problematic, however, because the treaty power continues to be cited as authorizing Congress to legislate over all Indians, long after treaty-making has ended and without necessarily referring to any agreement or other contractual action by specific Indian nations or by Indians generally. Such a justification of federal plenary power is specious on its face. The power of the United States to conclude treaties with other foreign nations in no way comprehends a power to legislate over the people of those nations, much less over people or governments not party to any treaty.[370]

The only colorable argument that can be made is that the terms of a treaty may perhaps enlarge the powers of Congress and confer upon it powers not enumerated in the Constitution. Despite its clear statement "that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument,"[371] the Supreme Court, in considering the reach of the treaty power, has held that "there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could."[372] In so writing, Justice Holmes recognized an inherent power in the federal government with respect to international relations, " 'a power which must belong to and somewhere reside in every civilized government.' "[373]

This recognition of inherent federal power in foreign affairs arose in the context of a suit by a state.[374] Later Courts have followed this holding, stating that "[t]o the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier."[375] However, the Court has reached a different result in considering whether a treaty may confer power upon Congress contrary to the rights of individual citizens. In *Reid v. Covert*,[376] the

and strength to the doctrine that the Indian tribes were independent nations with their own rights and sovereignty . . . ."); *see also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832).

369. *See supra* text accompanying note 201 (discussing post-1871 practice of negotiating "executive agreements").

370. Legislating over the people of other nations would violate the fundamental principle of international law prohibiting interference with the internal affairs of other nations. "[I]nternational law upholds the exclusive sovereignty of states, which are presumed to be equal and independent, and thus guards the exercise of that sovereignty from outside interference." Anaya, *supra* note 11, at 204 (citing, inter alia, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 287 (3d ed. 1979) (the doctrine of state sovereignty is "the basic constitutional doctrine of the law of nations")); *see* U.N. CHARTER art. 2, ¶¶ 4, 7.

371. The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620-21 (1870); *see also* Geofroy v. Riggs, 133 U.S. 258, 267 (1890).

372. Missouri v. Holland, 252 U.S. 416, 433 (1920).

373. *Id.* (quoting Andrews v. Andrews, 188 U.S. 14, 33 (1903)); *see also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (executive power in foreign affairs is inherent).

374. Missouri had challenged the provision of a federal statute enacted to fulfill the obligations of the United States under the Migratory Birds Treaty. *Holland*, 252 U.S. at 416.

375. Reid v. Covert, 354 U.S. 1, 18 (1957) (plurality opinion) (citing United States v. Darby, 312 U.S. 100, 124-25 (1941)).

376. 354 U.S. 1 (1957) (plurality opinion).

infamous "war brides" case in which a rare petition for reargument was granted[377] and the initial decision[378] reversed,[379] the Court held by a plurality that "[i]t would be manifestly contrary to the objectives of those who created the Constitution, . . . [to] permit[] the United States to exercise power under an international agreement without observing constitutional prohibitions."[380] Justice Harlan, concurring, wrote that "[t]o say that the validity of [a] statute may be rested upon the inherent 'sovereign powers' of this country [is] no more than begging the question."[381]

There is thus a dichotomy between Justice Holmes' holding in *Holland* that a state cannot present a justiciable claim that a treaty violates its constitutional rights and the *Reid* holding that an individual can assert such a claim. This distinction turns upon the fact that a state can remedy its claim that an act of Congress violates its sovereignty by appealing to the national political process,[382] as under the Commerce Clause.[383] Individuals, on the other hand, may look to the judiciary for protection under the Bill of Rights.[384]

Since the grant of citizenship in 1924, therefore, Indians have been protected under the Bill of Rights from federal action based upon the potential extraconstitutional emanations of power from treaties. In fact, to some degree they have even been protected where Congress acts within its treaty powers, as in the case of abrogation of Indian treaty rights under the "last in time" rule.[385] For example, property taken by the federal government in violation of treaty guarantees to Indians is subject to the payment of just compensation under the Fifth Amendment.[386] The question, however, is whether Congress's general plenary legislative power can be exercised over Indian nations pursuant to the treaty power and the inherent power held to accompany it. Are Indian nations in the same position as the states with respect to the treaty power? That is, are Indian nations' claims against the exercise of federal power under the treaty power nonjusticiable, like those of the states?

The answer should be no. As with the Commerce Clause, state claims

377. 352 U.S. 901 (1956).

378. Kinsella v. Krueger, 351 U.S. 470 (1956).

379. The case concerned the applicability of the Bill of Rights to American military trials held in foreign countries. In both *Reid* and its companion case, an English woman had murdered her husband, an American soldier, and was tried by an American military court.

380. 354 U.S. at 17.

381. *Id.* at 66 (Harlan, J., concurring). Lower federal courts have followed the plurality's holding. *See, e.g.*, Holmes v. Laird, 459 F.2d 1211, 1217 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972). The reluctance of a majority of the Court to join the plurality can probably be attributed to the fact that the cases concerned military court martials and thus implicated Congress's enumerated power "[t]o make Rules for the Government and Regulation of the land and naval forces." U.S. CONST. art. I, § 8, cl. 14. Both concurrences addressed this clause at length. *Reid*, 354 U.S. at 41-64 (Frankfurter, J., concurring); *id.* at 65-78 (Harlan, J., concurring).

382. *See supra* notes 312-23 and accompanying text.

383. *Reid*, 354 U.S. at 18.

384. *See, e.g.*, *Reid*, 354 U.S. 1.

385. *See supra* notes 364-66 and accompanying text.

386. *See* United States v. Sioux Nation, 448 U.S. 371, 415 (1980).

against federal power exercised pursuant to treaties are nonjusticiable political matters redressable only through the political process.[387] The nonjusticiability of such claims is premised on the existence of an alternative remedy in the national political process.[388] Where such a remedy does not exist, as in the case of individual citizens, the Court has not stayed its hand in preventing the exercise of unenumerated federal power.[389]

Indian nations do not enjoy the protections upon which the exercise of inherent power in connection with treaties is conditioned. They have no greater participation or political process protection with respect to congressional legislation pursuant to treaties than they do with respect to legislation under the Commerce Clause.[390] Without such protection, the claimed power of Congress must fail. As with the Commerce Clause, the protection of Indians only as individuals is not only insufficient but also violates the basic premise of protection as collective entities, like the states, upon which the exercise of power is based.

The federal government's treaty power with respect to Indian nations, therefore, is simply the original power to make treaties. No legislative power is implied, nor can any "inherent" power be exercised without the protections of the political process. If an Indian nation in a particular treaty granted power to the United States, for example, to extend its police and public safety powers to Indian territory or to administer Indian lands, such agreement would be a matter of contractual consent and would be a valid delegation under international law.[391] Outside of such an international bilateral context, however, the United States government has no power to interfere with the lives or governments of Indian peoples.

Under international law, as recognized by the Supreme Court, Indian nations reserve all rights and privileges that are not expressly granted in a treaty.[392] In an ambiguous case, the sympathetic canons of construction mandated by the Supreme Court in interpreting Indian treaties require the retention of sovereign rights by the Indian nation.[393] The lack of protection for Indian nations in the American political process, and their noninvolvement and nonparticipation in the polity, should guarantee the application of international law to them and prevent them from being subject to domestic legislation.

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387. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (concerning the Commerce Clause); *Reid*, 354 U.S. 1 (plurality opinion) (concerning treaty power).

388. *Garcia*, 469 U.S. at 552 (quoted *supra* note 323); *Reid*, 354 U.S. at 18 (quoted *supra* text accompanying note 375).

389. *See, e.g., Reid*, 354 U.S. 1.

390. *See supra* notes 324-34, 337-45 and accompanying text.

391. Many treaties with Indian nations included such delegations. *See* COHEN, *supra* note 6, at 67, 69; Comment, *Federal Plenary Power in Indian Affairs after* Weeks *and* Sioux Nation, 131 U. PA. L. REV. 235, 268 (1982); CORNELL, *supra* note 13, at 46-50.

392. United States v. Wheeler, 435 U.S. 313, 327 n.24 (1978); United States v. Winans, 198 U.S. 371, 381 (1905).

393. *See supra* notes 358-63 and accompanying text; COHEN, *supra* note 6, at 221-25.

In sum, despite the Supreme Court's valiant attempts to "constitutionalize" federal plenary power, the two constitutional bases claimed by the Court as justification for the exercise of the broad congressional power, the Commerce Clause and the treaty power, offer no such support. Viewed from the perspective of the Framers, and in light of the history of United States relations with Indian nations, the Commerce Clause is limited in scope to the mere regulation of trade,[394] and the treaty power merely gives the federal government, as opposed to the states, the right to conduct international relations.[395] This remains true even when viewed in the light of twentieth century constitutional jurisprudence, with a greatly expanded commerce power and a recognized inherent power in foreign affairs, since any extension of federal power over Indian nations would violate the basic and necessary premise of a functioning political process upon which such powers were extended over the states.

In recognition of their independent, sovereign status, Indian nations are not subject to the Bill of Rights in the conduct of their internal affairs, including the prosecution of suspected criminals.[396] This is based upon the long history of Indian nations exercising such powers as separate sovereign governments.[397] How can Indian nations be subject to federal legislative power when they are not subject to the Constitution itself, particularly when the specific legislative powers claimed are conditioned upon the existence of structural constitutional protections that Indian peoples do not enjoy?

Congress's enumerated powers to conclude treaties and regulate commerce with Indians serve only to grant the central government, as against the states, the authority to implement the United States' inter-sovereign relationship with the Indian nations. Like the conduct of traditional foreign affairs, the conduct of Indian relations is thus a matter of federalism, of power as divided *between* federal and state governments, rather than a question of power *over* Indian peoples. Federal power over an Indian nation can extend only as far as that Indian nation's delegation of specific powers to the United

394. Such was the original understanding of both Congress and the Supreme Court. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 378-79 (1886); H.R. REP. No. 474, 23d Cong., 1st Sess. 14 (1834) (A Report of the Committee Regulating the Indian Department stating that "Congress expressly reserves the power . . . to legislate over the Indian country, so far as the Constitution requires them to do, viz. for the regulation of commerce with the Indian tribes"); *see also* McSloy, *supra* note 30, at 151 n.68.

395. *See, e.g.*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (finding no state power to make treaties with Indian nations).

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

397. *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 322-23 (1978) ("The powers of Indian tribes are, in general, *'inherent powers of a limited sovereignty which has never been extinguished'*. . . . Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws.") (alteration in original) (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942)); *Talton*, 163 U.S. at 384 ("[A]s the powers of local self-government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the fifth amendment."); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

States in freely and fairly negotiated treaties.[398] There is no general, plenary power with respect to Indians, just as there is no general power with respect to Europeans or Asians. There are instead bilateral relations with various different international actors, each with its own history, culture, government, policies, and course of dealing with the United States. Relations with Indian nations are a matter of international relations, and as such, responsibility for representing the United States in its dealings with Indian nations properly belongs with the State Department.

Recognition of the international nature of Indian affairs is not novel, and actually would be a re-recognition of that fact. The Framers clearly saw Indian peoples, in the words of Chief Justice John Marshall,

> as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial . . . . The Constitution, by declaring treaties . . . to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.[399]

C. The Trust Relationship

Beginning with Chief Justice Marshall's famous 1831 pronouncement in *Cherokee Nation v. Georgia* that the "relation [of Indian people] to the United States resembles that of a ward to his guardian,"[400] the Supreme Court has proclaimed the existence of, and developed through a common law process,[401] an alleged "trust relationship" between the United States and Indian nations,[402] pursuant to which Indian governments, lands, and people are subject to federal control.[403] The existence of this relationship is based as much upon

398. *See* BARSH & HENDERSON, *supra* note 144, at 59 ("Beyond specific grants of tribal jurisdiction by treaty, Congress is limited to the regulation of 'commerce.' "). Whether in fact treaties were freely and fairly negotiated is a separate question which, until the repudiation of the political question doctrine in Indian affairs, *see* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977), was held to be nonjusticiable. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903). Delegations of power through treaties were historically common and often mundane. *See* CORNELL, *supra* note 13, at 46-50. A frequent modern example is the cross-deputization of Indian, state, and federal police forces. *See* COHEN, *supra* note 6, at 381.

399. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832); *see also id.* at 556, 562.

400. 30 U.S. (5 Pet.) 1, 17 (1831).

401. *See* COHEN, *supra* note 6, at 220 (the "federal trust responsibility to Indians evolved judicially.").

402. *See generally* COHEN, *supra* note 6, at 220-28; Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422 (1984); Chambers, *supra* note 45.

403. *See supra* text accompanying notes 41-52.

beliefs about the "inferior" status and civilization of Indian people[404] as upon treaties or statutes,[405] and in the past the trust was held to be an independent source of federal power over Indians.[406] In the modern era, the trust doctrine, though still the basis of restrictions on Indian sovereignty,[407] has also come to mean that in dealing with Indians "the United States serves in a fiduciary capacity . . . and that, as such, it is duty bound to exercise great care in administering its trust."[408] The trust relationship thus imposes limitations on federal power, with the result that although "[t]he power of Congress over Indian affairs may be of a plenary nature, . . . it is not absolute."[409]

The transformation from a paternalistic guardianship to a beneficial trust has meant that the trust doctrine has been dismissed by the Supreme Court as a present day source of federal power[410] and "has not been cited as an independent source of congressional power since . . . 1926."[411] Nevertheless, the use of the trust doctrine to justify the first exercises of power over Indian

404. *See* Board of County Comm'rs v. Seber, 218 U.S. 705, 715 (1943) (Indian people were "an uneducated, helpless and dependent people, needing protection."). With regard to the powers of the United States as trustee, "[i]t is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race." Beecher v. Wetherby, 95 U.S. 517, 525 (1877); *see also* Ball, *supra* note 43, at 63 (discussing cases).

405. *See* Chambers, *supra* note 45, at 1219, 1220-21, 1246. Chambers, as Assistant Solicitor for Indian Affairs in 1974, concluded that "the trust responsibility is basically derived from treaties with and statutes concerning the various Indian tribes." AMERICAN INDIAN POLICY REVIEW COMMISSION, TASK FORCE ONE: TRUST RESPONSIBILITIES AND THE FEDERAL-INDIAN RELATIONSHIP, INCLUDING TREATY REVIEW, FINAL REPORT 50-51 (1976); *see also* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) (the trust relationship is based upon Nonintercourse Acts).

406. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 384 (1886) ("From their very weakness and helplessness . . . there arises the duty of protection, and with it the power."); COHEN, *supra* note 6, at 220 (the trust relationship has been held to be a "separate and distinct basis for congressional power over Indians"); Newton, *supra* note 14, at 322 (the source of plenary power is the guardian-ward relationship); Note, *supra* note 402, at 436 n.71 ("plenary power derives from the trust doctrine").

407. Most notable are the restrictions on Indians' ability to alienate land or enter into contracts. *See* 25 U.S.C. §§ 81, 84, 177, 415 (1988 & Supp. II 1990), discussed *supra* text accompanying notes 45-47.

408. United States v. Mason, 412 U.S. 391, 398 (1973) (citing Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942)); *see also* Chambers, *supra* note 45, at 1213 n.1 (listing cases in accordance).

409. Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 73-74 (1977).

410. Morton v. Mancari, 417 U.S. 535 (1974) (*Kagama*'s upholding of power on the basis of Indian "helplessness" and "dependence" held to be merely a statement of the "special relationship" between Indians and the United States and not a source of power); *see also* COHEN, *supra* note 6, at 220 ("[the] reasoning [of *Kagama*] has not been followed"). Both Professor Newton and the Cohen treatise read the *Mancari* and *Weeks* holdings as implicitly overruling *Kagama*. COHEN, *supra* note 6, at 218-19; Newton, *supra* note 14, at 228 ("In modern times, the Supreme Court has apparently repudiated both the ethnocentric overtones of the doctrine of the plenary power and the doctrine itself, at least as far as the doctrine suggests it has an extra-constitutional source or is a power unlimited by other constitutional provisions."). Professor Ball is not so optimistic. Ball, *supra* note 43, at 65-66.

411. COHEN, *supra* note 6, at 220 n.31 (citing United States v. Candelaria, 271 U.S. 432 (1926)).

nations in the late nineteenth century, and its continuing existence in a fiduciary formulation, require discussion. As an initial matter, however, any discussion of the trust relationship is a study in judicial activism,[412] since the judiciary may not confer extraconstitutional power upon the Congress by fiat.[413]

Chief Justice Marshall's dicta in *Cherokee Nation v. Georgia* that the relationship between the United States and Indian nations "resembles that of a ward to his guardian"[414] was a politically adroit compromise.[415] It allowed Marshall to acknowledge that the United States "plainly recognize[d] the Cherokee nation as a state"[416] in the sense that it was a "distinct political society, separated from others, capable of managing its own affairs and [of] governing itself,"[417] but also allowed him to hold that for purposes of invoking the original jurisdiction of the Court to sue the state of Georgia,[418] the Cherokee Nation was not a "foreign state in the sense of the constitution."[419] Marshall was thus able to deny jurisdiction to hear the Cherokee Nation's politically charged case challenging Georgia's taking of Cherokee lands.[420] In order to reconcile the de facto independence and sovereignty of the Cherokee Nation with the political need to prevent them from invoking the Court's original jurisdiction as a foreign state, Marshall creatively (that is, out of whole cloth) held that the Cherokee Nation (and all other Indian peoples) "may, more correctly, perhaps, be denominated domestic dependent nations. . . . they are in a state of pupilage."[421] Marshall left his new terms undefined, as well as the extent of the duties owed by the "guardian," but his wardship/trust conception has proven quite long-lived.[422]

The most important historical use of the trust doctrine was its invocation

412. *See* Ball, *supra* note 43, at 66.

413. TRIBE, *supra* note 34, § 5-2, at 225-27 (discussing doctrine of enumerated powers); *see also* Kansas v. Colorado, 206 U.S. 46, 48 (1907); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

414. 30 U.S. (5 Pet.) 1, 17 (1831). Earlier conceptions of a guardianship can be seen in the writings of the Spanish theologian Francisco de Vitoria, *supra* note 84, at 128 ("by defect of their nature they need to be ruled and governed by others just as sons need to be subject to their parents.") (relying on Book I of ARISTOTLE, THE POLITICS). Vitoria was, however, equivocal in discussing this position. *See* Vitoria, *supra* note 84, at 160-61. On Vitoria generally, see *supra* note 84.

415. *See* sources cited *supra* note 149.

416. *Cherokee Nation*, 30 U.S. (5 Pet.) at 16.

417. *Id.*

418. U.S. CONST. art. III, § 2, provides that "[t]he judicial Power shall extend to . . . Controversies . . . between a State . . . and foreign States."

419. *Cherokee Nation*, 30 U.S. (5 Pet.) at 20.

420. Marshall's attempts to avoid reaching the merits of the case were thwarted by Georgia's arrest of two white missionaries under the anti-Cherokee laws. The missionaries, unlike the Cherokee Nation, were proper plaintiffs, and the Court held that Georgia's actions were unconstitutional. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). *See generally supra* text accompanying notes 149-55.

421. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

422. *See, e.g.*, Chambers, *supra* note 45, at 1213 n.1 (listing cases).

in *United States v. Kagama*[423] to uphold, for the first time in the history of relations between the Indian nations and European and American society, and in the acknowledged absence of any constitutional authority,[424] the imposition of American laws upon the internal affairs of an Indian nation.[425] Though arguably overruled[426] by recent decisions holding the trust responsibility to be a source of Indian rights as opposed to federal power,[427] the *Kagama* opinion and its conception of Indians as "dependent wards" remains the foundation of the plenary power doctrine. Congressional legislation enacted on the basis of its authority, most notably the virulently assimilative Allotment Act, has never been questioned as beyond the powers of Congress.[428] Moreover, the paternalistic restrictions preventing Indians from alienating land or making contracts remain part of United States law, based upon the idea of guardianship.[429]

As a source of federal power, the ad hoc, judicially-created guardianship doctrine, premised upon theories of inferiority and paternalism, was used to justify the worst excesses of federal authority. Today, however, the doctrine has lost its vitality, and has been interpreted in modern times to protect Indian nations through the imposition of fiduciary duties upon the United States in its dealings with Indian peoples and lands. Those same peoples and lands, however, only became subject to federal power through the extraconstitutional rationales now abandoned. While it may be appropriate that the United States, in arrogating power to itself, has imposed limitations upon its own exercise of that power,[430] the fundamental question of where the power comes from re-

423. 118 U.S. 375 (1886).

424. *See* Newton, *supra* note 14, at 207 (plenary power was "frankly acknowledged to be extraconstitutional" in *Kagama*); *id.* at 214 ("Acknowledging that no existing constitutional provision granted Congress [the] right to govern Indian affairs, the Court found [such power] to be inherent [in the federal government]."); *see also supra* text accompanying notes 213-18.

425. *See* Chambers, *supra* note 45, at 1223 (In *Kagama*, the Supreme Court "recast the Marshallian guardianship, treating it as a source of federal power in addition to and apart from the express power in the Constitution to regulate commerce with the Indian tribes.").

426. *See supra* note 410.

427. *See, e.g.*, United States v. Mitchell, 463 U.S. 206, 224 (1983) (stating that a "fiduciary relationship" exists between the United States and Indian nations); Morton v. Mancari, 417 U.S. 535 (1974); United States v. Mason, 412 U.S. 391, 398 (1973) (quoted *supra* text accompanying note 408); United States v. Creek Nation, 295 U.S. 103, 110 (1935) (taking Indian lands protected by treaty " 'would not be an exercise of guardianship, but an exercise of confiscation' ") (quoting Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919)).

428. *See* Ball, *supra* note 43, at 57, 63.

429. *See* 25 U.S.C. §§ 81, 84, 177, 415 (1988), discussed *supra* text accompanying notes 45-47.

430. The actual enforceability of the fiduciary trust by Indians against the United States is of only recent vintage, Chambers, *supra* note 45, at 1230-32, and was accomplished through congressional waivers of sovereign immunity, *see, e.g.*, 28 U.S.C. § 1505 (Supp. IV 1992), and judicial recognition of breach of trust claims against the executive branch. *See, e.g.*, United States v. Creek Nation, 295 U.S. 103 (1935); Cramer v. United States, 261 U.S. 219 (1923). Prior to this, the guardianship had long been held to be only a moral duty. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Beecher v. Wetherby, 95 U.S. 517, 525 (1877) ("It is to be presumed that in [dealing with Indian nations] the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant

main unanswered. To this day, though supposedly protected by the fiduciary conception of the trust doctrine, Indians continue to be subject to its paternalistic restrictions. Unlike the beneficiaries of civil guardianship or custody cases, Indian people cannot demonstrate their "competency" and regain their rights. Incompetency to contract and to deal in lands is "presumed from membership in an Indian tribe,"[431] and it "rests with Congress to determine when the guardianship relation shall cease."[432] Indian peoples never attain their majority in the eyes of United States law, and "generation after generation the Indian lives and dies a ward."[433] Even the grant of citizenship to Indian people did not serve to end their status as "wards."[434]

The modern interpretation of the trust doctrine is best captured in the 1974 case of *Morton v. Mancari*,[435] in which the Supreme Court held that the trust responsibility operated as a limit on plenary power. The Court renamed the Indian "wardship" as a "special relationship,"[436] and required that in exercising its plenary power, now claimed to be "drawn both explicitly and implicitly from the Constitution itself,"[437] Congress must show that legislation over Indians is "tied rationally to the fulfillment of Congress's unique obligation toward the Indians."[438] Thus, the *Kagama*[439] holding that the trust relationship was a source of federal power was implicitly overruled, and the new conception of the relationship as a fiduciary trust was held to limit the powers of the federal government under the Indian Commerce Clause and the treaty power.[440]

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and dependent race. Be that as it may, the propriety or justice of [the United States'] action towards the Indians . . . is a question of governmental policy, and is not a matter open to discussion.").

431. BARSH & HENDERSON, *supra* note 144, at 93.

432. Board of County Comm'rs v. Seber, 318 U.S. 705, 718 (1943); *see also* United States v. Ramsey, 271 U.S. 467, 469 (1926); Tiger v. Western Inv. Co., 221 U.S. 286, 315 (1911).

433. PRUCHA, *supra* note 78, at 25 (quoting Report of the Commissioner of Indian Affairs, 1901, *in* H.R. DOC. No. 5, 57th Cong., 1st Sess. 4). The Report is reprinted, in part, in DOCUMENTS OF INDIAN POLICY, *supra* note 89, at 199-202.

434. *Seber*, 318 U.S. at 718; *see also Tiger*, 221 U.S. at 310-16.

435. 417 U.S. 535 (1974) (upholding hiring preference for Indians applying for jobs with the Bureau of Indian Affairs against equal protection challenge by non-Indians).

436. *Id.* at 552.

437. *Id.* at 551-52.

438. *Id.* at 555; *see also* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 85 (1977).

439. United States v. Kagama, 118 U.S. 375 (1886).

440. As argued in parts II.A-B of this Article, neither the Commerce Clause nor the treaty power can support federal plenary power over Indian nations. The fiduciary trust thus would serve to further restrict the limited powers of the federal government to regulate commerce and conclude treaties. A less hopeful view of the trust responsibility is provided by Professor Ball:

> In sum, the trust is an affirmative basis for claims of power and does not arise from the Constitution. It is of advantage to tribes in recovering for federal executive abuse in mismanaging tribal land and money. It has sometimes been a moral referent for congressional actions and judicial decisions as well as judicial canons of construction. But the trust doctrine is not now and never has been a limit on congressional [plenary] power. Nor is it likely to be.

Ball, *supra* note 43, at 65-66 (citations omitted).

Though preferable to that of *Kagama*, the *Mancari* opinion's interpretation of the trust doctrine is worthy of Lewis Carroll. In *Kagama*, the putative "wardship" status of Indians was held to permit the imposition of extraconstitutional power by Congress. In *Mancari*, the power justified in *Kagama* on the basis of the wardship is said to be instead based upon provisions of the Constitution, even though *Kagama* had explicitly rejected such a constitutional basis. *Mancari* then goes on to say that these constitutional provisions are limited by the "special relationship" (i.e., the wardship) which created the power in the first place.[441] The source of power in *Kagama* becomes a limitation on power in *Mancari*, and the sources of power rejected by *Kagama* are adopted by *Mancari*.

D. Implicit Divestiture

The *Mancari* Court appropriately, though not explicitly, held that the *Kagama* opinion's profound racism, paternalism, historical contingency, and theory of extraconstitutional powers under the guise of a ward/guardian or trust relationship could not satisfy the modern demands of constitutional jurisprudence.[442] Yet the Supreme Court still needed to justify the broad sweep of federal authority over Indian people, even as it was beginning to understand (though not admit) the paucity of textual constitutional support for federal plenary power. In 1978 the Court thus undertook a new departure in American Indian law. This was the concept of "implicit divestiture,"[443] a fourth and final alleged source of federal power over Indian people. Implicit divestiture is similar to the trust doctrine, in that it is premised upon the "dependent status"[444] of Indian nations. Unlike the trust doctrine, however, divestiture operates not as a grant of power to the federal government but rather as a negation of Indian sovereignty.

The seed for the Court's development of the implicit divestiture doctrine is the same as that for the trust doctrine, the politically adroit *ipse dixit* by Chief Justice Marshall in 1831 that Indian nations were "domestic dependent nations,"[445] and as such were subject to restrictions upon their external sovereign powers. The only limits proclaimed by Marshall, however, were to restrict the powers of Indian nations to ally with or grant land rights to any country other than the "discovering" European power.[446] With regard to Indian nations' internal sovereignty, Marshall held that their power to form governments, administer justice, and control their lands was not to be interfered

441. For a graver reading, *see* Ball, *supra* note 43, at 61-62.

442. Morton v. Mancari, 417 U.S. 535 (1974).

443. United States v. Wheeler, 435 U.S. 313, 326 (1978). *See also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-10 (1978).

444. Montana v. United States, 450 U.S. 544, 564 (1981); *Wheeler*, 435 U.S. at 323.

445. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17-18 (1831).

446. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573-74 (1823); Canby, *supra* note 153, at 8; *see also* discussion *supra* parts I.B-C.

with.[447] Thus, apart from the limits imposed upon their ability to freely form alliances and alienate lands, for the first full century of its existence the United States dealt with Indian nations as "distinct, independent political communities, . . . admit[ting] their rank among those powers who are capable of making treaties . . . [like] the other nations of the earth."[448]

The 1978 case of *Oliphant v. Suquamish Indian Tribe*[449] thus represented "the first time in 150 years [that] there was an expansion of the list of tribal powers held to be inconsistent with the status of the tribes as domestic dependent nations."[450] In *Oliphant*, the Court held that Indian nations had lost their inherent power to exercise criminal jurisdiction over non-Indians on Indian land due to their alleged "submi[ssion] to the overriding sovereignty of the United States,"[451] despite the fact that such power had been recognized by nineteenth century cases and treaties.[452] Though the *Oliphant* holding has frequently been criticized,[453] the crux of the Court's decision seems to have been its interest in protecting the "personal liberty"[454] of non-Indians on Indian land. This desire stems from the fact that in any prosecution of a non-Indian, the Indian nation, as a separate sovereign, would not be required to provide the non-Indian defendant with the protections of the Bill of Rights.[455]

Chief Justice Marshall's holding a century and a half earlier that Indians were "domestic dependent Nations" had limited only the "external" sovereign powers of Native nations, and had left untouched their powers of local self-government. The Court harmonized *Oliphant* with that holding by finding that jurisdiction over non-Indians, even when they committed crimes on In-

447. *Worcester*, 31 U.S. (6 Pet.) at 546-47; *see also* Talton v. Mayes, 163 U.S. 376 (1896); *Ex parte* Crow Dog, 109 U.S. 556 (1883).

448. *Worcester*, 31 U.S. (6 Pet.) at 558.

449. 435 U.S. 191 (1978).

450. Canby, *supra* note 153, at 8.

451. 435 U.S. at 210.

452. *See, e.g.*, United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 593 (1823); COHEN, *supra* note 6, at 67 n.53 (citing treaties).

453. *See, e.g.*, Berkey, *supra* note 17, at 70-75; Curtis G. Berkey, *The U.S. Supreme Court and the Assault on Indian Sovereignty*, 2 WITHOUT PREJUDICE: THE EAFORD INT'L REV. OF RACIAL DISCRIMINATION 27 (1989); Russell L. Barsh, *Is There Any Indian "Law" Left? A Review of the Supreme Court's 1982 Term*, 59 WASH. L. REV. 863, 869-70 (1984); Canby, *supra* note 153, at 8-9; Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 567-68; Williams, *The Algebra of Federal Indian Law*, *supra* note 291, at 273-74.

454. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

455. Talton v. Mayes, 163 U.S. 376 (1896); *see* CLINTON, NEWTON & PRICE, *supra* note 6, at 317-18. However, after 1968, Indian nations became subject to the Bill of Rights language made statutorily applicable to them under the Indian Civil Rights Act, Pub. L. No. 90-284, 82 Stat. 77 (1968) (codified as amended at 25 U.S.C. §§ 1301-03 (1988 & Supp. IV 1992)). Thus, relief under that act, though limited to habeas corpus proceedings, 25 U.S.C. § 1303 (1988), should have been sufficient to protect the non-Indian defendant. Though *Oliphant* was in fact a habeas proceeding, the Court believed that Indian courts could not be trusted with the "personal liberty" of the non-Indian defendants, despite the Supreme Court's "recogni[tion] that some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts." 435 U.S. at 210-12. The civil jurisdiction of tribal courts has been accorded greater respect. *See, e.g.*, National Farmers Union Ins. v. Crow Tribe of Indians, 471 U.S. 845 (1985).

dian land, was not a matter of local government, but instead was similar to concluding treaties and ceding land because it was a matter of "external relations."[456] However, Indian nations retained their "internal" sovereignty. In the same term in which *Oliphant* was decided, the Court also held that as a function of its "inherent tribal sovereignty,"[457] an Indian nation was not subject to a double jeopardy bar in trying an Indian criminal who had already been tried for the same offense in federal court,[458] since "prosecutions under the laws of separate sovereigns"[459] do not give rise to double jeopardy.

The new doctrine of implicit divestiture thus holds that "Indian tribes still possess those aspects of [inherent] sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[460] While the cession of rights by treaty is an unobjectionable and time-honored principle of international law,[461] the power of Congress to limit Indian sovereignty by statute, however, is without basis in either the Constitution or international law.[462] The newly declared power of the judiciary to abrogate Indian sovereignty by declaring certain powers to be "inconsistent with the dependent status of the tribes"[463] is not only made of the same whole cloth as was the guardian/ward doctrine but also contradicts precedent,[464] international law,[465] and Indian sovereignty. Not surprisingly,

> [t]he Supreme Court has struggled, with mixed results, to apply the implicit divestiture rule consistently. The Court appears to be confused about the meaning and scope of the rule. In cases after *Oliphant*, the rule has been reformulated twice, ignored on one occasion, and reinterpreted by four justices to constrict further tribal powers.[466]

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456. United States v. Wheeler, 435 U.S. 313, 326 (1978).

457. *Id.* at 322.

458. *Id.* In *Wheeler* the defendant had first been tried for a lesser included offense by the Indian nation and then indicted in federal court, which indictment the defendant sought to dismiss on double jeopardy grounds, but the Court's holding would be applicable in the reverse case as well.

459. *Id.* at 317.

460. *Id.* at 323.

461. *See supra* note 302.

462. *See supra* parts II.A-B.

463. Montana v. United States, 450 U.S. 544, 564 (1981).

464. *See* Berkey, *supra* note 17, at 71 ("Before *Oliphant*, federal law recognized that Indian tribes retained all those sovereign powers not voluntarily given up in treaties or expressly taken away by Congress in the exercise of its plenary power."); *see also* Canby, *supra* note 153, at 8. Professor Ball states that after *Oliphant*, not only Congress but also the Supreme Court can claim plenary power. *See* Ball, *supra* note 43, at 55; *accord* Barsh, *supra* note 453, at 870; Canby, *supra* note 153, at 16. As had been done before by the Court in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and by Congress in ending treaty-making, *see supra* note 191, the Court in *Oliphant* avoided having to directly address the source of federal power by simply redefining the status of Indian nations. *See supra* text accompanying notes 130-32, 196-97.

465. A primary principle of international law is the right of a nation to exercise jurisdiction over persons on its territory, whether they are citizens or foreigners. *See* OPPENHEIM'S INTERNATIONAL LAW, *supra* note 23, at § 137.

466. Berkey, *supra* note 17, at 72 (citations omitted). As explained by Professor Berkey,

The fundamental problem with the doctrine of implicit divestiture is that it, like the now-discredited guardian/ward theory that plenary power is extra-constitutional,[467] represents an ad hoc judicial declaration that the sovereignty of Indian nations has been diminished. These theories were created without any principled initial conception of Indian sovereignty,[468] without reference to or respect for history or precedent, without reference to international law generally, and particularly without reference to the principle of international law recognized by the Supreme Court that Indian nations, as with other foreign powers, retain all sovereign authority not granted away by treaty.[469]

Divestiture of sovereign powers would not be problematic if it was an overt, consensual, international, political matter handled pursuant to treaties and international law. However, it is entirely inappropriate to divest sovereign powers by judicial fiat, an open-ended judicial "activism in which [the] Court should not indulge."[470] Implicit divestiture is the Supreme Court's newest tool for disempowering Native nations, but the very need to develop new judicial doctrines to limit Indian sovereignty shows the lack of efficacy of the old doctrines and the paucity of legitimate constitutional power.

E. There Is No There There

Of the four claimed sources for congressional plenary power over Indian peoples, neither the Commerce Clause, the treaty power, the trust relationship, nor the implicit divestiture doctrine can even begin to survive minimal scrutiny. The trust relationship, a judicial creation, has been reinterpreted by the courts not to confer power upon the government after all, but instead to limit it by fiduciary principles.[471] This comes, however, only after the damage has been done.[472] The enumerated powers of Congress which bear on Indian matters, the Commerce Clause and the treaty power, cannot be read to sup-

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the reformulations can be found in Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 153 (1980) (divestiture occurs "where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government"), and in Montana v. United States, 450 U.S. 544, 564 (1980) (Indian nations are divested of all powers "beyond what is necessary to protect tribal self-government or to control internal relations"). *See also* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 147 n.13 (1982) (following *Colville*, not *Montana*). The multitude of opinions constituting Brendale v. Yakima Indian Nation, 492 U.S. 408 (1989), variously ignored and reinterpreted the rule. Another potential reformulation was the holding in Rice v. Rehner, 463 U.S. 713 (1983), that an Indian nation might be divested of powers in areas where there is a "lack of a tradition of self-government" by the Indian nation. *Id.* at 731.

467. *See supra* part II.C.

468. *See* Canby, *supra* note 153, at 16.

469. United States v. Wheeler, 435 U.S. 313, 327 n.24 (1978); *see also* United States v. Winans, 198 U.S. 371, 381 (1905) (a "treaty was not a grant of rights to the Indians, but a grant of right from them — a reservation of those not granted."); The Kansas Indians, 72 U.S. (5 Wall.) 737, 757 (1866).

470. *Rice*, 463 U.S. at 744 (Blackmun, J., dissenting).

471. *See supra* part II.C.

472. The damage being the nineteenth century use of the trust doctrine as the source of power for the Major Crimes and Allotment Acts. *See supra* part I.E.

port the power claimed to stem from them.[473] The Supreme Court agreed for over a century,[474] changing its position only when the Commerce Clause became the least untenable of several slim reeds ostensibly supporting the massive edifice of federal plenary power over Native people. The most recent doctrine used to justify federal power, the notion of implicit divestiture, is a return to the same confused judicial activism so recently rejected by the Court with respect to the trust doctrine. Moreover, it does not comport with precedent, history, or international law.[475]

In the absence of federal power, and given the constitutional and historical ban on involvement by the states in Indian relations,[476] we are brought back to where we started in 1492, with the existence in North America of ancient sovereign political entities exercising inherent powers of government, over whom European society could not and did not exercise authority. We have, after a long, hard legal "trail of tears,"[477] filled with judicial justification and willful disregard of the Constitution, gone back to the future: the United States is without power, under its own rules, to assert power over Native nations. Under the rule of law, the United States must therefore recognize the inherent and international character of Indian sovereignty, and reconstruct relations with the many Indian nations along their original international diplomatic lines. Professor Milner Ball eloquently states the price of staying where we are, trapped in the pathology of Manifest Destiny:

> Because we say we have a government of laws and not men, we hold our government to be limited and to have no unlimited power. If the federal government nevertheless exercises unrestrained power over Indian nations, then what we say is not true, and we have a different kind of government than we think we have. And if our government is different in fact in relation to Native Americans, perhaps it is not what we believe it is in relation to other Americans, including ourselves. The Court is regarded as the institution of restraint and a protector of rights. If the Court restrains neither Congress nor itself in taking away tribal rights, then we are confronted by a fundamental contradiction between our political rhetoric and our political realities.[478]

Recognizing Indian sovereignty is not a matter of civil rights, equal protection, or due process, nor is it a matter of privileges and immunities or the

473. *See supra* parts II.A-B.

474. The Court instead used the extra-constitutional guardian/ward doctrine (later renamed the trust doctrine) to make up for the lack of constitutional power. *See* United States v. Kagama, 118 U.S. 375 (1886); *see also* discussion *supra* part I.E.

475. *See supra* part II.D.

476. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

477. *See* PRUCHA, *supra* note 13, at 213-73 (discussing the "trail of tears" upon which the Cherokee people were forcibly removed from their homeland despite their legal victory in *Worcester*); *see also* sources cited *supra* note 157.

478. Ball, *supra* note 43, at 61.

protection of "discrete and insular minorities"[479] in a domestic sphere. It is instead a matter of international law and of limiting the authority of the United States to those powers that its founding charter recognizes and allows. The Framers declared that Native peoples were not citizens, and they did not intend them to become so except upon complete abandonment of their "Indian" character.[480] Even such abandonment did not serve to make them citizens in the eyes of the Supreme Court.[481] The Framers did not view Indian nations as states of the Union, and despite stray promises over the years,[482] they did not intend that Indian statehood would come to pass.

The Framers' legal conception of Native peoples, written in the Constitution in the English language,[483] was that Native nations were nations, that they were proper subjects of international law, and that the laws of the United States did not run to Indian lands. However unkindly the Framers viewed Indian peoples — as inferior, savage, and nomadic — and however "America-centric" their view of the future might have been, with Indian peoples vanishing either into history and archeology or perhaps occasionally into the "melting pot," the Framers did not purport to strip Native nations of their sovereignty. The Constitution in this regard merely reflected reality in giving Congress only those powers that concerned treaties and trade. A provision granting Congress the power to impose criminal laws, civil statutes, or other legislation upon an Indian nation would have been as anomalous as giving Congress the constitutional power to impose income taxes on the Italians in Italy or murder statutes upon Germans in Germany.[484]

F. What Is to Be Done?

The answer is clear. First, treat Native nations as nations. The verb *treat* is critical, for only through diplomacy, negotiation, consent, and the formal making of treaties may the United States take action with respect to other nations. Only a Native nation can grant power to the United States over its affairs. While Indian nations, like many of the countries of the world, might view United States aid and protection as beneficial, the United States should only be allowed to act by invitation.

Second, the United States should return all land not freely given in fairly negotiated treaties to the Native nations to whom such land belongs. This

479. United States v. Carolene Products, 304 U.S. 144, 152-53 n.4 (1938).

480. *See* discussion *supra* text accompanying notes 27-30.

481. Elk v. Wilkins, 112 U.S. 94 (1886); *see* discussion *supra* text accompanying notes 328-30.

482. *See supra* text accompanying notes 25-26.

483. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832) ("The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.").

484. Noting of course that unlike the Cherokee and other Native nations, neither Italy nor Germany was a country in 1789. *See infra* notes 534 (Italy) & 535 (Germany).

comports with international law,[485] and while Manhattan may have been purchased "fair and square," other tracts of land most certainly were not.[486] As with real estate generally in American law, monetary damages, however astronomical, should not be adequate at law.[487]

Third, the United States should respect its treaty commitments regarding land, sovereignty, jurisdiction, and noninterference. President Bush in his inaugural address quoted Justice Black's resounding phrase that "great nations like great men must keep their word."[488] The President was probably unaware that Justice Black wrote the phrase in a stinging dissent from an opinion that upheld the taking of lands belonging to the Tuscarora Indian Nation, a member of the Iroquois Confederacy, which had broken with its brethren and sided with the colonists in the American revolution.[489] As put in the title of a well-regarded law review article on the abrogation of Indian treaties, "As long as water flows, or grass grows upon the earth—how long a time is that?"[490] Great nations should indeed keep their word.

Fourth, and most importantly, the United States must undo the imperialist history of the Manifest Destiny era and return to the Framers' original intentions by recognizing the independent, inherent, sovereign, and international status of Native nations, whose existence has never ended and whose powers have never been extinguished. As hard as the United States has tried, through force and persuasion, it has never bent the "nations within" to its

485. *See, e.g.*, U.N. CHARTER art. 2, ¶ 4; S.C. Res. 242, U.N. SCOR, 22d Sess., 1382d mtg. at 8, U.N. Doc. S/RES/242 (1967) (U.N. Resolution that territory cannot be acquired by war).

486. *See* Russel L. Barsh, *Indian Land Claims Policy in the United States*, 58 N.D. L. REV. 7, 7-8 (1982) (citations omitted):

> From the close of the American Revolution to 1900, the United States took possession of more than two billion acres of land claimed by indigenous tribes and nations. Half of this area was purchased by treaty or agreement at an average price of less than seventy-five cents per acre. Another 325,000,000 acres, chiefly in the Great Basin area, were acres confiscated unilaterally by Act of Congress or Executive Order, without compensation. An estimated 350,000,000 acres in the contiguous forty-eight States, and most of the State of Alaska's 375,000,000 acres, were claimed by the United States without agreement or the pretense of a unilateral action extinguishing native title.

See also Ward Churchill, *The Earth is Our Mother: Struggles for American Indian Land and Liberation in the Contemporary United States*, *in* THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE 139 (M. Annette Jaimes ed., 1992).

487. *See* 5A ARTHUR L. CORBIN, A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW 126 (4th ed. 1984) ("[L]and is assumed to have a peculiar value so as to give an equity for specific performance, without reference to its quality, quantity or location."). The Sioux Nation, though victorious in the Supreme Court in asserting their land claims, have refused any settlement other than the return of their lands. The 1980 judgment of $106 million, worth $300 million in 1991, remains in escrow. *See* EDWARD LAZARUS, BLACK HILLS, WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT 401, 427 (1991); Ball, *supra* note 43, at 118.

488. Inaugural Address, 1 GEORGE BUSH, PUB. PAPERS 1, 3 (1989). President Bush was in fact more emphatic than Justice Black, who had used the word "should." Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (Black, J., dissenting).

489. *Tuscarora*, 362 U.S. at 142.

490. Wilkinson & Volkman, *supra* note 364.

ultimate will nor replaced their separate nationhood with the American Dream.

Although seemingly a "modest proposal," the recognition of Indian sovereignty is not only simple, but also not unprecedented. Native nations seek only the recognition that has been granted in the last few years to Lithuania,[491] Estonia,[492] and Latvia[493] in the Baltics, to Armenia,[494] Azerbaijan,[495] Kazakhstan,[496] Kyrgyzstan,[497] Moldova,[498] Tajikistan,[499] Turkmenistan,[500] Uzbekistan,[501] Georgia,[502] Belarus,[503] Ukraine,[504] and Russia[505]

491. MATSUURA, MÜLLER & SAUVANT, *supra* note 63, at 229 (admitted to the United Nations Sept. 17, 1991); CENTRAL INTELLIGENCE AGENCY, LDA CS 93-006, CHIEFS OF STATE AND CABINET MEMBERS OF FOREIGN GOVERNMENTS 50 (Sept. 1993) (recognized by the United States).

492. MATSUURA, MÜLLER & SAUVANT, *supra* note 63, at 228 (admitted to the United Nations Sept. 17, 1991); CENTRAL INTELLIGENCE AGENCY, *supra* note 491, at 28 (recognized by the United States).

493. MATSUURA, MÜLLER & SAUVANT, *supra* note 63, at 229 (admitted to the United Nations Sept. 17, 1991); CENTRAL INTELLIGENCE AGENCY, *supra* note 491, at 47 (recognized by the United States).

494. MATSUURA, MÜLLER & SAUVANT, *supra* note 63, at 227 (admitted to the United Nations Mar. 2, 1992); CENTRAL INTELLIGENCE AGENCY, *supra* note 491, at 3 (recognized by the United States).

495. MATSUURA, MÜLLER & SAUVANT, *supra* note 63, at 227 (admitted to the United Nations Mar. 2, 1992); CENTRAL INTELLIGENCE AGENCY, *supra* note 491, at 5 (recognized by the United States).

496. MATSUURA, MÜLLER & SAUVANT, *supra* note 63, at 229 (admitted to the United Nations Mar. 2, 1992); CENTRAL INTELLIGENCE AGENCY, *supra* note 491, at 43 (recognized by the United States).

497. MATSUURA, MÜLLER & SAUVANT, *supra* note 63, at 229 (admitted to the United Nations Mar. 2, 1992); CENTRAL INTELLIGENCE AGENCY, *supra* note 491, at 47 (recognized by the United States).

498. MATSUURA, MÜLLER & SAUVANT, *supra* note 63, at 230 (admitted to the United Nations Mar. 2, 1992); CENTRAL INTELLIGENCE AGENCY, *supra* note 491, at 56 (recognized by the United States).

499. MATSUURA, MÜLLER & SAUVANT, *supra* note 63, at 231 (admitted to the United Nations Mar. 2, 1992); CENTRAL INTELLIGENCE AGENCY, *supra* note 491, at 80 (recognized by the United States).

500. MATSUURA, MÜLLER & SAUVANT, *supra* note 63, at 231 (admitted to the United Nations Mar. 2, 1992); CENTRAL INTELLIGENCE AGENCY, *supra* note 491, at 84 (recognized by the United States).

501. MATSUURA, MÜLLER & SAUVANT, *supra* note 63, at 232 (admitted to the United Nations Mar. 2, 1992); CENTRAL INTELLIGENCE AGENCY, *supra* note 491, at 87 (recognized by the United States).

502. MATSUURA, MÜLLER & SAUVANT, *supra* note 63, at 228 (admitted to the United Nations July 31, 1992); CENTRAL INTELLIGENCE AGENCY, *supra* note 491, at 32 (recognized by the United States).

503. MATSUURA, MÜLLER & SAUVANT, *supra* note 63, at 227 (admitted to the United Nations Oct. 24, 1945 as Byelorussia; changed its name on Sept. 19, 1991); CENTRAL INTELLIGENCE AGENCY, *supra* note 491, at 7 (recognized by the United States).

504. MATSUURA, MÜLLER & SAUVANT, *supra* note 63, at 227 (admitted to the United Nations Oct. 24, 1945); CENTRAL INTELLIGENCE AGENCY, *supra* note 491, at 86 (recognized by the United States).

505. MATSUURA, MÜLLER & SAUVANT, *supra* note 63, at 230 (Russia took over the former Soviet Union's seat in the United Nations); CENTRAL INTELLIGENCE AGENCY, *supra* note 491, at 68 (recognized by the United States).

in the former Soviet Union, to Slovenia,[506] Croatia,[507] Bosnia and Herzegovina,[508] and Macedonia[509] in the former Yugoslavia, to the Czech[510] and Slovak[511] Republics in the former Czechoslovakia, and to the reunified Germany.[512] All of these new nations have been recognized by the United States and the United Nations.[513] Of course, these countries are "new" only in the sense of being re-recognized; it is exactly their "oldness" that compelled their recognition.

If one looks back only a few decades in this century, dozens of additional examples present themselves. In Europe, the breakup of the Hapsburg[514] and Ottoman[515] empires resulted in the recognition of many "new" countries, as did the breakup of the League of Nations mandates in the Middle East.[516] Poland,[517] Finland,[518] and Ireland[519] regained their national recognition after decades of subjugation. The breakup of the overseas empires of Europe created an abundance of new countries, redrawing the maps of Africa[520] and Asia,[521] as the map of South America had been redrawn in the prior century.[522] India achieved independence[523] and then itself became two[524] and later three countries.[525] Even the American Empire set free the Philippines[526]

506. MATSUURA, MÜLLER & SAUVANT, *supra* note 63, at 231 (admitted to the United Nations May 22, 1992); CENTRAL INTELLIGENCE AGENCY, *supra* note 491, at 74 (recognized by the United States).

507. MATSUURA, MÜLLER & SAUVANT, *supra* note 63, at 228 (admitted to the United Nations May 22, 1992); CENTRAL INTELLIGENCE AGENCY, *supra* note 491, at 23 (recognized by the United States).

508. MATSUURA, MÜLLER & SAUVANT, *supra* note 63, at 227 (admitted to the United Nations May 22, 1992); CENTRAL INTELLIGENCE AGENCY, *supra* note 491, at 9 (recognized by the United States).

509. *See* Paul Lewis, *U.N. Compromise Lets Macedonia be a Member*, N.Y. TIMES, Apr. 7, 1993, at A5. *But see* CENTRAL INTELLIGENCE AGENCY, *supra* note 491 (as of Sept. 1993, the United States had not yet recognized Macedonia).

510. G.A. Res. 221, U.N. GAOR, 47th Sess. (1993) (recognized by the United Nations April 7, 1993); CENTRAL INTELLIGENCE AGENCY, *supra* note 491, at 24 (recognized by the United States).

511. G.A. Res. 222, U.N. GAOR, 47th Sess. (1993) (recognized by the United Nations April 7, 1993); CENTRAL INTELLIGENCE AGENCY, *supra* note 491, at 74 (recognized by the United States).

512. MATSUURA, MÜLLER & SAUVANT, *supra* note 63, at 228 (effective Oct. 3, 1990, the two German states unified their seats in the United Nations); CENTRAL INTELLIGENCE AGENCY, *supra* note 491, at 32 (recognized by the United States).

513. As of May, 1992, the United Nations had 178 members, as compared with 51 at its founding in 1945. MATSUURA, MÜLLER & SAUVANT, *supra* note 63, at 227.

514. *See* KINDER & HILGEMANN, *supra* note 172, at 59.

515. *Id.* at 87, 97.

516. *Id.* at 259.

517. *Id.* at 154-55.

518. *Id.* at 199, 229.

519. *Id.* at 170.

520. *Id.* at 266-69

521. *Id.* at 262.

522. *Id.* at 92.

523. *Id.* at 169.

524. *Id.* at 265 (Pakistan became separate nation in 1947).

525. *Id.* at 287 (East Pakistan became separate nation of Bangladesh in 1971).

and Cuba,[527] though it retained power over Puerto Rico, Guam, Samoa, the Marshall Islands, and various other small island nations,[528] and made Hawaii a state.[529]

The experience of the world in undoing the Age of Empire as well as the Communist system reveals a number of obvious truths: "new" nations are often recognized; there is no status quo if one takes a long enough view; nations which were incorporated into larger nations or empires, by force and even by consent, have often achieved re-recognition; and subjugated nations in particular have become free and been re-recognized by the international community.

Applying such ideas to Native nations would seem straightforward. Separate histories, cultures, languages, and territories undoubtedly belong to the various Native nations as much as to Poland or India. Time should be no bar. The Baltics were captive for half a century, the Finns and Poles even longer, and the nations of Africa and South America for centuries.

To the American reader, however, this must all seem an academic exercise, since all of the examples cited, though occurring on every continent save Antarctica, seem somehow not only "historical" but also to concern "foreign" affairs. Native nations, on the other hand, seem somehow "domestic," as if we all have taken to heart Justice Marshall's dictum that Native nations were *sui generis* in being "domestic dependent nations."[530] The first thing nearly every modern American says regarding the question of separate Indian nationhood is, "but they are in the United States." This statement, intended to show the impossibility of separation, somehow seems true, whereas a statement such as "but they are in the Hapsburg Empire" or "but they are part of the Soviet Union" did not make other independence movements impossible.

The attitude that Indian peoples are a domestic issue is reflected in judicial opinions as well, even those that uphold Indian sovereignty. Ultimately this is due to the far-reaching (and unintended) consequences of the doctrine of discovery.[531] Just as the Monroe Doctrine purported to make the Western

526. *Id.* at 241.

527. *Id.* at 187. While the standard history holds that the United States did not "own" Cuba and the Philippines, it is clear that both countries were part of the "American Colonial System." *See* 2 MORISON, COMMAGER & LEUCHTENBERG, *supra* note 80, at 315-18; *see also id.* at 256-61, 264-65.

528. *See* 2 MORISON, COMMAGER & LEUCHTENBERG, *supra* note 80, at 239, 244-46, 256-61.

529. *Id.* at 234-39, 719-20. Hawaii was made a state in 1959. Pub. L. No. 86-3, 73 Stat. 4 (1959). The centennial of the Marines' overthrow of the Hawaiian government has sparked a great deal of interest in the Hawaiian sovereignty movement. *See generally* Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective,* 8 ARIZ. J. INT'L & COMP. L. 77 (1991); *Anniversary Stirs Hawaii Sovereignty Movement,* N.Y. TIMES, Jan. 18, 1993, at A13; Robert Reinhold, *A Century After Queen's Overthrow, Talk of Sovereignty Shakes Hawaii,* N.Y. TIMES, Nov. 8, 1992, at A24.

530. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

531. *See supra* part I.B.

Hemisphere "our hemisphere,"[532] the doctrine of discovery even more effectively made Native nations "our Indians."

To put events in proper context, one must take a slightly longer view of history. In 1832 the Supreme Court wrote the following with regard to the Cherokee Nation:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil . . . . The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The Constitution . . . admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.[533]

At the same time as the Supreme Court was recognizing the sovereignty of the Cherokee Nation, the following modern European nations did not yet exist: Italy,[534] Germany,[535] Belgium,[536] Ireland,[537] Finland,[538] Poland,[539] Hungary, Romania, the Czech Republic, the Slovak Republic, Slovenia, Croatia,[540] Bulgaria, Albania, Macedonia, and Bosnia and Herzegovina.[541] Greece, Serbia, Moldova, and Wallachia (the latter now part of Romania) had only recently attained independence from the Ottoman Empire between 1817 and 1829.[542] The fifteen states that recently were re-recognized after the fall of the Soviet Union, including the three Baltic nations, Great Russia, Belarus, Ukraine, and Georgia were nearly all subsumed under the Russian Empire, and the entire Middle East of today was under the control of the Ottoman Empire.[543]

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532. *See supra* note 106, at 209.

533. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832).

534. In 1848 Italy was "a purely geographic definition," according to the statesman Metternich, spread over numerous small kingdoms, principalities, duchies, and republics. COLIN MCEVEDY, THE PENGUIN ATLAS OF RECENT HISTORY: EUROPE SINCE 1815, at 12-13 (1982).

535. In 1848, Germany was a confederation of 38 states, including parts of both the Kingdom of Prussia and the Austrian Empire, the Kingdoms of Bavaria, Saxony, Hanover, and Württemberg, the Grand Duchy of Baden, the Free Cities of Frankfurt, Lubeck, Bremen and Hamburg, four separate Saxon duchies, two separate Mecklenburg duchies, the electorate of Hesse-Kassel, and various and sundry other states. KINDER & HILGEMANN, *supra* note 172, at 56-57.

536. *See* MCEVEDY, *supra* note 534, at 3 (until 1838 part of the Netherlands).

537. *Id.* at 13 (part of the United Kingdom).

538. *Id.* (part of the Kingdom of Sweden and Norway).

539. *Id.* (partitioned between the Russian Empire and the Kingdom of Prussia).

540. *Id.* (all subsumed under the Austrian Empire).

541. *Id.* (all subsumed under Ottoman Empire).

542. *Id.*

543. *Id.*

Given the constant birth and rebirth of independent nations the world over, the burden of proof must be on the opponents of re-recognition of Indian sovereignty to explain in a principled manner why Native nations do not deserve similar treatment. For example, why is Native Alaska, which was never conquered, not a country, when Cuba and the Philippines are countries, though both were captured and held under military rule by the United States?[544] Why is the Cherokee Nation, which was recognized by treaties in the very first years of American existence, not a nation, whereas Italy, which did not become a unified nation until 1870,[545] and Israel, which did not come into being until 1948,[546] are nations? Why are the Oneida and Tuscarora Nations, who fought as allies with the colonists against England in the American Revolution,[547] not recognized nations, but Mexico, which lost several wars both to the United States and an independent Texas, is a recognized nation?[548] Moreover, why could Texas be a nation, as it was for several years, and negotiate on favorable terms its entry into the Union,[549] yet Alaska be purchased, not from its inhabitants, but from its "discoverer," Russia?[550] Why was Hawaii, a separate nation enjoying diplomatic treaty relations with Japan, Britain, and the United States, among others, taken over militarily in a manner no different than Iraq's attempted annexation of Kuwait?[551] Iraq at least had a colorable historical claim to the land that is now Kuwait.[552]

Why then may Native peoples living in their ancestral homelands, maintaining their languages, cultures, religions, and governments, not be able to "dissolve the Political Bands which have connected them with another, and . . . assume among the Powers of the Earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them"?[553]

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544. *See* 2 MORISON, COMMAGER & LEUCHTENBERG, *supra* note 80, at 315 ("Cuba was not a colony, but until 1902 the island was ruled by the United States Army."). On the Philippines, see *id.* at 256-61, 317-18. *See also* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 284 n.18 (1955) (discussing the better treatment accorded Filipino property rights as compared with those of Native Alaskans). The comparison in the text is not intended to imply that Cuba and the Philippines are somehow less than nations because they were part of the United States' overseas empire, but rather to make clear the United States' disparate treatment of equally independent peoples.

545. 6 THE NEW ENCYCLOPAEDIA BRITANNICA MICROPAEDIA 433 (15th ed. 1993).

546. *Id.* at 423.

547. *See* 1 PRUCHA, *supra* note 79, at 40, 44.

548. *See* 1 MORISON, COMMAGER & LEUCHTENBERG, *supra* note 80, at 537-56; MCEVEDY, *supra* note 76, at 72-78. The comparison in the text is not meant to imply an insult to Mexico.

549. *See* 1 MORISON, COMMAGER & LEUCHTENBERG, *supra* note 80, at 541-45; MCEVEDY, *supra* note 76, at 72-74.

550. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

551. *See* 2 MORISON, COMMAGER & LEUCHTENBERG, *supra* note 80, at 234-39; *see generally* ROBERT S. HELMS, THE PERSIAN GULF CRISIS: POWER IN THE POST-COLD WAR WORLD (1993).

552. *See, e.g.*, Michael Wines, *Mideast Tension: Hints of Hussein's Strategy in an Iraqi Map*, N.Y. TIMES, Oct. 24, 1990, at A10; Editorial, *What's Iraq's Best Case*, N.Y. TIMES, Sept. 16, 1990, at A22.

553. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). Particularly when

III
INTERNATIONAL LAW AND INDIGENOUS PEOPLES

A. Self-Determination

The fundamental principles of self-determination enshrined in the American Declaration of Independence have become enshrined as well in international law.[554] The Charter of the United Nations, adopted in 1945, attempted to undo the nationalistic and imperial causes of both World Wars by declaring in Article 1 that the purpose of the United Nations was to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . . ."[555]

At the end of the First World War, the Treaty of Versailles,[556] forged under the leadership of President Woodrow Wilson and his drive for self-determination, (re)created the nations of Czechoslovakia, Austria, Hungary, Poland, Romania, and Yugoslavia out of the ashes of the Austro-Hungarian Empire and facilitated the breakup of the Ottoman Empire.[557] The United Nations has continued this trend, demanding and fostering self-determination and the independence of peoples throughout the world.[558] The United Nations Charter reinforced the fundamental self-determination principle set forth in Article 1 by restating it as a human rights principle in Article 55, declaring that, "based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[559]

One of the most visible examples of the United Nations' position on self-determination was its support for the decolonization and independence of colonized nations in Africa and Asia.[560] In 1960, during its Fifteenth General

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"whenever any Form of Government becomes destructive [of the people's inalienable rights], it is the Right of the People to alter or abolish it . . ." and "when a long Train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism, it is their Right, it is their Duty, to throw off such Government . . ." *Id.* at para. 2.

554. *See generally* Edward A. Laing, *The Norm of Self-Determination, 1941-1991*, 22 CAL. W. INT'L L.J. 209 (1992).

555. U.N. CHARTER art. 1, ¶ 2.

556. June 28, 1919, 2 Bevans 43.

557. 2 MORISON, COMMAGER & LEUCHTENBERG, *supra* note 80, at 398-403.

558. *See generally Decolonization*, *in* UNITED NATIONS, EVERYONE'S UNITED NATIONS 329 (10th ed. 1990).

559. U.N. CHARTER art. 55; *see also* U.N. CHARTER art. 56 ("All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.").

560. "At the end of World War II, more than 750 million people lived in colonial and other dependent territories; today, forty-six years later, less than three million live in such dependencies." Lung-Chu Chen, *Self-Determination and World Public Order*, 66 NOTRE DAME L. REV. 1287, 1289 (1991).

Assembly, the United Nations admitted seventeen "new" countries[561] and adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples, known as the "Magna Carta of decolonization."[562] The 1960 Declaration states that "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development."[563] The 1960 Declaration condemns "[t]he subjection of peoples to alien subjugation, domination, and exploitation [as] constitut[ing] a denial of fundamental human rights."[564] It also proclaims the international trend toward self-determination and prohibits delays in granting self-determination based on the pretext that a people may not have attained "political, economic, social or educational preparedness" for independence.[565]

Two subsequent declarations, the 1965 Declaration on the Inadmissibility of Intervention in Domestic Affairs of States and the Protection of their Independence and Sovereignty[566] and the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States,[567] both reaffirmed the United Nations' strong support for the right of self-determination. The 1965 Declaration states that "[a]ll States shall respect the right to self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms."[568] The 1970 Declaration similarly states that "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development."[569]

Though declarations of the General Assembly reflect unanimously approved legal statements,[570] they are not necessarily legally binding upon member states.[571] In order to further incorporate these principles of self-determination into international law, the United Nations in 1966 approved the

561. *See* 2 EVAN LUARD, A HISTORY OF THE UNITED NATIONS: THE AGE OF DECOLONIZATION, 1955-1965, at 175-97 (1989).

562. *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960) [hereinafter 1960 Declaration]; *see* UNITED NATIONS, *supra* note 558, at 329; *see generally* Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 592-94.

563. 1960 Declaration, *supra* note 562, at 67.

564. *Id.*

565. *Id.* at 66-67.

566. *Declaration on the Inadmissibility of Intervention in Domestic Affairs of States and the Protection of their Independence and Sovereignty*, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1965) [hereinafter 1965 Declaration].

567. *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8082 (1970) [hereinafter 1970 Declaration].

568. 1965 Declaration, *supra* note 566, at 12.

569. 1970 Declaration, *supra* note 567, at 123.

570. *See* EDMUND J. OSMANCZYK, ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS 194 (1985).

571. *See* OPPENHEIM'S INTERNATIONAL LAW, *supra* note 23, at § 577.

International Covenant on Civil and Political Rights[572] and the International Covenant on Economic, Social and Cultural Rights,[573] both of which became legally binding upon sufficient ratification in 1976.[574] Both covenants repeat in their first articles language from both the 1960 and 1965 Declarations, stating that "[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[575] The covenants further obligate states to "promote the realization of self-determination."[576] As international treaties, the covenants are binding upon all signatory nations, including the United States.[577]

B. Some "Peoples" Are More Equal Than Others

As Curtis Berkey has succinctly stated, "[t]o say that the right to self-determination is part of contemporary international law raises more questions than it answers for Indians and other indigenous peoples."[578] Two major questions present themselves in attempting to extend the principle of self-determination to Native nations. The first is whether Native peoples are "peoples" within the meaning of the United Nations Charter, declarations, and covenants declaring the right of "peoples" to "self-determination." Even if Native peoples are considered to be "peoples," however, the second question is

572. G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967), 999 U.N.T.S. 171 (1966), (entered into force Mar. 23, 1976, entered into force for the United States Sept. 8, 1992) [hereinafter Political Rights Covenant]. For U.S. concerns, declarations, and understandings, see 138 CONG. REC. S4783-84 (daily ed. Apr. 2, 1992).

573. G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967), 993 U.N.T.S. 3 (1966) (entered into force Jan. 3, 1976) [hereinafter Economic Rights Covenant].

574. As of December 31, 1991, 100 countries had ratified the Political Rights Covenant. *Multilateral Treaties Deposited with the Secretary General, Status as of 31 December 1991*, U.N. Doc. ST/LEG/SEK.E/10, at 133. As of the same date, 104 countries had ratified the Economic Rights Covenant. *Id.* at 122.

575. Political Rights Covenant, *supra* note 572, at art. I; Economic Rights Covenant, *supra* note 573, at art. I.

576. Political Rights Covenant, *supra* note 572, at art. I; Economic Rights Covenant, *supra* note 573, at art. I.

577. The Political Rights Covenant was finally ratified by the United States in 1992, fourteen years after it was signed by President Carter. 138 CONG. REC. S4781 (daily ed. Apr. 2, 1992); Jimmy Carter, *U.S. Finally Ratifies Human Rights Covenant*, CHRISTIAN SCI. MONITOR, June 29, 1992, at 19. On June 14, 1993, Secretary of State Warren Christopher announced the Clinton administration's intention to pursue ratification of the Economic Rights Covenant, *see* 139 CONG. REC. E 1489, 1491, which was also initially signed by President Carter in 1978. *See* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, S. DOC. NO. S385-3, Executives C, D, E, and F, 95th Cong., 2d. Sess. (1978). The United States is also a signatory to the 1975 Helsinki Final Act. Conference on Security and Cooperation in Europe: Final Act, DEP'T ST. BULL., Sept. 1975, at 323. Article 1(a)(VIII) of the act states that signatories are bound "to respect the equal rights of peoples and their self-determination." *Id.* at 325.

578. Berkey, *supra* note 17, at 78; *see generally* Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 586-621; Anaya, *supra* note 11; INDIAN LAW RESOURCE CENTER, INDIAN RIGHTS-HUMAN RIGHTS: HANDBOOK FOR INDIANS ON INTERNATIONAL HUMAN RIGHTS COMPLAINT PROCEDURES (1984).

whether the principle of self-determination is meant to apply to them or instead only in the "classical overseas colonial context."[579] Professor Anaya describes the parameters of the debate as follows:

> Indigenous groups insist on being identified as "peoples" rather than "populations" so as not to be reduced to simple aggregations of individuals. State governments resist the term "peoples" because of its association with the term "self-determination" . . . which in turn is associated with a right of independent statehood . . . . Indigenous rights advocates prefer the term "territories" over "lands" as more descriptive of their claims. Governments resist the term "territories" on the grounds that it implies sovereignty. And so on.[580]

The obstacle to answering the first question is that there is no authoritative definition of the term "people." The most often cited definition[581] is one offered by the International Court of Justice:

> [A] group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and tradition, in a sentiment of solidarity, with a view to preserving their tradition, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.[582]

Other definitions follow in the same vein,[583] and under any of them, it is difficult to argue that American Indian nations do not qualify as "peoples."[584] Nonetheless, no United Nations body or treaty has formally adopted this view, and several have directly or indirectly sought to avoid the question.[585] Being defined as a "people" carries with it the right of self-determination under the United Nations' Charter and the various United Nations declarations and covenants.[586] In contrast, defining a Native group as merely a "mi-

579. Berkey, *supra* note 17, at 79; *see also* Vitit Muntarbhorn, *Realizing Indigenous Social Rights*, 2 WITHOUT PREJUDICE: THE EAFORD INT'L REV. OF RACIAL DISCRIMINATION 7, 9-10 (1989); Daes, *supra* note 94, at 43-44; Anaya, *supra* note 11, at 218-20.

580. Anaya, *supra* note 11, at 218-19. A bibliography of work concerning the debate can be found in Williams, *supra* note 114, at 663 n.4.

581. Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 597.

582. Advisory Opinion No. 17, Question of the Greco-Roman "Communities," 1930 P.C.I.J. (ser. B) No. 17, at 21.

583. The definitions proposed by Aureliu Cristescu, a United Nations special rapporteur, and by the International Commission of Jurists, a nongovernmental organization with consultative status at the United Nations, are discussed in Berkey, *supra* note 17, at 79, and Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 597-600.

584. *See* Sharon Venne, *The New Language of Assimilation*, 2 WITHOUT PREJUDICE: THE EAFORD INT'L REV. OF RACIAL DISCRIMINATION 53, 55-57; Daes, *supra* note 94, at 43-44; Muntarbhorn, *supra* note 579, at 9-10; John H. Clinebell & Jim Thomson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law*, 27 BUFF. L. REV. 669, 710 (1978).

585. *See infra* text accompanying notes 600-03 and note 614.

586. *See supra* part III.A.

nority" within a state carries with it only protection from discrimination by the dominant society and the right to maintain one's separate culture, religion, and language under the laws of that state.[587]

More serious is the question of the scope of the right to self-determination outside the context of overseas colonialism. Nearly every example of the exercise of self-determination rights in the twentieth century has come from the breakup of the transoceanic empires of the European powers in Africa, the Middle East, and Asia.[588] Harder questions are posed when the self-determination of a people threatens the territorial integrity of an existing state. At least since the admission of California to the Union in 1850, the United States has considered Native nations to be within its "interior,"[589] and any present day attempt at self-determination would pose the threat of secession. The same is true for the indigenous peoples of South America, Central America, Africa, and elsewhere. The bloody remains of the former Yugoslavia point to the dangers of too quickly loosening the borders of existing states.[590]

Even in cases where disassociation might seem manageable, no existing state wishes to decrease its territory and resources, to create an adjacent, potentially hostile, and independent state beyond its control, to provide a new ally for its enemies, nor to raise aspirations for other groups within its borders. Nearly all the nations of the world strongly espouse the principle of territorial integrity, and many, including the United States, have gone to great lengths to enforce this principle on their own behalf or even on behalf of other states. Illustrations abound, including the recent wars in Kuwait,[591] the Falkland Islands,[592] the former Yugoslavia,[593] the former Soviet Union,[594] Korea,[595] and

587. *See* Asbjørn Eide, *Minority Situations: In Search of Peaceful and Constructive Solutions*, 66 NOTRE DAME L. REV. 1311 (1991); Hurst Hannum, *Contemporary Developments in the International Protection of the Rights of Minorities*, 66 NOTRE DAME L. REV. 1431 (1991); Muntarbhorn, *supra* note 579, at 9-10; Daes, *supra* note 94, at 44; Venne, *supra* note 584, at 55-57; *see generally* Political Rights Covenant, *supra* note 572, arts. 2, 3, 16, 25, 26, 27; United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

588. Berkey, *supra* note 17, at 78-79; Anaya, *supra* note 11, at 214-15.

589. *See supra* text accompanying notes 172-203.

590. Though this is the fear of existing states, "virtually all [indigenous peoples] deny aspirations to independent statehood." Anaya, *supra* note 11, at 219; *see also* Howard R. Berman, *Are Indigenous Populations Entitled to International Juridical Personality?* PROC. AM. SOC'Y INT'L L. 189, 192-93 ("few indigenous peoples presently aspire to statehood"), *quoted in* CLINTON, NEWTON & PRICE, *supra* note 6, at 1284. However, the willingness of indigenous peoples to accede to geopolitical realities and compromise solutions does not affect their inherent rights of self-determination.

591. *See generally* HELMS, *supra* note 551.

592. *See generally* ANDREW ORGILL, THE FALKLANDS WAR: BACKGROUND, CONFLICT, AFTERMATH (1993).

593. *See generally* SLAVENKA DRAKOLIC, THE BALKAN EXPRESS: FRAGMENTS FROM THE OTHER SIDE OF WAR (1993).

594. *See generally* ROY D. LAIRD, THE SOVIET LEGACY (1993).

595. *See* KINDER & HILGEMANN, *supra* note 172, at 237.

Ethiopia.[596]

Interestingly, some of the nations most committed to using the concept of territorial integrity to negate the rights of indigenous peoples to self-determination are the recently decolonized nations of Africa and the former colonies of South America,[597] many of whose borders were artificially and arbitrarily drawn by their European colonizers.[598] Having attained independence and international status, these nations are reluctant to allow peoples "within" their claimed borders to similarly achieve self-determination. These nations thus put themselves in the slightly anomalous position of vigorously proclaiming their independence from their colonizers, and just as vigorously defending the borders drawn by Popes, Kings, and often, arbitrary caprice.[599]

The argument for the postcolonial integrity of colonial boundaries, reflecting the notion that self-determination should apply only to overseas colonies and not to identifiable peoples residing within the claimed borders of an existing state, has been labeled the "blue water thesis."[600] According to this thesis, "blue water," i.e. an ocean, must exist between the dominant and subordinate societies in order for the colonized people to realize self-determination. Advocated most strongly by Latin American nations,[601] the blue water thesis turns groups seeking self-determination as "peoples" into "minorities,"[602] subject to the laws of the dominant society and protected only by anti-discrimination precepts.[603]

Despite the seeming disingenuousness of the blue water thesis, the United Nations Charter does offer some support for the inapplicability of self-determination principles to indigenous peoples. For example, Article 73 of the Charter, while dedicated to the principle of self-determination found in Articles 1 and 55, allows dominant societies some flexibility with respect to granting self-determination:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose people have not yet

596. *See generally* ANDARGACHEW TIRUNEH, THE ETHIOPIAN REVOLUTION, 1974-1987: A TRANSFORMATION FROM AN ARISTOCRATIC TO A TOTALITARIAN AUTOCRACY (1993).

597. Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 591-92.

598. The most famous example being the arbitrary "line of demarcation" drawn by Pope Alexander in 1493 dividing the world between Spain and Portugal. *See* WILLIAMS, *supra* note 11, at 79-81.

599. *See id.* The International Court of Justice has upheld the inviolability of colonial boundaries by decolonized nations. *See, e.g.,* Burkina Faso/Mali Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554 (Dec. 22).

600. *See* Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 591. It is sometimes also called the "salt water thesis." The contrary position advocated by this article is sometimes called the "Belgian thesis," as Belgium has been its most prominent proponent in international fora. *See* WILLIAMS, *supra* note 11, at 327 n.14.

601. Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 591.

602. *Id.*; *see also* WILLIAMS, *supra* note 11, at 327 n.14.

603. Minorities are protected under Article 27 of the Political Rights Covenant, *see supra* note 572, at 179, which protects the rights of "persons belonging to ethnic, religious or linguistic minorities."

> attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation . . . to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.[604]

While Article 73 supports self-determination, it leaves a great deal of discretion to dominant societies to "develop self-government" and measure the "progress" of the peoples within their borders or under their jurisdiction. Its language mirrors the trust doctrine used for so long in United States law to justify the assertion of power over Native nations. The 1886 *Kagama* Court similarly stated that "Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. . . . From their very weakness and helplessness, . . . there arises the duty of protection, and with it the power."[605] Though Article 73 contemplates the "sacred trust" as a temporary measure, its provisions illustrate some tempering of the United Nations' strong desire to extend self-determination to "all peoples."[606]

The various declarations of the United Nations regarding self-determination have, like the Charter, been somewhat ambiguous on the blue water thesis. The 1960 Declaration, notwithstanding its ringing endorsement of self-determination, states that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."[607] The 1970 Declaration also addressed the blue water thesis by discouraging actions which would affect the territorial integrity of countries but stated that such territorial inviolability would apply only to those countries that "conduct[ed] themselves in compliance with the principle of equal rights and self-determination . . . and [were] possessed of a government representing the whole people belonging to the territory."[608] This principle, though still ambiguous, should work to prevent the use of the territorial integrity defense in situations where the dominant society holds lands in violation of international law (for example, by conquest or in contravention of a treaty) or where the indigenous people are not politically integrated into the dominant society. In

604. U.N. CHARTER art. 73. As a successor to a League of Nations Covenant provision that applied to indigenous peoples within independent states, it has been argued that Article 73 has a similar reach and therefore rejects the blue water thesis. *See* Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 599 n.448 (relying on GORDON BENNETT, ABORIGINAL RIGHTS IN INTERNATIONAL LAW 10-12 (1978)).

605. United States v. Kagama, 118 U.S. 375, 383-84 (1886).

606. "All peoples" is the phrase found in both of the 1966 covenants, *supra* notes 572 & 573, and the 1960, 1965, and 1970 declarations. *See supra* notes 562 (1960), 566 (1965), and 567 (1970).

607. 1960 Declaration, *supra* note 562, at 67.

608. 1970 Declaration, *supra* note 567, at 124.

large part, American Indians would fall under either heading, since many nations lost their lands through force and coercion[609] and Indian people have never been seen as a part of the American polity.[610]

C. *Where the Action Is*

The 1992 quincentennial of Columbus' voyage to the Western Hemisphere created a great deal of interest in the present day situation of Native peoples. The United Nations, anticipating this, declared that 1993 would be the International Year for the World's Indigenous People.[611] The attention has also spurred work by the two main international organizations involved in working to define the rights of indigenous peoples, the Working Group on Indigenous Populations of the Sub-Commission on Prevention of Discrimination and the Protection of Minorities of the United Nations Commission on Human Rights (the Working Group),[612] and the International Labour Organization (ILO), a specialized agency of the United Nations which has become involved with indigenous peoples' rights.[613] In the last few years, both groups have produced major documents on the rights of indigenous peoples which

609. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289-90 (1955):

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conqueror's will that deprived them of their land.

610. *See* Elk v. Wilkins, 112 U.S. 94, 102 (1884):

> Indians born within the territorial limits of the United States . . . . and owing immediate allegiance to, one of the Indian . . . tribes . . . are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the Fourteenth Amendment, than the children of . . . ambassadors or other public ministers of foreign nations.

The latter-day and unilateral grant (or imposition) of citizenship in 1924 to (or upon) American Indians, *see supra* text accompanying notes 331-33, cannot qualify the United States government as one that "represent[s] the whole people belonging to the territory" within the meaning of the 1970 Declaration, *supra* note 567, for several reasons. First, the most important laws imposing power over Native Americans were passed prior to 1924, *see supra* part I.F.; second, the right to vote was often denied to Indians even after 1924 by the states, *see* sources cited *supra* note 333; and third, Native Americans do not enjoy the political process protections required by the Supreme Court as a prerequisite to the extension of federal power pursuant to the Constitution. *See supra* parts II.A-B.

611. G.A. Res. 45,164, U.N. GAOR, 45th Sess., Supp. No. 49, at 277, U.N. Doc. 45/164 (1990).

612. The history and work of the Working Group is discussed in WILLIAMS, *supra* note 11, at 104; Catherine J. Iorns, *Indigenous Peoples and Self Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199 (1992); Kronowitz, Lichtman, McSloy & Olson, *supra* note 11, at 612-20.

613. The ILO was initially concerned with the exploitation of indigenous laborers, but came to find those problems inextricably tied to larger questions of indigenous peoples' self-determination rights. On the history of the ILO's involvement with indigenous peoples' rights, see Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 OKLA. CITY U. L. REV. 677 (1990); S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. OF INT'L COMP. L. 1 (1991); Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 601-02.

deal with the fundamental question posed by the blue water thesis.[614]

The Working Group has been preparing, since 1985, a draft Universal Declaration of the Rights of Indigenous Peoples,[615] which it initially aimed to adopt during 1993 in conjunction with the other activities of the International Year of Indigenous People.[616] A final draft of the declaration was promulgated by the Working Group on August 25, 1993, and submitted to its parent Sub-Commission for approval.[617] Though the declaration will have to pass through several levels of approval and perhaps amendment before coming before the General Assembly for adoption, indigenous rights advocates have called the draft declaration "extraordinarily strong" and a "powerful statement."[618] In language echoing that of the Charter, the 1966 covenants and the 1960, 1965, and 1970 declarations, the draft declaration makes clear that the United Nations' self-determination precepts apply to indigenous peoples.[619] However, in keeping with the blue water thesis, "the interpretation of the term 'self-determination' specifically excludes the right of 'secession.' "[620] Instead, the draft declaration provides that "as a specific form of exercising their right to self-determination, [indigenous peoples] have the right to autonomy or self government in matters relating to their internal and local affairs."[621] Indigenous peoples are thus held to be something more than minorities, yet something less than states.

The ILO's work has been similar in focus. Its first attempt to address indigenous peoples' issues was the 1957 Convention (Number 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-

614. Even the naming of the Working Group raised the issue. Nearly everyone involved with the Working Group refers to it as the "Working Group on Indigenous *Peoples*," *see, e.g.*, Muntarbhorn, *supra* note 579, at 9-10, though its official title, in keeping with the blue water thesis, is the "Working Group on Indigenous *Populations*."

615. *See* sources cited *supra* note 612; Berkey, *supra* note 17, at 82-84.

616. *See* Don Betz, The United Nations and Indigenous Peoples: Emerging Partners in a Changing World 282, 295 (presented to the Sovereignty Symposium V: The Year of the Indian; symposium presented by the Oklahoma Supreme Court, the Oklahoma Indian Affairs Commission, and the Sovereignty Symposium, Inc.) (June 9, 10, and 11, 1992) (on file with the *NYU Review of Law and Social Change*).

617. *Draft Declaration as Agreed upon by the Members of the Working Group at its Eleventh Session*, U.N. Working Group on Indigenous Populations of the Sub-Commission on Prevention of Discrimination and the Protection of Minorities of the United Nations Commmission on Human Rights, 11th Sess., U.N. Doc. E/CN.4/Sub. 2/1993/29 at 50 (1993) [hereinafter Draft Declaration]; *see UN Working Group Completes Draft of Declaration of Rights of Indigenous Peoples*, 1 INDIAN RTS.—HUM. RTS. (Indian Law Resource Ctr., Helena, Mont.), Summer 1993, at 1, 5.

618. *UN Working Group Completes Draft of Declaration of Rights of Indigenous Peoples*, 1 INDIAN RTS.—HUM. RTS. (Indian Law Resource Ctr., Helena, Mont.), Summer 1993, at 1.

619. The draft declaration states that "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Draft Declaration, *supra* note 617, at 52. For comparison, see text accompanying notes 555, 563, 568, 569, and 576.

620. Daes, *supra* note 94, at 48. Erica-Irene A. Daes is the chairperson-rapporteur of the Working Group. *See also supra* note 590.

621. Draft Declaration, *supra* note 617, at art. 31.

Tribal Populations in Independent Countries,[622] which, as its title indicates, had a strongly assimilationist tone.[623] Though credited by some for raising the issue of indigenous peoples' rights and for affording some minimal protections,[624] Convention 107 was rejected by indigenous peoples, and later by the ILO itself, as "paternalistic and integrationist."[625] Nevertheless, it remains an international treaty with binding legal force.[626]

In 1989 the ILO adopted a successor to Convention 107, the Convention (Number 169) Concerning Indigenous and Tribal Peoples in Independent Countries.[627] The new convention is aimed at "promoting the full realization of the social, economic and cultural rights of [indigenous] peoples with respect for their social and cultural identity, their customs and traditions and their institutions."[628] Though much improved from Convention 107 on self-determination issues, Convention 169 was limited from its inception by the limited mandate of the ILO, which does not include setting general international standards for indigenous rights,[629] and by the continuing debate over the blue water thesis. In addition, since Convention 169 is sought to be ratified as an international treaty with binding legal force,[630] it is much less aspirational and more protective of the status quo than the technically nonbinding 1960, 1965, and 1970 declarations and the Working Group's draft declaration. Most notably, while Convention 169's broad language requires states to "promot[e] the full realization of the social, economic and cultural rights of [indigenous] peoples,"[631] such goals are limited by the provision that "[t]he use of the term 'peoples' in this convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."[632]

Convention 169 has been strongly condemned by many indigenous groups for not going far enough to affirm indigenous peoples' right to self-determination.[633] Others see Convention 169 as beneficial because it has kept

622. June 26, 1957, 328 U.N.T.S. 247.

623. *See* Russel L. Barsh, *Revision of ILO Convention No. 107*, 81 AM. J. INT'L L. 756 (1987); Anaya, *supra* note 613, at 6-7.

624. *See* Anaya, *supra* note 11, at 216 n.115.

625. Lee Swepston, *Introduction to ILO Convention 169*, 2 WITHOUT PREJUDICE: THE EAFORD INT'L REV. OF RACIAL DISCRIMINATION 68, 70 (1989); *see also* Anaya, *supra* note 613, at 6-7.

626. The United States, however, is not a party to it.

627. Convention (No. 169): Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991) [hereinafter Convention 169], *reprinted in* 2 WITHOUT PREJUDICE: THE EAFORD INT'L REV. OF RACIAL DISCRIMINATION 72-86 (1989); *see* Berkey, *supra* note 17, at 84; *see generally* Swepston, *supra* note 613; Anaya, *supra* note 613.

628. Convention 169, *supra* note 627, art. II(2)(b).

629. Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 602.

630. The United States has not yet signed the Convention.

631. Convention 169, *supra* note 627, art. II(2)(b).

632. *Id.* The history of this caveat is discussed in Anaya, *supra* note 11, at 218.

633. *See, e.g.*, Venne, *supra* note 584; *Editor's Introduction to ILO Convention 169*, 2 WITHOUT PREJUDICE: THE EAFORD INT'L REV. OF RACIAL DISCRIMINATION 68, 68 (1989)

indigenous peoples' rights on the international agenda, it denunciates the assimilative Convention 107, and it "can also be seen as a small step forward in the drive for full rights of self-determination for indigenous peoples."[634]

In addition to the standard-setting work of the Working Group and the ILO, other international and multilateral organizations, such as the Organization of American States (OAS)[635] and the World Bank,[636] have begun to take greater cognizance of indigenous peoples' rights. There also exist several international bodies empowered to hear human rights complaints in specific cases, including the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the ILO, and the Inter-American Commission on Human Rights of the Organization of American States.[637] These forums have been utilized by indigenous peoples to resolve specific claims and to focus publicity on the treatment of indigenous peoples, particularly in cases where the aggrieved parties have no remedy under the domestic law of the society under whose rule they live.[638]

The actions of the United Nations and other international organizations in promoting decolonization and the protection of ethnic and cultural groups, including indigenous peoples, and the broad trend among nations to promote such principles have led many to argue that in addition to the specific pronouncements of international agreements, a customary norm of international law has "crystallized"[639] around the principle of self-determination,[640] making it a general rule of international law binding upon all nations of the world.[641]

(noting walkout by indigenous peoples on ILO representative's presentation of Convention 169 to the Working Group).

634. Berkey, *supra* note 17, at 85; *see also* Swepston, *supra* note 613, at 713; Russel L. Barsh, *An Advocate's Guide to the Convention on Indigenous and Tribal Peoples*, 15 OKLA. CITY U. L. REV. 209, 209 (1990).

635. *See* Anaya, *supra* note 11, at 217; Berkey, *supra* note 17, at 86.

636. *See* Berkey, *supra* note 17, at 86; H. Elizabeth Dallam, *The Growing Voice of Indigenous Peoples: Their Use of Story-telling and Rights Discourse to Transform Multilateral Development Bank Policies*, 8 ARIZ. J. INT'L & COMP. L. 117 (1991).

637. *See generally* INDIAN LAW RESOURCE CENTER, *supra* note 578, at 24-48.

638. Indigenous peoples in Brazil, Nicaragua, and Canada have successfully utilized these procedures. *See* Anaya, *supra* note 613, at 17-19. For a discussion of complaints brought by the Hopi and Mohawk Nations before the United Nations, see Kronowitz, Lichtman, McSloy & Olsen, *supra* note 11, at 604-12.

639. Raizda Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127, 156 (1991) ("The proliferation of domestic and international declarations, the publication of various studies, the creation of international bodies dealing exclusively with indigenous issues, and the attention given by states to indigenous concerns are all evidence of the crystallization of a norm protecting indigenous rights.").

640. *See* Anaya, *supra* note 613, at 29-30 ("Beyond its textual affirmation, self-determination is widely held to be a norm of general or customary international law, and arguably *jus cogens* (a peremptory norm)."); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 45 (1990); Torres, *supra* note 639; Deborah Z. Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21 (1992); Laing, *supra* note 554.

641. On the concept of customary international law, see OPPENHEIM'S INTERNATIONAL LAW, *supra* note 23, at § 10; ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTER-

Though this "emerging norm"[642] has not been completely defined,[643] with views ranging from a right to secession[644] to a more minority rights-oriented norm of "cultural integrity,"[645] there does exist "a core of widely held conviction in international legal discourse . . . consist[ing] of the idea that human beings, individually and as groups, should be in control of their own destiny."[646] The qualified self-determination provisions of the Working Group's draft declaration and the ILO's Convention 169 can perhaps be seen in this light.

Commentators have also urged the use of emerging norms of self-determination, however imperfectly developed at the international level, as tools in enforcing rights in domestic courts.[647] Given the United States' consistent affirmations in recent years of a "government to government relationship" with Native nations,[648] and the current proclaimed "era of self-determination" in American Indian affairs,[649] international law norms regarding the right of self-determination should be used by United States courts in considering the rights and powers of Native nations,[650] most importantly, to defeat arguments that the powers of Native nations have been "implicitly divested"[651] by virtue of their simply being Indian.

D. Back to the Future

Current international law, building upon the principles established in the United States' Declaration of Independence, supports the rights of peoples to self-determination. These principles have been acted upon in numerous contexts, from the admission to the family of nations of newly decolonized states in Africa, the Middle East, and Asia, to the use of force to prevent the taking of territory by conquest, as in South Korea and Kuwait. Even in North

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NATIONAL LAW (1971); United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820) (United States recognizes customary international law); Anaya, *supra* note 613, at 8-9.

642. *See generally* Torres, *supra* note 639.

643. *See* Chen, note 560, at 1291 ("self-determination encompasses alternatives ranging from considerable self-government within an existing state to complete independence"); Cass, *supra* note 640, at 2 ("One could expect therefore that a principle so readily utilized in the international arena would possess a definite meaning. This is not the case."); Anaya, *supra* note 613, at 30-39.

644. *See* Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257 (1981); James E. Falkowski, *Secessionary Self-Determination: A Jeffersonian Perspective*, 9 B.U. INT'L L.J. 209, 210-11 (1991).

645. *See* Anaya, *supra* note 613, at 15-24.

646. Anaya, *supra* note 613, at 30; *see also* W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990); S. James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, 75 IOWA L. REV. 837 (1990); sources cited *supra* note 643; *see generally* Allen E. Buchanan, *The Right of Self-Determination: Analytical and Moral Foundations*, 8 ARIZ. J. INT'L & COMP. L. 41 (1991).

647. *See* Berkey, *supra* note 17, at 87-94.

648. *See* President Reagan's Statement on Indian Policy, *supra* note 16.

649. *See supra* notes 239-40; President Bush's Proclamation 6407, *supra* note 16.

650. *See* Anaya, *supra* note 613, at 39.

651. *See* Berkey, *supra* note 17, at 91-94. On the United States' doctrine of implicit divestiture, see *supra* part II.D.

America there has been redrawing of the map: as the European-descended inhabitants of Canada struggle over the continuance of their nation as a nation,[652] the original inhabitants of Canada have established their own territory of Nunavat, which has been recognized by the Canadian government.[653] The United Nations, however, either cynically, because it represents the wishes of its members,[654] or pragmatically, given the horrors of the births of Pakistan, Bangladesh, and the successor states of Yugoslavia and the Soviet Union, holds firm to the principle of territorial integrity, even of those borders drawn by the conquerors of the Old World.

Native nations are therefore caught between these two principles. Unlucky in that they are not separated by oceans from the continental nations of the Americas, nor made up of islands like their Caribbean and Pacific brethren, they instead find themselves surrounded on the mainlands of continents by the modern states which arose from imperial expansion. The indigenous peoples of the Western Hemisphere have thus fared less well than their African, Asian, Caribbean, and Pacific counterparts. Indeed, indigenous peoples now find many of these counterpart nations supporting the blue water thesis and the doctrine of territorial integrity to preserve their own borders against the "nations within."[655] Indian peoples become merely the subject of academic debates about whether nations like the Cherokee, Lakota, Oneida, and Navajo, recognized by treaties and each having their own language, culture, religion, and traditions, are *peoples*, or whether the self-determination principles that allow sovereignty and United Nations membership to Saint Kitts and Nevis (139 square miles, 54,775 people), Liechtenstein (62 square miles, 27,074 people), and San Marino (23 square miles, 22,791 people),[656] to name just a few, should apply to the Navajo (166,000 people), the Lumbee (50,000 people), the Cherokee (42,992 people), the Papago (Tohono O'odham) (22,501 people), the Choctaw (20,054 people), the Pine Ridge Sioux (20,054 people),[657] and other Indian peoples, who in the aggregate still own 52,500,000 acres of land in the contiguous United States, an additional 44,000,000 acres in Alaska,[658] and potentially millions of additional acres presently the subject of land claim litigation.[659]

The debate as to whether Native nations are *peoples* with a right to self-determination or simply *minorities* with civil and political rights under inter-

652. *See* Clyde H. Farnsworth, *The Canadian Impasse*, N.Y. TIMES, Oct. 28, 1992, at A1.

653. *See* Clyde H. Farnsworth, *Canada to Divide its Northern Lands*, N.Y. TIMES, May 6, 1992, at A16.

654. *See generally* Anaya, *supra* note 11, at 211-25.

655. *Cf.* VINE DELORIA, JR., THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY (1984) (Deloria coined the phrase the "nations within").

656. For U.N. membership, see Matsuura, Müller & Sauvant, *supra* note 63, at 227. Figures are taken from NEW YORK PUBLIC LIBRARY DESK REFERENCE, *supra* note 70, at 752-63.

657. Figures are taken from GETCHES & WILKINSON, *supra* note 72, at 6.

658. *Id.* at 13.

659. *See* discussion *supra* notes 136, 146.

national law, mirrors the legal struggle of Native peoples for sovereignty under American law. The answer under international law should be the same as it must be under American law. The only coherent and consistent principle that can be applied to Native peoples is the principle originally propounded in international law by Church theorists like Francisco de Vitoria[660] and in American law by Chief Justice John Marshall:[661] Native nations are independent political powers with the rights of nations, subject only to the geopolitical realities which affect all nations in their external diplomatic relations. The current trend of recognizing the sovereignty of nations like the Baltic republics and the former Yugoslav states should work to undo the hypocritical blue water thesis, as no ocean separates Moscow from Lithuania nor Slovenia from Croatia.[662] Moreover, the ultimately peaceful transitions to independence in the former Czechoslovakia, Eritrea, and the Baltics should work to allay the fears raised by the horrors of Pakistani independence and Sarajevo.

The process of granting self-determination to the peoples of the world who seek it must continue. In the United States, we must go back to the future, reinstitute treaty making, re-recognize sovereignty, and free the "nations within."[663] Even if the right to self-determination were to be defined at the extreme as a right to secession, this should not bar the independence of Native nations. As put by Igor Grazin, an Estonian law professor:

> But now, a comment on the word "secession." It is not exactly correct, or appropriate, because an occupied territory cannot secede.[664]

IV
SO, HOW TOUGH ARE YOU?

The only possible conclusion to this Article is that the author is crazy. This Article has called for the abolition of every congressional statute touching upon Indian affairs, save the occasional regulation of commerce, as in the original Trade and Intercourse Acts. It has also called for the invalidation of

660. *See supra* part I.A.

661. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); *supra* text accompanying notes 148-55.

662. "There is a growing list of examples where a right to self-determination has been recognized regardless of its failure to fit conventional theoretical requirements." Cass, *supra* note 640, at 38. Cass thus contends that there has been a Kuhnian "paradigm shift" in the norm of self-determination away from the purely decolonization formulation represented by the "blue water thesis." *See generally id.*

663. Small steps in the right direction have been the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S. §§ 450a (1988)); the Tribal Self-Governance Demonstration Project, Title III, Pub. L. 100-472, 102 Stat. 2296 (1988); and the proposals for a New Federalism for American Indians, advanced by the Senate Select Committee on Indian Affairs, Special Committee on Investigations. S. REP. No. 216, 101st Cong., 1st Sess. (1989).

664. *See* Igor Grazin, *The International Recognition of National Rights: The Baltic States' Case*, 66 NOTRE DAME L. REV. 1385, 1421 (1991). On similarities between the Baltic States and indigenous peoples, see Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, *supra* note 646, at 837.

centuries of Supreme Court and lower court case law, save the occasional holdings, most frequently found in the early history of the nation, which forbade interference by the United States in the affairs of Native nations. Finally, it has argued that Native nations belong in the United Nations, alongside the other free nations of the world, as independent peoples having a right of self-determination. Most radically, this article has relied for support for the latter proposition upon the Declaration of Independence.

Yet the evidence is there. It cannot be denied that the United States fought wars and concluded peace treaties with Native nations on an arms-length, international basis. It cannot be denied that the original intentions of the Framers did not include a sense of power over the affairs of Indian nations. It cannot be denied that for the first century of the United States' existence its courts consistently disavowed any federal or state government power to interfere in the affairs of Native governments and peoples. It cannot be denied that when, during the Age of Empire, the United States arrogated to itself the power to interfere with Native nations, the country's highest court expressly disclaimed any constitutional basis for doing so. It cannot be denied that the modern Supreme Court's latter day attempts to constitutionalize federal power over Indians run afoul not only of the Framer's original plan for the nation but also the Court's own twentieth century jurisprudence regarding the proper reach of the Commerce Clause and the treaty power.

It cannot be denied that the nations, names, borders, and empires of the Old World have changed more than the map of North America ever has, and that many of these changes have occurred in the last few months, much less years. It cannot be denied that the smallest and poorest of countries have become members of the international community and that more nations emerge from their imperial bonds every year. It cannot be denied that the United Nations, with the full support of the United States, has proclaimed and even waged war in support of the rights of peoples to control their destiny.

Where, then, are the Indians? They have not died out, try as we did. They have not assimilated, try as we might. They remain, in their ancestral homelands, speaking their native tongues, practicing their own religions, raising their children, preserving and living their culture, governing themselves, following, and when they choose, changing, their traditions and laws, and when the time comes, dying and being buried next to ancestors who have lain in the same ground since before Columbus was born.

The United States must bear the burden of persuasion. At the very least, the United States should have the integrity of its preeminent Chief Justice John Marshall, who made clear that what he did in limiting Indian sovereignty he did as a judge sitting in the "court of the conqueror,"[665] making decisions "opposed to natural right, and to the usages of civilized nations,"[666]

665. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 588 (1823).
666. *Id.* at 591.

regardless of the "original justice of the claim."[667] The United States should not hide behind specious Commerce Clause arguments nor a feigned trust relationship, but rather admit that the "nations within"[668] are captive nations, just as the nations of the Soviet Union and Eastern Europe were, but that unlike communism, the United States is built to last.

As for Native peoples, though I am not one, I am hopeful. I take hope because of the words of an Indian leader some years ago.[669] The leader first enjoined lawyers, reminding them that:

> When you talk about the lawyer/client relationship, you are talking about the future of nations.[670]

He then concluded:

> So, how tough are you?
> You're taking on the greatest power in the world.
> But it's been capable of the people before us or we wouldn't be here today.[671]

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667. *Id.* at 588. As Thomas Jefferson stated,

> Whoever shall attempt to trace the claims of the European nations to the countrys [sic] in America from the principles of Justice, or reconcile the invasions made on the Native Indians to the natural rights of mankind, will find that he is pursuing a Chimera, which exists only in his own imagination, against the evidence of indisputable facts.

Quoted in Wilcomb E. Washburn, *The Moral and Legal Justifications for Dispossessing the Indians, in* SEVENTEENTH CENTURY AMERICA: ESSAYS IN COLONIAL HISTORY 26 (James M. Smith ed., 1959).

668. DELORIA, *supra* note 655.

669. Oren Lyons, *When You Talk About Client Relationships, You are Talking About the Future of Nations, in* RETHINKING INDIAN LAW, *supra* note 281, iv, iv.

670. *Id.* at v.

671. *Id.* at vi.