

Nation Building in Indian Country: The Blackfoot Constitutional Review*

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The Blackfoot People of the Blackfoot Nation, in order to secure our physical and cultural survival, in order to provide for our common defense and security, in order to provide for prosperity for all Blackfoot, in order to secure redress for past and present injustices done to Blackfoot People, in order to realize our internationally recognized right to independence and self-determination, in order to form bilateral relations with other nations, in order to respect the legacies and sacrifices of our ancestors and pass them on to our descendants and in order to secure and protect our resources and birthrights, do hereby declare that we constitute/are—and have never relinquished our right to be or be recognized as—a sovereign nation and do, also, hereby create and enact this Constitution.¹

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I. INTRODUCTION

Native Americans within the forty-eight contiguous states have governed themselves through a variety of models since well before the Columbian encounter. However, as rich political and theoretical discourses have developed during the last few centuries in the West, the evolution of tribal governments has been hindered by a number of historical factors, including their relationships with the United States, insufficiently recognized legal status internationally, and lack of economic development. As a result, tribes retain the right of self-determination, yet have not developed a comprehensive political theory. Tribal policy makers and scholars in the field have focused primarily on economic development or the role of Indian nations within the United States' federal system.² Most often, tribal officials govern reactively, responding to opportunities and obstacles, but failing to proactively consider the future.

From the birth of the Republic, the federal government has attempted to exert dominion over the destinies of the tribal nations whose land it occupies. The First Congress asserted its authority to regulate intercourse with those nations exclusive of the states, and an early Supreme Court justified federal dominion in a series of cases called the Marshall Trilogy. In *Johnson v. M'Intosh*,³ a case that included no tribal advocate, the Court justified the expropriation of tribal lands through the dubious doctrines of discovery and conquest. Subsequently, in *Cherokee Nation v. Georgia*,⁴ the Court denied tribal nations standing in federal courts, reasoning that although sovereigns, tribes could not gain access as foreign nations or states. Finally, in *Worcester v. Georgia*,⁵ a case involving a non-Indian resisting the State of Georgia's jurisdiction within the Cherokee Nation, the Court again acknowledged the inherent sovereignty of tribal nations and the sanctity of their territory, but held that tribes were dependent allies.⁶ These cases described the status of tribal peoples as "domestic dependent nations,"⁷ a tripartite concept⁸: (1) tribes have diminished sovereignty,⁹ (2) Congress has plenary power over Indian affairs,¹⁰ and (3) the federal government has a trust responsibility to act in favor of tribes.¹¹

The Domestic Dependent Nations Doctrine ignores two other important sources of Indian law — tribal law and international law — both of which have been neglected, primarily as a consequence of U.S. influence and intervention.¹² Given the level of such influence, it is reasonable that tribal governments have only recently re-initiated efforts to participate in the international community¹³ and to consider the expansion of their own internal legal frameworks. Human nature urges one not to expend effort where the fruits of that labor are relatively certain to be circumvented or appropriated.¹⁴ Accordingly, tribes have been reluctant to construct truly independent governments in the face of the United States' effectiveness at undermining virtually

any model of self-governance.¹⁵ Nevertheless, there is hope that a movement toward greater self-determination is no longer entirely futile; and the recent Supreme Court has demonstrated an increasing willingness to describe a lack of exercise of tribal sovereignty as proof that sovereignty in a given arena never existed at all.¹⁶

Increasing sovereignty in fact, stemming the tide of judicial divestiture of tribal sovereignty in law, and even the long-term survival of the Peoples themselves require that tribes establish governments that are representative of their own values. Tribal leaders and citizens, well versed in their own needs, must look inward for the resolution of those needs and act upon their own internally-derived conclusions.¹⁷ How, though, can the freedom of tribal nations be achieved given the political and historical facts — the “actual state of things?”¹⁸

The arduous process of re-asserting sovereignty begins not with the nation’s land, but with sovereignty of the minds of its people. This article proposes a paradigm shift in favor of tribal introspection and full membership in the international community, urging tribes to examine the political discourses of others and then generate their own. First, tribes must stop trying to fit into the mold of Domestic Dependent Nation Status and stop preceding any proposal with the question, what are we allowed to do by the federal government? Rather, tribes should ask three questions. First, what do governments do? Second, in accordance with tribally specific cultural, political, and economic norms and aspirations, what should our government do? Third, how shall those goals be achieved?

While such questions demand an analysis well beyond the scope of this article, the previous three questions are not merely academic. In order to govern themselves appropriately and regain international recognition, the citizenry of the Blackfoot Nation has asked itself these questions and has produced a draft constitution that incorporates the resulting answers.¹⁹ Comprised of seventy-seven articles divided into five chapters, the Draft Constitution is a wordy blend of down-to-earth ideals and sophisticated political philosophy; it is decidedly Blackfoot.

The following section of this article reviews and critiques the current state of federal law relating its purported authority over Indian nations. After examining the diminishment of tribal autonomy through lack of use (Part III), this article proposes that only by posing the aforementioned questions can indigenous nations craft their own destinies and avoid one dictated to them (Part IV). Finally, Part V discusses the example set by the Blackfoot Nation and the unique constitution drafted in favor of self-governance.

II. BACKGROUND

A. A Brief History of U.S. Indian Policy

United States policy in dealing with American Indian tribes has generally wavered between two conflicting principles, encouraging assimilation into the dominant culture on the one hand and maintaining separation on the other. With few exceptions, however, all policies have recognized the continuing right of tribes to maintain their own governments and manage their own affairs. Early U.S. policy developed from legal precedents established by European governments during the Colonial Period.²⁰

Although the European Nations that colonized North America presumed that discovery carried with it the right to acquire land in the name of the discovering sovereign, they recognized the indigenous peoples' right of occupancy.²¹ Thus, the act of "discovery" preempted other Europeans from obtaining title from the Indians, but did not extinguish the indigenous right of occupancy.²² Despite the practical reality of Spanish violence in the New World,²³ Spanish legal theorists rejected the notion of title by conquest, except in the event of a just war.²⁴

During the Colonial Period, 1492–1776,²⁵ the British government generally allowed individual colonies to manage their own transactions with Indian tribes, and the colonies also recognized tribal sovereignty and land title,²⁶ repeatedly treating for peace.²⁷ However, during the French and Indian Wars, Great Britain recognized the need for centralized planning of Indian affairs.²⁸ This recognition led to the Proclamation of 1763,²⁹ which prohibited further cessions of tribal land West of the crest of the Appalachian Mountains and secured to the Crown the process of approving land cessions east of that line.³⁰ Given the high cost of enforcing the border against land-hungry colonists, the Crown raised taxes and eventually found the Proclamation too costly to fully implement.³¹ Soon after the Proclamation, the Revolutionary War erupted, opening the next era in Indian policy, the Confederation Period.

During the Confederation Period, 1776-1789,³² the federal government and states disputed authority over management of Indian affairs.³³ This conflict was resolved in favor of federal authority in 1790, when the first Congress asserted the absolute and exclusive right of the federal government, rather than the states, to acquire and dispose of tribal lands by enacting the Indian Trade and Non-Intercourse Act.³⁴ During the Trade and Intercourse era, lasting until approximately 1835,³⁵ treaties between tribes and the United States and federal legislation articulating the relationship between the national and state governments reflected six major policies, as summarized by Father Francis Paul Prucha:

- (1) Protection of Indian rights to their land by setting definite boundaries for the Indian Country, restricting the whites from entering the area except under certain controls, and removing illegal intruders.
- (2) Control of the disposition of Indian lands by denting the right of private individuals or local governments to acquire land from the Indians by purchase or by any other means.
- (3) Regulation of the Indian trade by determining the conditions under which individuals might engage in the trade, prohibiting certain classes of traders, and actually entering into the trade itself.
- (4) Control of the liquor traffic by regulating the flow of intoxicating liquor into the Indian Country and then prohibiting it altogether.
- (5) Provision for the punishment of crimes committed by members of one race against another and compensation for damages suffered by one group at the hands of the other, in order to remove the occasions for private retaliation which led to frontier hostilities.
- (6) Promotion of civilization and education among the Indians, in the hope that they might be absorbed into the general stream of American society.

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The goal of the American statesmen was the orderly advance of the frontier. To maintain the desired order and tranquility it was necessary to place restrictions on the contacts between the whites and the Indians. The intercourse acts were thus restrictive and prohibitory in nature — aimed largely at restraining the actions of whites and providing justice to the Indians as a means of preventing hostility. But if the goal was an *orderly* advance, it was nevertheless *advance* of the frontier, and in the process of reconciling the two elements, conflict and injustice were often the result.³⁶

The states grew increasingly dissatisfied with the existence of tribal enclaves within their border, as well as with federal restrictions on their acquisition of tribal land.³⁷ As the balance of power in the United States shifted in favor of the white population after the War of 1812, the federal government felt less need to placate tribes and prevent their alliance with foreign nations, particularly the British.³⁸ Although legally obliged to prevent the continuous white encroachment on tribal lands,³⁹ the federal government formulated a policy of removal,⁴⁰ by which Native American tribes were forced to leave their ancestral homelands to facilitate white settlement and prevent warfare.⁴¹ Frequently, the removal of native populations was a prelude to the admission of a state to the Union.⁴²

Westward expansion quickly outpaced removal of tribes from the east,

particularly after gold was discovered in California, and a perceived scarcity of land outside the states and territories for tribes to inhabit resulted in a shift toward reservation policy. The Reservation Era, 1861–1887,⁴³ saw the creation of smaller, discrete regions, also intended to be permanent jurisdictional enclaves within the states and territories.⁴⁴

The Removal and Reservation Periods reflected a fundamental belief among policy-makers that segregation of Indians and non-Indians was a requisite for peace. In 1871, however, federal Indian policy began to shift away from segregation and toward forced assimilation.⁴⁵ Congress ended treating formally with tribes, although it continued to negotiate contracts, ratified as statutes.⁴⁶ In 1885, Congress extended federal jurisdiction over seven felonies,⁴⁷ a theretofore unseen effort to extend Anglo-American legal norms in Indian Country.⁴⁸ Shortly thereafter, Congress passed the General Allotment Act of 1887,⁴⁹ by which communally owned land was allotted to individual tribal members.⁵⁰ The remainder of the land, deemed “surplus,” was then opened to white settlement.⁵¹ A central goal of the General Allotment Act was the dissolution of tribal governments.⁵²

The General Allotment Act was stated in general terms, and its implementation was left up to individual negotiations with each affected tribe.⁵³ As a result, its level of implementation varied widely across Indian Territory.⁵⁴ Nevertheless, its impact was devastating.⁵⁵ President Theodore Roosevelt described the Allotment Act as “a mighty pulverizing engine to break up the tribal land mass.”⁵⁶ “During the period from 1887 to 1934, Indian land holdings were reduced by two-thirds, from 138 million acres to 48 million acres.”⁵⁷

The now famous *Meriam Report*⁵⁸ of 1928, a nongovernmental two-year study of the Indian Bureau undertaken at the request of Secretary of the Interior Hubert Work, highlighted the altogether negative existence in Indian communities — including poverty, disease, suffering and discontent — much of it attributable to the allotment policy.⁵⁹ The *Meriam Report* sparked a policy shift toward the rejuvenation of tribal governments and communities. In response, Congress passed the Indian Reorganization Act of 1934,⁶⁰ the purpose of which was to “encourage economic development, self-determination, cultural plurality, and the revival of tribalism.”⁶¹

The Indian Reorganization Act (“IRA”) incorporated a number of schemes to strengthen tribal communities,⁶² including the end of the allotment era,⁶³ but the element demonstrating the most significant departure from past policy was the congressional sanction for continued tribal governance. Section 16 of the IRA permitted tribes to organize under a constitution and reaffirmed tribal authority.⁶⁴

The Indian Reorganization Act provided only limited tribal autonomy, however, and Secretarial approval was required for ratification. “Although some constitutions were individualized, many were standard ‘boilerplate’ constitutions prepared by the Bureau of Indian Affairs and based on federal constitutional and

common law notions rather than on tribal custom.”⁶⁵ Moreover, as the Supreme Court noted, “the most that can be said about this period of constitution writing is that the Bureau of Indian Affairs, in assisting the drafting of tribal constitutions, had a policy of including provisions for Secretarial approval; but that policy was not mandated by Congress.”⁶⁶

The Indian Reorganization Act provoked considerable criticism,⁶⁷ and while never repealed, the Reorganization Era was replaced by the Termination Era, which lasted from approximately 1943 until 1962.⁶⁸ During this period, tribal sovereignty came directly under attack. Congress delegated to states authority over certain tribes,⁶⁹ and terminated federal supervision and the government-to-government relationship with approximately 110 tribes and bands.⁷⁰ Further, the federal government implemented a number of programs to force assimilation, including relocation of entire families into urban settings (after which federal supervision ended)⁷¹ and “blind adoptions,” through which Indian children were removed from their families and adopted to distant, unknown white families.⁷²

Although President Nixon formally announced the Self-Determination Era in 1970,⁷³ its roots began during the Kennedy Administration.⁷⁴ This era, which continues into the present time, includes the recognition of tribal governments as separate sovereigns. In accordance with the Indian Self-Determination and Education Assistance Act of 1975,⁷⁵ tribal governments may assume authority over certain federal programs. During the 1980s, the federal government focused additional attention on economic development in order to promote self-sufficiency.⁷⁶

At least one commentator has described a more recent era, beginning in approximately 1978, in which federal policy is influenced more by the Supreme Court.⁷⁷ Congress and the Executive Branch continue to advocate for government-to-government relationships, but receive less deference from the Court.⁷⁸ Consequently, the Court may be revitalizing former policy eras that have since been repudiated.⁷⁹ The following section discusses the legal status of indigenous nations resulting from the various policy eras, then compares their domestic status with that described in international law.

B. The Legal Status of Tribal Nations

1. Federal Common Law

In the *Marshall Trilogy*, the U.S. Supreme Court described tribes as domestic dependent nations, effectively determining that tribes exchanged their foreign relations powers in consideration of protection by the United States.⁸⁰ The Domestic Dependent Nations Doctrine has been expanded by subsequent Supreme Court decisions and now

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includes three core principles. First, as a consequence of discovery and conquest tribal sovereignty was necessarily diminished. Second, Congress has plenary power over Indian affairs. Third, the federal government has a trust responsibility to its Indian wards.

According to the Court in *Johnson v. M'Intosh*,⁸¹ as a consequence of [the] ultimate dominion of European nations over indigenous nations, tribal "rights to complete sovereignty were necessarily diminished."⁸² Although the *Johnson* Court discussed this diminishment in the context of a tribal nation's power to convey its property, the principle has been expanded into other areas.⁸³ Tribal governments retain "all the powers of any sovereign state,"⁸⁴ except foreign relations, those "expressly divested by a treaty or statute,"⁸⁵ or those "implicitly divested as inconsistent with their dependent status."⁸⁶ Express divestiture by statute may be achieved by Congress under certain conditions,⁸⁷ while the courts determine implicit divestiture.⁸⁸

"After rationalizing [the] hierarchical and totalizing subjugation of the Indian on the basis of a superior rationalizing capacity exercised by the European, the only matter left for the Court to determine was which branch of government possessed the authority to exercise this subjugating power."⁸⁹ Given Congress' Treaty⁹⁰ and Commerce⁹¹ Powers, it has this plenary power over Indian affairs,⁹² and this power has been determined to have extra-constitutional sources.⁹³ While this full power is not absolute,⁹⁴ limited by constitutional restraints and judicial review,⁹⁵ the standard of review is rational basis⁹⁶ and Courts give broad deference to the legislature.⁹⁷ "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."⁹⁸ Indeed, despite the Trust Doctrine,⁹⁹ Congress may terminate the federal-tribal relationship entirely¹⁰⁰ or abrogate Indian treaties,¹⁰¹ although its intent to do so must be clearly expressed,¹⁰² and such statutes are to be strictly construed.¹⁰³

As domestic dependent nations in a state of pupilage,¹⁰⁴ the relationship of tribes to the federal government resembles that of a ward to his guardian¹⁰⁵ — a trust relationship. As the Court noted in *Seminole Nation v. United States*:¹⁰⁶

[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it charged itself with moral obligations of the highest responsibility and trust.¹⁰⁷

This general trust responsibility provides further justification for the exertion of plenary power over tribes,¹⁰⁸ tempered by certain canons of statutory and treaty construction¹⁰⁹; however, it imposes virtually no enforceable obligations on the federal government.¹¹⁰ Likewise, this general trust responsibility does not necessarily require the United States to reveal or address conflicts of interest stemming from its concurrent representation of tribes and other entities.¹¹¹ In order for a tribe to have a cause of action against the United States for breach of trust, the federal government must have expressed its intent to assume either specific or full fiduciary trust obligations.¹¹² This intent may be expressed in a treaty or statute¹¹³ or may be implicit in a comprehensive federal management scheme for tribal resources.¹¹⁴

Even as “dependent domestic nations,” tribes retain the pre-constitutional right of self-determination and internal self-government.¹¹⁵ In accordance with that right of self-government, Native Nations may select their own model of governance,¹¹⁶ which need not simulate the secular, tripartite government of the United States.¹¹⁷ The approximately 181 tribes organized under the Indian Reorganization Act¹¹⁸ are not an exception to the common law right of self-government. Accordingly, IRA tribes may amend their constitutions to reflect their own values.¹¹⁹ Although the Act still requires approval of the Secretary of the Interior,¹²⁰ the Secretary generally approves such measures automatically during the current era of self-determination, so long as the formal requirements of the election have been met.¹²¹

Nevertheless, the right to reform existing tribal governments is limited by the Domestic Dependent Nations Doctrine, so tribes may modify their constitutions only insofar as they do not conflict with the system of domination established by the United States. That is, tribes may change how they govern themselves, but may not expand their inherent powers beyond the limitations imposed by the doctrine of diminished tribal sovereignty. In international law, however, such limitations on the right to self-determination are not so limited, as discussed in the next section. Thus, tribes should continue to advance their rights at international law, in hopes that the international community will constrain the United States and Canada from using their coercive power to limit tribal autonomy.

2. Tribal and International Law¹²²

The body of international law initially expressed a preference for a state-centered approach,¹²³ which defined the individual actor within the international community to be the nation-state.¹²⁴ As autonomous entities, nations enjoyed a status of equal sovereignty¹²⁵ and were assured nonintervention by the international community in domestic affairs.¹²⁶ Thus, so long as indigenous peoples could be viewed as mere minority populations within a European nation,¹²⁷ they could be denied

international recognition as nations.¹²⁸

Nevertheless, even in the earliest stages of international law, scholars recognized at least some aboriginal peoples as nations or noted that Europeans had no right to take indigenous lands except by sale or a just war.¹²⁹ For example, in 1532 Francisco de Victoria “maintained that discovery of the Indians’ lands alone could not confer title in the Spaniards ‘anymore than if it had been they who discovered us.’”¹³⁰ Emerich de Vattel noted in 1758, “[t]hose ambitious European states which attacked the American nations and subjected them to their avaricious rule, in order, as they said, to civilize them, and have them instructed in the true religion — those usurpers, I say, justified themselves by a pretext equally unjust and ridiculous.”¹³¹ Hugo Grotius, the father of modern international law,¹³² similarly noted that the “Spanish had no right to wage a Just War in the Americas based on discovery and also believed in the equality of nations.”¹³³ “The German theorists, Gunther, Kliber, and Heffter, agreed that no nation, regardless of its degree of civilization, has the right to take the property of another nation, ‘even savages or nomads.’”¹³⁴ Further, Samuel von Puffendorf noted that “since every man is, by nature, equal to every man, and consequently not subject to the dominion of others, therefore this bare seizing by force is not enough to found a lawful sovereignty over men. . . .”¹³⁵ All European powers endeavoring to acquire land title from tribal nations recognized their sovereign right to enter into treaties and convey land.¹³⁶ In fact, the power to enter into treaties was a power limited to nations.¹³⁷ As noted previously, the United States also recognized the sovereignty of tribal nations.¹³⁸

Despite the implications drawn from the *Marshall Trilogy*, the Doctrine of Discovery,¹³⁹ on which those cases partially relied, actually said nothing about the rights of tribal nations. Rather, it was merely an agreement between European sovereigns as to how to divide a colonized globe¹⁴⁰ — it created a monopsony¹⁴¹ in favor of the first European nation to encounter an indigenous group previously “unknown to all Christian people.”¹⁴² In Marshall’s words:

[A]s [European nations] were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.¹⁴³

Marshall expounded further in *Worcester v. Georgia*:

The principle, acknowledged by all Europeans, because it was in the self-interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the title and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it. *It regulated rights given by discovery among European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants or by virtue of discovery made before the memory of man. It gave the exclusive right of purchase, but it did not found that right on a denial of the possessors to sell.*¹⁴⁴

Although this European complicity in the United States' refusal to recognize the unfettered sovereignty of tribal nations existed for some time,¹⁴⁵ the refusal to recognize one nation's sovereignty, or to prevent its exercise, does not unmake a nation.¹⁴⁶

After the period of state-centered bias, the body of international law returned to a recognition of the rights of indigenous peoples and minority populations as part of the human rights agenda after World War II.¹⁴⁷ "By directly addressing the concerns of human beings,"¹⁴⁸ contemporary processes of international law seek to "expand[] the competency of international law over spheres previously reserved to the asserted prerogatives of states."¹⁴⁹ Now a number of United Nations documents support the self-determinative rights of indigenous peoples, providing "ample evidence that there now exists a legal right to self-determination."¹⁵⁰ For example, the International Covenant on Civil and Political Rights¹⁵¹ and the International Covenant on Economic, Social, and Cultural Rights¹⁵² both state that "all peoples" enjoy the right to self-determination.¹⁵³

Although Canada and the United States have claimed that American Indians are mere "populations," rather than "peoples" for purposes of international law,¹⁵⁴ most indigenous groups within the United States fall within any of the three definitions of "people."¹⁵⁵ According to the International Court of Justice, a "people" is:

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 traditions, maintaining their own form of worship, insuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.¹⁵⁶

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Aureliu Cristescu, defined people as “a social entity possessing a clear identity and its own characteristics,” with a “relationship with a territory.”¹⁵⁷ Finally, the International Commission of Jurists defined the term as a group having: (1) a common history; (2) racial or ethnic ties; (3) cultural or linguistic ties; (4) religious or ideological ties; (5) a common territory or geographical location; (6) a common economic base; (7) a sufficient number of people.¹⁵⁸

Further, the United Nations Declaration on the Rights of Indigenous Peoples states:

Indigenous peoples, as a specific form of exercising their right of self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.¹⁵⁹

Given that indigenous peoples are eliciting more attention at the international level, Native American nations are in a heretofore unseen position to destroy the illusion that their experience is so unique as to justify federal domination. The current international setting creates the opportunity to improve the circumstances of Native Americans¹⁶⁰ and establish greater freedoms and self-determination.

Because attention to the needs of indigenous peoples in international law is a relatively recent phenomenon, Native Americans have been subjected to the various federal policies reviewed above. As discussed in the next section, tribal peoples in the United States have generally not fared well as a consequence of these policies.

C. Indian Wealth and Poverty

Throughout the Removal and Reservation Periods, federal officials generally professed a desire to protect Native American tribes¹⁶¹ and effectuate a shift from traditional tribal life-ways to that of the yeoman farmer.¹⁶² In reality, however, tribes were generally relocated to areas considered undesirable by the non-Indian population.¹⁶³

Ironically, the barren land once thought worthless, to which the United States relegated Indian nations, is inordinately rich in mineral resources. “[T]he U.S. Department of the Interior has estimated that 25% of all the nation’s mineral wealth is located on Indian lands.”¹⁶⁴ Indian reservations encompass approximately one-third of the low-sulfur coal in the western United States, more than half of all uranium

deposits, and twenty percent of the continental oil and natural gas reserves.¹⁶⁵ Tribal lands also hold substantial supplies of phosphate, copper, bentonite, limestone, tungsten, sandstone, gold, gypsum, and silver.¹⁶⁶ Additionally, tribes own approximately one percent of the nation's commercial timberland (about 6.3 million acres), more than 43 million acres of rangeland,¹⁶⁷ and three million acres of agricultural land.¹⁶⁸

Despite the substantial resources within their jurisdictions, Native Americans "are the most impoverished minority in the United States."¹⁶⁹ According to the 1990 census, 31% of all Native Americans lived below the poverty line.¹⁷⁰ "Per capita income for Native Americans was slightly more than \$8,300, the lowest of all racial groups in the U.S., and less than half the level for the entire population. As of 1991, the Indian unemployment rate was 45 percent."¹⁷¹ Further, Native Americans demonstrate the "lowest rate of pay when employed[] and lowest level of educational attainment of any North American population aggregate."¹⁷² In 1993, the Bureau of Indian Affairs released a reservation housing inventory showing that at least 35% of existing units were in substandard condition, and 20% lacked complete plumbing facilities.¹⁷³ The inventory also noted the need for an additional 49,000 housing units.¹⁷⁴

Some tribal communities experience rates well above those averages. For example, "[i]n 1997, the Bureau of Indian Affairs reported that the unemployment rate for the Oglala Sioux on Pine Ridge was seventy-three percent, a great deal higher than the total figure of fifty percent for Native Americans nationwide. "On Pine Ridge, sixty-three percent of the population lives below the poverty line."¹⁷⁵ Pine Ridge is also the poorest county in the United States.¹⁷⁶ The average annual income per family there is under \$4,000,¹⁷⁷ and these statistics are arguably optimistic.¹⁷⁸ A review of housing on the reservation reveals 65% of the homes have no telephones, 26% lack indoor plumbing, and 8% have no electricity.¹⁷⁹ "One consequence is that Indians die from exposure at five times the national rate,"¹⁸⁰ and die from malnutrition at twelve times the national rate.¹⁸¹

"Correspondingly, [Native Americans] suffer, by decisive margins, the greatest incidence of malnutrition and diabetes, death by exposure, tuberculosis, infant mortality, plague, and similar maladies. . . . [T]he average life expectancy of a reservation-based Native American male in 1980 was a mere 44.6 years, that of his female counterpart less than three years longer."¹⁸² While the life expectancy for on- and off-reservation Indians has increased substantially in the last two decades, it remains significantly lower than the life expectancy for Americans of all races.¹⁸³ Despite significant decreases in Indian mortality rates in all categories during recent years,¹⁸⁴ those rates are still considerably higher than those of the U.S. population generally: 425% greater for tuberculosis, 276% for chronic liver disease and cirrhosis,

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184% for accidents, 166% for diabetes, 51% for pneumonia and influenza, 46% for suicide, and 39% higher for homicide.¹⁸⁵ “Similar statistics show that the incidence of strep infections is 1,000 percent higher [than the national average], meningitis is 2,000 percent higher, and dysentery is 10,000 percent higher.”¹⁸⁶

The combination of extreme poverty and the presence of nearly two trillion dollars worth of minerals¹⁸⁷ places incredible pressure on tribal governments to develop natural resources within their jurisdictions. “Historically, reservation economic activity—when it existed—was typified by mineral companies extracting tribal resources with the tribes receiving only royalties, more often than not at below-market rates.”¹⁸⁸ Tribal timber and oil resources have suffered from similar federal disinterest and mismanagement.¹⁸⁹ “The non-Indian society has established a tight and often damaging grip on Indian land. Of the 56.6 million acres owned by tribes, over fifteen million are leased to non-Indians for grazing, mining, and commercial and residential leases, with some leases extending ninety-nine years.”¹⁹⁰ In 1991 the BIA supervised 7,400 mineral leases and agreements, covering 3.3 million acres of Indian tribal and individual allotment land.¹⁹¹

Non-Indians have demonstrated a continuing desire to access tribal resources, often with devastating economic and environmental consequences. The situation is summarized by Professor Mary Wood as follows:

Most Indian range land is leased to non-Indian interests and is seriously overgrazed. The reservation lands of the Southwest have been extensively mined for uranium and coal. In 1975, all federally controlled uranium production came from Indian reservation lands. Many of those operations have left a barren landscape and pervasive, lethal contamination. On many Northwest reservations, the BIA’s timber clearcutting practices have led to near decimation of tribal forest and fishery resources. Several reservations confront severe environmental problems resulting from past mining operations and disposal of commercial, industrial, and agricultural wastes. A 1985 study of twenty-five reservations found 1200 toxic waste sites, some contaminated with mercury, arsenic, asbestos, radionuclides, PCBs, and dioxin. In a more recent survey, seventeen of fifty-one responding reservations reported violations of drinking water standards.¹⁹²

In the current federal policy era of self-determination¹⁹³ and nation-to-nation interaction, tribes have begun exercising greater control over their own resources and more autonomy in environmental decision-making.¹⁹⁴ For example, the Mescalero Apache Tribe has established a comprehensive scheme for managing the reservation’s

fish and wildlife resources,¹⁹⁵ as has the Montana Blackfeet Tribe.¹⁹⁶ Tribes are generally endeavoring to create economic development opportunities founded on more than mere resource extraction, without the environmental degradation typical of large-scale industrial development projects.¹⁹⁷

In their extensive field work, Professors Stephen Cornell and Joseph Kalt, of the Harvard Project on American Indian Economic Development, concluded that tribes are fully capable of managing their own resources more effectively than the federal government.¹⁹⁸ They observed that successful development projects are consistently (1) preceded by an assertion of tribal sovereignty, (2) preceded by the creation of capable and accountable institutions of self-government, and (3) are compatible with the tribe's underlying cultural norms.¹⁹⁹ This article proposes an analysis that offers the means to ensure that those three factors are present when tribal communities undertake development projects.²⁰⁰

III. DIVESTITURE OF SOVEREIGNTY ON THE BASIS OF LACK OF HISTORICAL USE

Any number of factors may offer an explanation for the limited exercise of full tribal autonomy,²⁰¹ including a sense of futility,²⁰² a focus on satisfying the most basic needs within Maslow's hierarchy,²⁰³ a sense of legal ambiguity,²⁰⁴ or even a genuine acceptance of and appreciation for United States dominion in Indian country.²⁰⁵ Whatever the reason, the Supreme Court has demonstrated a willingness to rely on the lack of exercise of sovereignty as a basis to deny that sovereignty ever existed at all. It is said that to the victor goes the spoils,²⁰⁶ likewise, to the victor goes the opportunity to write history.²⁰⁷ The shaping of legal concepts from a particular historical perspective, begun by Marshall, continues in present jurisprudence relating to Native Americans.²⁰⁸

For example, in *Oliphant v. Suquamish Indian Tribe*,²⁰⁹ the Court held that tribes lack criminal jurisdiction over non-Indians,²¹⁰ a conclusion which "came as a surprise to many"²¹¹ and has been widely criticized.²¹² For nearly 150 years after the Marshall Trilogy its principles regarding limitations on tribal sovereignty remained largely undisturbed; Indian nations retained all aspects of sovereignty, except those explicitly over-ridden by Congress and two inherent limitations, the foreign relations power and unfettered power to transfer land title.²¹³ The *Oliphant* Court conceded that no act of Congress had removed tribal criminal authority over non-Indians;²¹⁴ neither did it have any precedent describing an inherent limitation on such criminal jurisdiction.²¹⁵ The Court was apparently so troubled by the prospect that tribes could prosecute non-Indians, even in accordance with the civil rights guarantees of the Indian Civil Rights Act²¹⁶ and the tribal Law and Order Code,²¹⁷ that it invented a third

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inherent limitation on tribal authority based on an apparently shared assumption among the three branches of government.²¹⁸ Notably, “[n]owhere does the Court explain why popular assumptions about tribes’ criminal jurisdiction should override the foundation principles’ guarantee that Indian autonomy will be curbed only at the direction of Congress.”²¹⁹

Justice Rehnquist justified his concerns with two assertions regarding fairness and supported his legal conclusions with a strained interpretation of selective history. Subsequent scholars have incisively refuted both his justifications and his use of history.²²⁰

Justice Rehnquist first justified the majority’s holding that tribal criminal jurisdiction over non-Indians conflicted with the interests of the “overriding sovereignty”²²¹ of the United States, which, “from the formation of the Union and adoption of the Bill of Rights,” had “manifested . . . great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty.”²²² In actuality, the primary concern of the Founders at the adoption of the Bill of Rights appears to have been that its citizens be protected *from* the United States. The due process guarantees in the Bill of Rights did not apply to states at all until 1868 when the Fourteenth Amendment was passed, “and the courts did not finish applying the Bill of Rights uniformly to state actions until a century later.”²²³ Even after Congress extended certain due process guarantees to state proceedings, the Supreme Court held that, as pre-Constitutional sovereigns, tribes were not bound by it.²²⁴ It is thus difficult to believe that Congress’ concern for personal liberties was so great that tribal criminal authority vanished when the tribes were incorporated into the Union.²²⁵

The Court’s second justice-based concern was that extending tribal criminal law to non-Indians would subject whites to “the restraints of an external and unknown code” stemming from foreign customs,²²⁶ although the Indian Civil Rights Act assured numerous U.S. civil rights protections for any defendant²²⁷ and “Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts.”²²⁸ Quoting *Ex Parte Crow Dog*,²²⁹ Rehnquist wrote: “It tries them, not by their peers, not by the customs of their people, nor the law of the land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception.”²³⁰ As one commentator wryly noted, the offenses in question, resisting arrest and assaulting a tribal police officer,²³¹ are “hardly crimes of ‘a different race’ of which non-Indians could have but ‘an imperfect conception.’”²³²

While it is true that tribes had rarely exerted criminal jurisdiction over non-Indians until relatively recently, no source, much less those relied upon by the Court, expressed a belief that the inherent jurisdiction over non-Indians had been implicitly divested.²³³ In addition to relying upon wholly “unsupported assertions,”²³⁴ regarding un-cited Supreme Court precedent, the *Oliphant* Court “substantiated its finding with a

selective discussion of 180 years of congressional action, executive pronouncements, and judicial opinions that purportedly demonstrated that all three branches assumed that Indian tribes lost criminal jurisdiction over non-Indians at the time of the founding of the country.”²³⁵

The *Oliphant* Court cited several sources opining that tribal nations had no criminal jurisdiction over non-Indians; however these sources base their conclusions on express congressional divestment after the founding of the Republic and not on prior implicit divestiture. For example, the Court relied on two Attorney General opinions of 1834²³⁶ and 1855,²³⁷ which concluded that the tribe’s criminal jurisdiction over non-Indians was inconsistent with various treaty provisions, not its status of dependency.²³⁸ In 1878, Judge Isaac C. Parker, the famous “Hanging Judge”²³⁹ having jurisdiction over the Indian Territory,²⁴⁰ addressed tribal jurisdiction over non-Indian crime outside of Indian country, and stated in *dicta* that tribal jurisdiction over non-Indians had been removed statutorily.²⁴¹ Similarly, a 1970 opinion of the Solicitor of the Department of the Interior,²⁴² which had been withdrawn four years later,²⁴³ based its conclusion that tribes lacked criminal jurisdiction over non-Indians on several treaties and the Trade and Intercourse Act.²⁴⁴ The Court failed to note that in 1934, the Solicitor of the Department of the Interior concluded that tribes retained criminal jurisdiction over non-Indians,²⁴⁵ an opinion cited with approval by the Court in *United States v. Wheeler*,²⁴⁶ a case decided just sixteen days after *Oliphant*.²⁴⁷ Justice Rehnquist also failed to acknowledge, much less cite, two earlier Attorney General opinions, which strongly stated that tribal nations “are as free, as sovereign, and independent as any other nation.”²⁴⁸

The Court pointed to a Senate Judiciary Committee Report implying that tribes lacked criminal jurisdiction over non-Indians,²⁴⁹ in order to support its assertion that there was a shared assumption among the three branches of the federal government that tribal jurisdiction was implicitly divested at the time of the founding of the Union. However, in the context of other Congressional activities, it can hardly be argued that such assumption can be shown. The American Indian Policy Review Commission, created by Congress “to conduct a comprehensive review of the historical and legal developments underlying the Indians’ relationship with the federal government and to determine the nature and scope of necessary revisions in the formulation of policy and programs for the benefit of Indians,”²⁵⁰ concluded that tribes retained jurisdiction.²⁵¹ Moreover, as Professor Peter Maxfield made clear, the legislative history of the 1834 Western Territory Bill²⁵² “Congress clearly assumed that tribes had this authority all along.”²⁵³

Other treaties and statutes, which the Rehnquist Court failed to interpret in accordance with the Canons of Construction,²⁵⁴ reveal no shared assumption of implicit divestiture. In fact, “[m]any of these treaties [cited by the Court]

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acknowledged tribal criminal jurisdiction over non-Indians who settled on Indian lands.²⁵⁵ Finally,²⁵⁶ the bill which led to the Indian Civil Rights Act, originally applied only to American Indians, but was modified to apply to *any person*, strongly implying that Congress assumed that tribes had jurisdiction of those who did not fall within that category.²⁵⁷ The Court rejected, in a conclusory fashion, that “the modification merely demonstrates Congress’ desire to extend the Act’s guarantees to non-Indians if and where they come under a tribe’s criminal or civil jurisdiction by either treaty provision or Act of Congress.”²⁵⁸

The gateway enabling the *Oliphant* Court to stroll down the path of revisionist history existed only because tribal governments had not exercised jurisdiction over non-Indians so obviously that jurisdiction could not be denied. The Court found a similar opening to apply its “use-it-or-lose-it approach” in *Montana v. United States*,²⁵⁹ in which it divested tribes of the inherent authority to regulate the activities of non-Indians on non-Indian fee land, unless they entered into “consensual relationships with the tribe or its members,”²⁶⁰ or their activities “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”²⁶¹ The *Montana* Court based its holding that such jurisdiction was inconsistent with their dependent status²⁶² in part on the fact that the tribe had not asserted authority over non-Indian hunting and fishing activities at the time of allotment.²⁶³

The Court employed a similar, albeit abbreviated, historical approach in *South Dakota v. Yankton Sioux Tribe*.²⁶⁴ In that case, the Court held that Congress intended to diminish the boundaries of the Yankton Reservation when it passed an 1894 statute ratifying the sale of surplus tribal lands.²⁶⁵ As a consequence of the Court’s disregard for the Canons of Construction,²⁶⁶ the tribe was held to have lost not only its property right in the land, but also its regulatory authority.

Established by the Treaty of 1858,²⁶⁷ the Yankton Sioux Reservation was originally comprised of approximately 430,000 acres of the tribe’s original 13 million acres.²⁶⁸ “In consideration for the cession of lands and release of claims, the United States pledged to protect the Yankton Tribe in their ‘quiet and peaceable possession’ of this reservation and agreed that ‘[n]o white person,’” with narrow exceptions, would “‘be permitted to reside or make any settlement upon any part of the [reservation].’”²⁶⁹ Nevertheless, the reservation was allotted in accordance with the General Allotment Act,²⁷⁰ and the remaining land, deemed “surplus,” was opened to white settlement pursuant to an agreement ratified by Congress in 1894.²⁷¹ In addition to offering non-Indians the opportunity to purchase land within the established boundaries of the reservation, the Act of 1894 included a savings clause, which stated:

Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the

United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.²⁷²

In the conflict that arose between the State of South Dakota and the Yankton Tribe over regulatory authority on non-Indian fee land located within the area allotted pursuant to the Act, the District Court denied that the Tribe had regulatory authority, but held that the reservation was not diminished by the Act and, consequently, that the site in question was within Indian country where federal environmental laws applied.²⁷³ The State appealed to the Eighth Circuit, which “agreed that ‘Congress intended by its 1894 Act that the Yankton Sioux sell their surplus lands to the government, but not their governmental authority over it.’”²⁷⁴ The appellate court based its decision on the “unusually expansive language” of the savings clause,²⁷⁵ a consequently narrow reading of the Act’s other provisions,²⁷⁶ and a lack of historical or demographic evidence that could have sustained a finding of diminishment.²⁷⁷

The Supreme Court reversed the decision of the Eighth Circuit regarding the savings clause. After a cursory recount of the Canons of Construction, the Court based its conclusion primarily on an historical assumption regarding tribal sovereignty: “that tribal ownership was a critical component of reservation status.”²⁷⁸ Despite the strongly worded and concededly “unusual”²⁷⁹ language of the savings clause, the Court refused to construe it literally.²⁸⁰ Rather, it cited with approval the federal negotiator’s threat to abrogate the Treaty of 1858 by refusing to provide the provisions required under it.²⁸¹ According to the Court, this threat provided a context for interpreting the savings clause as merely ensuring that the promised supplies would indeed be provided.²⁸² From an historical perspective, the Court determined that later acts by the Executive and Legislative Branches treating the land as retaining reservation status did not undermine its holding that diminishment had already occurred.²⁸³ It buttressed its conclusion, as it did in *Montana*, by noting that the state assumed regulatory jurisdiction over the lands in question almost immediately and the Tribe only recently asserted jurisdiction of its own.²⁸⁴

At least one state, perhaps emboldened by the Court’s implicit divestiture cases,²⁸⁵ has followed suit. In *Vermont v. Elliott*,²⁸⁶ the state supreme court recognized that “aboriginal title has been deemed ‘as sacred as the fee simple of whites,’”²⁸⁷ that “the right to extinguish [aboriginal title is] the exclusive right of the federal government,”²⁸⁸ that such intent to extinguish must be “plain and unambiguous,”²⁸⁹ and that “the intent to extinguish Indian title will not be lightly implied.”²⁹⁰ At the outset of its historical review, the Court acknowledged, “conflicting interpretations of

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recorded history,”²⁹¹ and that “valid questions remain as to the legitimacy of the opposing governing entities”²⁹² during the “confusing era”²⁹³ preceding Vermont’s statehood. Nevertheless, the Court dubiously held that extinguishment of the Abenaki’s aboriginal title was “establishing by the increasing weight of history.”²⁹⁴

The Abenaki occupied that area in question well before white settlement began in 1669.²⁹⁵ In order to maintain peaceful relations with indigenous nations, the British Crown issued a number of proclamations, including the Royal Proclamation of 1761, which prohibited colonial governors from making land grants without its “specific authority” and required the removal of settlers from improperly obtained territory.²⁹⁶ “In 1763, the Crown issued a ‘Royal Proclamation,’ once again forbidding colonial settlement on Indian-occupied lands and ordering settlers occupying Indian lands to abandon the properties.”²⁹⁷ In contravention of these proclamations, New Hampshire Governor Benning Wentworth made certain land grants to the area in question, but qualified that without actual “settlement and cultivation of the lands, title would revert to the British Crown.”²⁹⁸ At the same time, New York Governor Cadwallader Colden attempted to grant the land and challenged Governor Wentworth’s authority to make the New Hampshire grants.²⁹⁹ In 1764, the Crown resolved the conflict in favor of the colony of New York, placing the Wentworth grants within New York’s territory,³⁰⁰ but the Wentworth grantees resisted New York’s efforts to make them repurchase the grants.³⁰¹ In response, the Crown ordered New York to halt its actions, but took no further steps as conflicts persisted.³⁰² The Wentworth grantees revolted against New York in 1777 and declared the independent Republic of Vermont, expelling those holding grants from Governor Colden.³⁰³ In negotiations with Congress over Vermont’s statehood, Vermont delegates conceded that settlement had not been completed as required by Governor Wentworth’s grants, but espoused an intent to complete it.³⁰⁴ In 1791, Congress admitted Vermont to the Union and included the land in question within its boundaries.³⁰⁵

After its historical recount, the Vermont Supreme Court held that the legal invalidity of Governor Wentworth’s grants³⁰⁶ and continuing presence of Abenaki citizens on the incompletely settled land³⁰⁷ did not detract from a finding that aboriginal title had been extinguished by implication.³⁰⁸ The court wrote, “[w]hile the Crown may have declared the grants invalid based on lack of jurisdictional authority in this particular governor, the sovereign’s intent to allow British appropriation of the area was not in question.”³⁰⁹ The court so held because, although the Crown made its strongly worded proclamations restraining settlement to maintain peace with the aboriginal nations,³¹⁰ it failed to physically remove settlers, which maintained the status quo.³¹¹ Further, the court held that the Crown’s later proclamations establishing the boundaries between the colonies of New Hampshire and New York implied an intent to allow dominion over the land by some Europeans, even if not the Wentworth

grantees.³¹² Although “cognizant of the federal decisions holding that a grant not rising to the level of an extinguishment conveys the naked fee only, thereby preserving aboriginal occupancy rights,”³¹³ the court held that the requirement of dominion by “settlement and cultivation”³¹⁴ in the grants at issue gave rise to extinguishment, despite the failure of the grantees to achieve such settlement by 1791 when Vermont was admitted to the Union. Because Congress included the land in Vermont’s borders on the basis of the grantees’ intent to eventually meet the requirement of settlement, the court implied Congressional intent to extinguish title as of statehood and grant official sanction to the grantees’ illegal conduct.³¹⁵

Although the single action by the federal government on which the court based its finding of implicit divestiture would not in itself support such a finding, the Vermont Supreme Court determined Congress’ intent to be “plain and unambiguous”³¹⁶ because that action took place in the “political backdrop”³¹⁷ discussed above. In the court’s view, it did not “lightly imply”³¹⁸ extinguishment. Quite the contrary, the court closed with the fantastic assertion that, “[s]hort of an express statement declaring an intent to extinguish, it is difficult to imagine”³¹⁹ a “more unequivocal”³²⁰ demonstration of intent.³²¹

Because federal and state courts are demonstrating an increasing willingness to argue that tribal jurisdiction does not exist as a consequence of its recent assertion in a particular area, it is important that tribes begin filling the voids that currently appear to be. These new actions are likely to come under similar attack, so tribes need to seek validation not only from the Executive and Legislative Branches, but more importantly, from outside the domestic United States sphere.³²² By filling these voids and obtaining international recognition, hopefully tribal governments can stem the tide of judicial divestiture.

IV. REASSERT AUTONOMY INTERNALLY AND THE REST WILL COME

The need to determine a long term political theory may well promote “the existence of a free, inclusive, rational debate by citizens that determines the basic thrust of public policy,”³²³ the type of deliberative democracy promoted by scholars such as Jürgen Habermas³²⁴ and Bruce Ackerman.³²⁵ The establishment of such a theory is not a single endeavor, but is part of a long-term effort to build hope, to attempt to grasp some control over the community’s own destiny, to secure the promise of greater freedom and prosperity for the next generation.³²⁶ While one with experience in tribal politics may well describe this assertion as extremely naïve, it may reasonably be suggested that much of the acrimony within tribal politics stems from the intense frustration and failure of participants to recall that they are involved in national, not merely local community, politics.³²⁷

An important step in achieving self-determination is making the paradigm shift from thinking of oneself as a member of a “domestic dependent nation” to realizing one’s status as a citizen of a nation — one of the many persons constituting a people. Rather than beginning any proposal with the question, Will the federal government allow this? Tribes should ask the following three questions: (1) What do governments do?; (2) What should our government do?, and; (3) How do we get there? In the words of *Tatanka Iotanka* (Sitting Bull), “[I]et us put our minds together and see what kind of future we can build for our children.”³²⁸

A. What Do Governments Do?³²⁹

The first inquiry is an objective question seeking to explore the various roles a government may potentially play. The answer will best be found through an examination of other members of the international community. On the most basic level, governments provide some level of physical security, regulate commerce, establish laws for the benefit of social stability,³³⁰ and relate with other nations. Governments may also provide for employment, housing, economic market stability, and balance environmental protection with economic development.³³¹ Because the question relates to the broad definition of government and the potential roles that government may play, the influence of the Canadian and United States colonial powers is irrelevant, except insofar as they provide examples for the possible responsibilities or charges a government may have.³³²

B. In accordance with tribally specific cultural, political, and economic norms and aspirations, what should our government do?

Having determined the broad range of governmental possibilities, the tribal body politik seeking to exercise its inherent self-determinative rights should then begin a culturally introspective process. In order to ensure that its government structure³³³ and role reflect the social³³⁴ and political norms and aspirations of the nation’s people, the community must participate in an internal dialogue to determine the most appropriate system of government. The nature and scope of this dialogue will inevitably be determined by the social and cultural characteristics of the community participants. The conclusions will inevitably be tribally specific, reflecting the discourse of its members, who may seek to balance social group equality, establish dispute resolution mechanisms, ensure certain rights, articulate certain responsibilities, or establish particular life-ways or beliefs. Because this process is culturally introspective, considerations of the desires of United States and Canada are relevant only insofar as history may provide some tribal members with certain dominant culture

characteristics that they wish to see incorporated in the modern tribal government.

C. How shall those goals be achieved?

Having determined the tribe's culturally specific form of government, its citizens must then consider the means of attaining their goals. If the influence of Canada and the United States enter the calculus at all, it should be at the implementation stage, during which tribes will need to consider the "actual state of things,"³³⁵ as Marshall described the world, or in more modern terms, the "facts on the ground."³³⁶

The implementation of tribal goals may begin, ironically, by using federal mechanisms for tribal self-determination to their fullest. While these mechanisms were developed within a context of dominion, they may be reasonably employed in the initial stages of overall self-determination, keeping in mind all the while their place within the community's long-term aspirations. Implementation will be an incremental process, in which tribal nations first fill the "voids of least resistance," for example using tools within the federal structure like the Indian Tribal Governmental Tax Status Act of 1982,³³⁷ treatment as a state for purposes of environmental regulation,³³⁸ or the Indian Self-Determination and Educational Assistance Act.³³⁹

Later steps in the process of implementing self-determination may include a fuller re-emergence into the international community. This may be pursued through trade and tariff agreements with other nations, diplomatic exchanges, and participation in international conferences and dialogues.

Fortunately, the discussion of these matters has departed academic circles and is being implemented. In order to govern themselves appropriately and regain international recognition, the citizenry of the Blackfoot Nation,³⁴⁰ which encompasses Bands on both sides of the U.S.-Canadian border,³⁴¹ has begun just such a process, as discussed in the next section.

V. BLACKFOOT EXAMPLE

A. Constitutional Drafting Process

The process by which the Blackfoot Nation is drafting its new constitution reflects community ideals of egalitarianism and inclusiveness. According to James M. Craven, the traditional Nation's Solicitor General, the new constitution is part of a grassroots movement,³⁴² not one initiated by and for elites.³⁴³ The campaign has included proponents traveling door-to-door to share the draft with citizens, and it is being read aloud to illiterate members of the tribe in order to ensure that educational

privilege does not exclude anyone.³⁴⁴ Additionally, anyone may amend the draft document, not merely propose amendments that can be rejected by the drafters,³⁴⁵ and the draft Constitution is being translated into the Blackfoot language.³⁴⁶

Representative of a desire to govern by broad consensus, the Draft Constitution will not be submitted for ratification until it has ten-percent more signatories than have ever voted in a Blackfoot election run by the colonially-established governments currently in power.³⁴⁷ Thus, even in the event that Canada and the United States resist its implementation as inconsistent with notions of dependency, the new government will have legitimacy both within³⁴⁸ and without the colonial spheres.³⁴⁹

The drafters were already well-informed as to their own normative and cultural preferences, but in determining the answer to the second inquiry — In accordance with our values, how should our government be structured and act? — the tribe recognized that legal innovations have taken place internationally. Therefore, the tribe looked to twelve sister nations within the international community,³⁵⁰ most notably, they drew upon the values articulated in the South African Constitution³⁵¹ and that of the Kingdom of the Netherlands.³⁵²

B. Constitutional Provisions

The 77 articles of the Draft Constitution are divided into five sections. Chapter One, Constitutional Principles, enumerates the basic reasoning of the drafters, including national and cultural survival³⁵³ and fundamental rights.³⁵⁴ It also states principles that inform the interpretation of the document as a whole.³⁵⁵ Chapter Two, Territory and Jurisdiction, describes the nation's stature and its relationship with its land base. Chapter Three enumerates the rights and responsibilities of citizens. Only after discussing the fundamental precepts of the government does the Constitution describe the logistical characteristics, or the means or realizing those principles; in Chapter Four, Government, the structure of the new government is described. Finally, in Chapter Five, Law and Judiciary, the Constitution establishes the judiciary. The Constitution enshrines a number of important cultural values, described below.

1. National Autonomy³⁵⁶ and Survival

At the outset, the Constitution stresses the autonomy of the Blackfoot Nation,³⁵⁷ specifically rejecting the dominion of colonial powers,³⁵⁸ without relinquishing claims the Blackfoot Nation and its citizens may have against them.³⁵⁹ In Chapter One, the Constitution recounts international support for its sovereignty in both codified and customary international law,³⁶⁰ but rejects any attempts by other entities to define its statehood.³⁶¹

Throughout the document, the importance of cultural, not merely sovereign, survival is stressed. For example, Article Five states in part, “The central purpose of the Blackfoot Nation is to guarantee and protect the prosperity, identity, rights and culture of the Blackfoot People collectively and individually.”³⁶² Article Seven states:

The Blackfoot Nation shall adhere to and preserve and protect Blackfoot survival, prosperity, heritage, values, customs and world view in all expressions of terms and obligations of treaties which it may undertake with other nations and/or in relation to relationships and interactions with any foreign States surrounding or influencing Blackfoot territories.

Remarkably, the government has a constitutional responsibility to address social factors that may undermine social cohesion within the nation, even “inequalities of wealth, incomes, security, access to services, access to information, access to legal assistance, access to government or access to means of subsistence.”³⁶³ The connection between social cohesion and cultural survival is also expressed in the requirement of government by consensus. All national statutes require a remarkable two-thirds majority of representatives to take effect.³⁶⁴

2. Fundamental Rights of Citizens³⁶⁵

Chapter One enumerates a number of fundamental rights innately belonging to the Nation’s members, many of which are given attention in specific provisions in later Chapters. Rather than appearing as an “afterthought” or amendment to the constitution,³⁶⁶ these rights are listed early and permeate the Constitution as a whole. These include: Freedom of Speech and Assembly,³⁶⁷ Freedom of/from Religion,³⁶⁸ Freedom of Association,³⁶⁹ Freedom from Unreasonable Search and Seizure,³⁷⁰ Right of Due Process,³⁷¹ Freedom from Double Jeopardy,³⁷² Freedom to Keep and Bear Arms,³⁷³ Right to Confront and Answer Accusers,³⁷⁴ Right to a Speedy Trial,³⁷⁵ and Right to Privacy.³⁷⁶

These rights may reasonably be expected in any constitution written after the era of human rights, but several of the additional fundamental human rights³⁷⁷ described in the Constitution are worthy of specific attention. First, the Constitution enumerates the right to the inviolability of the person.³⁷⁸ Second, the Constitution includes a very broad non-discrimination clause. Article Nineteen guarantees that “[a]ll Blackfoot citizens shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, gender, blood-quantum, family, clan, band/tribe, sexual orientation or on any other grounds whatsoever shall

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not be permitted” Further, the constitution guarantees freedom from discrimination based on social class, disability, or age.³⁷⁹ The Rights of Citizens also include Education,³⁸⁰ Housing,³⁸¹ Medicine,³⁸² and Subsistence.³⁸³ Finally, transparent government, the equivalent of the Freedom of Information Act³⁸⁴ in the United States, is guaranteed in the Constitution,³⁸⁵ as is open government.³⁸⁶

3. Environmental Stewardship

Two articles in the Constitution articulate the Nation’s concern for the environment and natural surroundings. Article Forty establishes environmental protection as a responsibility of both the government and the citizens.³⁸⁷ The chapter on Territory and Jurisdiction concludes with the following mandate:

The Blackfoot Nation shall devote itself to just, equitable and sustainable environmental, economic, land-use, water, natural resource and other policies and practices in accordance with Blackfoot traditions and values. The Blackfoot Nation, in accordance with Blackfoot values and traditions, shall be guided by the needs of future generations, preservation of the Blackfoot Nation and sustainability in formulating and implementing all environmental, economic, land-use, water, natural resource and other policies and practices.³⁸⁸

4. Jurisdiction

As may be expected, the nation asserts exclusive jurisdiction over all its lands currently held.³⁸⁹ It also provides for the expansion of territory to its original land holdings and empowers its officials to seek the return of land taken “through unconscionable, fraudulent or broken treaties and contracts.”³⁹⁰ The Constitution recognizes not only the rights of citizens within its territory, but also the rights of the “Blackfoot Diaspora,” and it extends its jurisdiction over citizens without its boundaries, as well.³⁹¹

5. Government Structure

Before describing the structure of the new reformed government, the Constitution restates the relevant guiding principle: “The Government of the Blackfoot Nation recognizes, operates and rests on the principle that government is only legitimate when it governs with the recognition and consent of the majority of the governed.”³⁹² The Constitution then provides for the Executive Branch, comprised of

the Principal Chief acting as Head of State³⁹³ and Ambassadors.³⁹⁴ The Legislative Branch includes the Assembly of Representatives³⁹⁵ and the Council of Advisors, which also has a close relationship with the Executive.³⁹⁶ Chapter Five establishes the Judicial Branch. The government includes an interesting blend of modern separation of powers principles and traditional power structures.

The Principal Chief “shall be a qualified and legitimate Hereditary Chief of one of the four principal Bands of the Blackfoot Nation (Kainaiwa, Amskaapiikani, Apatohsipiikani or Siksika) and descendant from the traditional and recognized lines of descendants governing selection of Blackfoot Chiefs as acknowledged and affirmed by a majority of the Council of Advisors.”³⁹⁷ He or she serves for “the span of his or her life unless . . . he or she resigns or suffers impeachment for due cause and in accordance with Blackfoot traditions and this Constitution.”³⁹⁸ In the event that no Hereditary Chief exists, “one shall be nominated by and from the Council of Advisors.”³⁹⁹

In addition to being Commander in Chief of the Blackfoot Military, the Chief has the power to grant pardons, to appoint Ambassadors, Cabinet Officers, Judges of the Supreme Court, and other officers.⁴⁰⁰

The Council of Advisors consists of “traditionally recognized Pipe Carriers, Bundle Holders and Spiritual Leaders of the principal Bands of the Blackfoot Nation (that request or agree to sit on the Council of Advisors) and/or those appointed by [t]he Principal Chief.”⁴⁰¹ The members of the Council of Advisors retain their positions unless the Principal Chief moves for their removal and receives a two-thirds majority in favor of it from its remaining members.⁴⁰² The Council of Advisors acts as advisor to the Principal Chief, but may propose legislation of its own, recommend government policy, and advise on spiritual and cultural matters.⁴⁰³

The members of the Assembly of Representatives are elected from each of the four principal Bands of the Nation.⁴⁰⁴ The representation for each Band and the Diaspora is determined by each decennial census,⁴⁰⁵ with elections occurring every six years.⁴⁰⁶ The Assembly holds the primary legislative authority of the government, which is general,⁴⁰⁷ and not enumerated like the powers of the government of the United States.

The Constitution establishes a “holistic” judiciary, which must consider the “totality of effects” of its decisions⁴⁰⁸ and which recognizes no distinction between criminal offenses and civil wrongs.⁴⁰⁹ The focus of the judiciary is not retribution, but healing and social prosperity:

The fundamental mandates guiding all law and judicial processes shall be: Truth; Justice; Healing; Reconciliation; Prevention of Future Abuses; Survival and Prosperity of the Blackfoot Nation. All rights,

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policies, judicial procedures, protocols and regulations governing individuals, judicial processes and government are without prejudice to and subordinate to these survival imperatives and mandates.⁴¹⁰

In addition to these governing principles, the Court must consider the consequences of its decision not only on the accused and the victims, but also on the family of the accused, “not complicit with that person.”⁴¹¹ Thus, the Constitution guarantees that a family not complicit with the convicted should not be harmed, and may even draw material support from the nation in the event that the accused was the family’s provider.⁴¹²

In substance, the judiciary is comprised of a Supreme Court, appointed by the Principal Chief and approved by a two-thirds majority of the Council and Assembly,⁴¹³ and lower courts within each Band.⁴¹⁴ Judicial terms are left to be determined by the Assembly and Council.⁴¹⁵

The draft Constitution includes what may well be described as a utopian vision for an individual Blackfoot citizen, with its focus on individual rights, community prosperity, and non-discrimination. The document begs numerous questions from one educated in the Anglo-American legal tradition regarding its implementation: How will group and individual rights be reconciled when in conflict? Will the consensus requirements prove to be not only inefficient, but unworkable? How will environmental and economic needs be balanced? How will a fledgling government provide for the constitutionally guaranteed human rights to education, housing, and medicine? The answers to these questions will not be found within the European-descended legal traditions; they will be found in the same source of the Constitution — the Blackfoot People, guided by their own traditions of justice and the values articulated in the Constitution.

VI. CONCLUSION

Given their historical, political, and social circumstances over the last few centuries, First Nations in the Western Hemisphere have not exercised the entirety of their sovereign rights. They have, to a large extent, experienced government by and for others, and as a result, indigenous theories of governance have not been explored to their fullest. Within this context, aboriginal peoples have not prospered as the European communities have developed. The hope for tribal futures lies within themselves, and their long-term survival depends upon exerting a greater level of autonomy over the decisions that affect their people and their resources. While tribal rights to self-determination exist as a matter of their inherent laws and international law, the federal judiciary has demonstrated an increasing willingness to further

constrain tribal powers where they have not been used fully.

As a matter of necessity, tribal peoples in North America need to participate in an introspective process to determine how they ought to govern themselves, what role their governments ought to play, and what structures their governments should take. Fortunately, these matters have left the sterile circles of academic debate, and the Blackfoot Nation is taking the brave and bold step of asserting its membership in the international community and taking hold of the responsibility to provide for its people. In accordance with Chief Sitting Bull's admonition, they are putting their minds together to see what kind of future they can build for their children.⁴¹⁶

Notes

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1. BLACKFOOT CONST. Preamble (Draft), *available at* http://www.chgs.umn.edu/Histories__Narratives__Documen/Documents_on_Native_American_G/BlackfootDraftConstitution.pdf (last visited Dec. 1, 2003) [hereinafter DRAFT CONST.].
2. *See, e.g.*, Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997) [hereinafter Frickey, *Coherence*]; WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT (Stephen Cornell & Joseph P. Kalt, eds., 1992). (1992); Robert Lawrence, *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); Frank Pommersheim, *Economic Development in Indian Country: What Are the Questions?*, 12 AM. INDIAN L. REV. 195 (1984); RENNARD STRICKLAND ET AL. EDs., FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (1982) [hereinafter COHEN'S HANDBOOK]; 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); Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061 (1974). This statement is by no means a criticism either of tribal leaders or Indian law scholars. Indeed, such a focus is often valuable and pragmatic, avoiding the seemingly futile quest of challenging federal dominion.
3. 21 U.S. (8 Wheat) at 543 (1823).
4. 30 U.S. (5 Pet.) at 1 (1831).

5. 31 U.S. (6 Pet.) at 515 (1831).
6. *Id.* at 553-54.
7. *Id.* at 554-55.
8. Robert A. Williams, Jr., *Columbus's Legacy: The Rehnquist Court's Perpetuation of European Cultural Racism Against Indian Tribes*, 39 FED. B. NEWS & J. 358, 361 (1992) [hereinafter Williams, *Columbus's Legacy*].
9. *Id.* at 361 (“[T]ribes still retain those aspects of their inherent sovereignty not expressly divested by treaty or statute, or implicitly divested by virtue of their dependent status...”).
10. Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 83-84 (1977). In this context, “plenary” does not mean “absolute,” as Congressional authority is limited by constitutional restraints and judicial review. See COHEN’S HANDBOOK, *supra* note 2, at 217.
11. The Trust doctrine requires “that in exercising its broad discretionary authority in Indian affairs,” the federal government bears “the responsibilities of a guardian acting on behalf of its dependent Indian wards.” Williams, *Columbus's Legacy*, *supra* note 8, at 361.
12. See Morris, *infra* note 133, at 66; *infra* Part II.B.
13. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 4 (1996) [hereinafter ANAYA, *INDIGENOUS PEOPLES*].
14. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347-57 (1967); ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 17-20 (Edwin Canaan ed. 1976) (1776) (theorizing a natural propensity in humans to act in furtherance of their self-interest); JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 22 (4th ed. 1998) (quoting *Pierson v. Post*, 3 CAL. R. 175 (N.Y. 1805) (Livingston, J. dissenting)); *id.* at 32 (quoting *Keeble v. Hickeringill*, 103 ENG. REP. 1127 (Q.B. 1707)).
15. Indeed, tribal nations have observed that after achieving relatively stable control over the nations within its borders, the United States has exerted a similar undermining influence repeatedly in other parts of the globe. For example, in Guatemala, see SUSANNE JONAS, *THE BATTLE FOR GUATEMALA* (1991); RICHARD H. IMMERMAN, *THE CIA IN GUATEMALA: THE FOREIGN POLICY OF INTERVENTION* (1982), Nicaragua, see NOAM CHOMSKY, *THE CULTURE OF TERRORISM* 169-92 (1988), Iran, see *id.*, Viet Nam, see ANDREW JON ROTTER, *LIGHT AT THE END OF THE TUNNEL: A VIET NAM WAR ANTHOLOGY* (1991), and Chile, see PETER KOMBLUH, ED., *THE PINOCHET FILE: A DECLASSIFIED DOSSIER ON ATROCITY AND ACCOUNTABILITY* (2003). See generally WILLIAM BLUM, *KILLING HOPE: U. S. MILITARY AND CIA INTERVENTIONS SINCE WORLD WAR II* (1995). It may be reasonably argued that this century’s globalism comes down in apostolic succession from colonialism. See generally JÜRGEN OSTERHAMMEL, *COLONIALISM: A THEORETICAL OVERVIEW* (Shelley L. Frisch, trans. 1997).
16. See *infra* Part III.B.
17. To some extent, this is a proposal that tribes pull themselves up by their own bootstraps. Concededly, the cause of many Indian problems rests with the United States and its predecessors. Nevertheless, it is arguably unreasonable to look to the “conqueror” for solutions to the problems associated with conquering and occupation, leaving the responsibility for finding and implementing a remedy to the tribes themselves. Indeed, if the future includes any hope for the next generation of native people, that lies within those in the present. Cf. SHELBY STEELE, *THE CONTENT OF OUR CHARACTER* 73 (1990). Recall the words of A. Philip Randolph:

Salvation for a race, nation, or class must come from within. Freedom is never granted; it is exacted. Freedom and justice must be struggled for by the oppressed of all lands and races, and the struggle must be continuous, for freedom is never a final fact, but a continually evolving process to higher and higher levels of human, social, economic, political, and religious relationships.

JERVIS ANDERSON, A. PHILIP RANDOLPH, A BIOGRAPHICAL PORTRAIT, epigraph, p. vii (1972) (quoting A. Philip Randolph, Speech at the 80th Birthday Dinner, Waldorf Astoria Hotel, New York, New York, May 6, 1969).

18. Worcester v. Georgia, 31 U.S. (6 Pet.) 546 (1832).
19. One of the most remarkable characteristics of Indian law is that the process of developing tribal governments allows observers to witness cases analogous to Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing the power of constitutional review within the judicial branch), decided in the first instance and Constitutional Conventions after the Century of Human Rights. Serendipitously, the efforts to restructure the Blackfoot government from the inside offer a working example of the thesis of this article.
20. See S. LYMAN TYLER, A HISTORY OF INDIAN POLICY 32-33 (1973).
21. Johnson v. M'Intosh, 21 U.S. (8 Wheat) at 576-77 (1823).
22. See ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: CASES AND MATERIALS 138 (3d ed. 1991).
23. See generally DAVID E. STANNARD, AMERICAN HOLOCAUST (1992).
24. See FRANCISCO DE VITORIA, *The First Relectio on the Indians Lately Discovered*, in DE INDIS ET DE IURE BELLI REFLECTIONES 115, 154-56 (J.B. Scott et al. eds., Carnegie Institute of Washington 1917 (J. Bates trans. 1917) (1557)).
25. See CLINTON ET AL., *supra* note 22, at 138.
26. See Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 40 (1947).
27. See COHEN'S HANDBOOK, *supra* note 2, at 58 n.65 ("That the securing and preserving the friendship of Indian nations, appears to be a subject of the utmost importance to these Colonies. . .," quoting Resolution of the Continental Congress, July 12, 1775); Worcester v. Georgia, 31 U.S. (6 Pet.) at 551 ("When the United States gave peace, did they not also receive it? Were not both parties desirous of it? If we consult the history of the day, does it not inform us that the United States were at least as anxious to obtain it as the [Indians]?").
28. See WILLIAM MOHR, FEDERAL INDIAN RELATIONS 1774-1788, at 4-9 (1933).
29. King George III, Proclamation (October 7, 1763); see WILCOMB E. WASHBURN, 3 THE AMERICAN INDIAN AND THE UNITED STATES: A DOCUMENTARY HISTORY 2137 (1973).
30. See FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 13-20 (1962) [hereinafter PRUCHA, FORMATIVE YEARS].
31. See CLINTON ET AL., *supra* note 22, at 140.
32. See *id.* at 141.
33. See *id.* at 141-42.
34. July 22, 1790, 1 Stat. 137. The current version of the Act, passed in 1834, states:
No purchase, grant, lease, or other conveyance of lands or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the

Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of \$1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

25 U.S.C. § 177 (2003). This exertion of Federal authority was enacted pursuant to the Indian Commerce Clause. U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power to “regulate Commerce . . . with the Indian tribes”).

35. CLINTON ET AL., *supra* note 22, at 142.
36. PRUCHA, *FORMATIVE YEARS*, *supra* note 30, at 2-3; *see also* DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 84-97 (4th ed. 1998).
37. *See* CLINTON ET AL., *supra* note 22, at 144.
38. *See id.* at 144-45.
39. *See, e.g.*, Treaty with the Cherokees, Nov. 28, 1785, 7 Stat. 18 (Treaty of Hopewell); Treaty with France, April 30, 1803, U.S.-Fr., art. III, 8 Stat. 200. (pledging to protect, “the inhabitants of the ceded territory . . . in the free enjoyment of their liberty, property and the religion they profess.”).
40. The duration of the Removal Period was from 1835 to 1861. *See* CLINTON ET AL., *supra* note 22, at 144.
41. *See, e.g.*, Treaty with the Choctaw and Chickasaw, Jan. 17, 1837, 11 Stat. 573; Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478 (Treaty of New Echota); Treaty with the Creeks, Feb. 14, 1833, 7 Stat. 417; Treaty with the Seminoles, May 9, 1832, 7 Stat. 368; Treaty with the Choctaw, Sept. 27, 1830, 7 Stat. 333 (Treaty of Dancing Rabbit Creek). *See generally*, ANGIE DEBO, *AND STILL THE WATERS RUN* (1940); GRANT FOREMAN, *INDIAN REMOVAL* (1932). The Cherokees were party to the first removal treaty in 1817, *see* Treaty with the Cherokee, July 8, 1817, 7 Stat. 156, although actual removal did not begin until the 1830s, *see* JOHN W. MORRIS ET AL., *HISTORICAL ATLAS OF OKLAHOMA* 23 (3d ed. 1986) (The Choctaw were forcibly relocated in 1831, the Creeks in 1836, the Chickasaw in 1837, the Cherokee in 1838-1839, and the Seminole in 1842.). A series of treaties, many of which were forced on the tribes, removed the Five Civilized tribes — the Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles — to the Indian Territory. *See generally* ANGIE DEBO, *AND STILL THE WATERS RUN* (1940); ANGIE DEBO, *THE ROAD TO DISAPPEARANCE* (1941); ANGIE DEBO, *THE RISE AND FALL OF THE CHOCTAW REPUBLIC* (1934). In exchange for the tribes’ relocation, the United States promised that the lands set aside for them would “in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory.” Treaty with the Cherokee, Dec. 29, 1835, art. 5, 7 Stat. 478, 481. The land was intended to be a permanent homeland for the tribes. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 625 (1970) (noting that “the United States promised to convey the land in fee simple ’to inure to them while they shall exist as a nation and live on it.” (quoting Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7. Stat. 333-334.)). After the Five Civilized Tribes arrived in their new land, they established comprehensive governments and signed treaties with one another promising peace and

- establishing intergovernmental relations. See COHEN'S HANDBOOK, *supra* note 2, at 772 & n.20.
42. See CLINTON ET AL., *supra* note 22, at 146.
 43. See *id.*
 44. See, e.g., Treaty with the Kansas, Oct. 5, 1859, 12 Stat. 1111; Treaty with the Winnebago, Apr. 15, 1859, 12 Stat. 1101; Treaty with the Menominee, May 12, 1854, 10 Stat. 1064; CLINTON ET AL., *supra* note 22, at 146.
 45. See CLINTON ET AL., *supra* note 22, at 147-48.
 46. See Appropriations Act of Mar. 3, 1871, 41st Cong. ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2000)).
 47. See Appropriations Act of Mar. 3, 1885, 48th Cong. ch. 341, 23 Stat. 362, 385 (codified as amended as the Federal Major Crimes Act, 25 U.S.C. § 1153 (2000)).
 48. In reviewing the Act, the Supreme Court concluded that it was beyond the scope of the Indian Commerce Clause, Article I, Section 8, Clause 3 of the Constitution (granting Congress the "power to regulate commerce with foreign nations and among the several states, and with the Indian tribes"), but asserted that Congress had an extra-constitutional power to regulate Indian affairs. See *United States v. Kagama*, 118 U.S. 375, 384-85 (1886).
 49. General Allotment Act of 1887, 49th Cong. ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331 et seq. (2000)).
 50. The Act provided for a grant of 160 acres to each family head, 80 acres to each single person over eighteen years of age and to each orphan under eighteen, and 40 acres to each other single person under eighteen. The federal government was to hold the patent to the land in trust for a period of 25 years, during which time the land could not be encumbered or alienated. At the end of 25 years, or upon proof of "competency," the encumbrances were to be removed. See *History of the Allotment Policy*, Hearings on H.R. 7902 Before the House Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 9, at 428 (1934) (statement of Delos Sacket Otis).
 51. See, e.g., *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 335 (1998).
 52. See CLINTON ET AL., *supra* note 22, at 148.
 53. See *id.* at 149.
 54. See *id.*
 55. See generally Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995) (discussing the impact of the allotment policy on recent court opinions) [hereinafter Royster, *Legacy*].
 56. GETCHES ET AL., *supra* note 36, at 191.
 57. *Id.* at 152.
 58. INSTITUTE FOR GOVERNMENT RESEARCH STUDIES IN ADMINISTRATION, *THE PROBLEM OF INDIAN ADMINISTRATION* (Lewis Meriam ed. 1928)
 59. See COHEN'S HANDBOOK, *supra* note 2, at 144. One recalls the words of Thomas Jefferson, "I tremble for my country when I reflect that God is just." RONALD WRIGHT, *STOLEN CONTINENTS* 212 (1992).
 60. 25 U.S.C. §§ 461-479 (2003).
 61. John Collier, *The Genesis and Formation of the Indian Reorganization Act*, in *INDIAN AFFAIRS AND THE INDIAN REORGANIZATION ACT, THE TWENTY YEAR RECORD 2* (William Kelly, ed. 1954).
 62. For example, the IRA limited transfers (including testamentary transfers) of Indian lands to Indians or tribes, Wheeler-Howard Act, 73rd Cong. ch. 576, § 4, 48 Stat. 984 (codified as amended at 25

U.S.C. §§ 461-466 (1934), authorized the Secretary of the Interior to acquire land in trust on behalf of tribes to expand the dwindled land mass, § 5, established a revolving fund for economic development, § 10, provided for the establishment of tribal corporations to encourage economic development, § 17, and preserved certain claims against the United States, § 15.

63. *See id.* at § 1.

64. Section 16 of the Indian Reorganization Act originally provided:

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriations estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

65. COHEN'S HANDBOOK, *supra* note 2, at 149; CLINTON ET AL., *supra* note 22, at 368; William H. Kelly, *Indian Adjustment and the History of Indian Affairs*, 10 ARIZ. L. REV. 559, 568 (1968).

66. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 198 (1985).

67. *See* HEARINGS ON S. 2103 BEFORE THE COMMITTEE ON INDIAN AFFAIRS, H.R. 76TH CONG., 3D SESS. (1940). For example, the right criticized the act as an anti-religious communist device, *see* COHEN'S HANDBOOK, *supra* note 2, at 153, while the left attacked it as an effort to destroy re-emerging and surviving tribal councils, *see* CLINTON ET AL., *supra* note 22, at 362.

68. *See* CLINTON ET AL., *supra* note 22, at 155; COHEN'S HANDBOOK, *supra* note 2, at 152.

69. *See* Act of Aug. 15, 1953, H.R. 1063, ch. 505, 67 Stat. 588, codified in part at 18 U.S.C. § 1162 (2000) and 25 U.S.C. § 1360 (2000) (commonly known as Public Law 280).

70. *See* Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977).

71. *See* CLINTON ET AL., *supra* note 22, at 158.

72. *See* WARD CHURCHILL, *INDIANS ARE US?*, 77 (1994).

73. *See* Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 91-363, at 3 (1970).

74. See ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 405 (1970).
75. 25 U.S.C. § 450(a) (2000).
76. See, e.g., Indian Tribal Government Tax Status Act of 1982, 26 U.S.C. § 7871 (2003); Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (2000).
77. See David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1594-95 (1996) [hereinafter Getches, *Subjectivism*].
78. See *id.*
79. See, e.g., *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (discussed *infra* notes 257-277 and accompanying text).
80. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); see also COHEN'S HANDBOOK, *supra* note 2, at 241.
81. 21 U.S. (8 Wheat.) 543 (1821).
82. *Id.* at 574; see also *United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested some aspects of the sovereignty which they had previously exercised."). This notion was not without opposition, even within the U.S. legal structure. For example, William Wirt, one of the nation's early Attorneys General noted:

The conquerors have never claimed more than the exclusive right of purchase from the Indians, . . . So long as a tribe exists and remains in possession of its lands, its title and possession are sovereign and exclusive; and there exists no authority to enter upon their lands, for any purpose whatever, without their consent. Of the admission of this principle, the [Treaty of Canandaigua, Nov. 11, 1794, U.S.-Iroquois Confederacy, 7 Stat. 44, *reprinted* in CHARLES J. KAPPLER, ED., 2 INDIAN AFFAIRS: LAWS AND TREATIES 34-37 (1904)] furnished a proof. The United States stood in need of a road through the lands of the Senecas from Fort Schlosser to Lake Erie; yet, inasmuch as they had no authority to enter upon the lands of the Senecas, even for the purposes of passing through them, without their consent, their right of way became the subject of a compact. Although Indian title continues only during their possession, yet that possession has been always held sacred, and can never be disturbed but by their consent. They do not hold under the States, nor under the United States; their title is original, sovereign, and exclusive. We treat with them as separate sovereignties, and while an Indian nation continues to exist within its acknowledged limits, we have no more right to enter upon their territory than we have to enter upon the territory of a foreign prince.

The Seneca Lands, 1 Op. Att'y Gen. 465, 466-67 (1821). Seven years later, Wirt issued an even stronger opinion:

The point, then, once conceded, that the Indians are independent to the purpose of treating, their independence is, to that purpose, as absolute as that of any other nation. Being competent to bind themselves by a treaty, they are equally competent to bind the party who treats with them. Such party cannot take the full benefit of the treaty with the Indians, and then deny them the reciprocal benefits of the treaty, on the ground that they are not an independent nation to all intents and purposes. It would require no technicality to perceive and to expose the injustice of such an attempt. It

would lie open to the reprehension of the plainest understanding. . . .

. . . Nor can it be conceded that their independence as a nation is a limited independence. Like all other independent nations, they are governed solely by their own laws. Like all other independent nations, they have the absolute power of war and peace. Like all other independent nations, their territories are inviolate by any other sovereignty. . . . They are entirely self-governed — self-directed. They treat, or refuse to treat, at their pleasure; and there is no human power that can rightly control them in the exercise of their discretion in this respect. In their treaties, in all their contracts with regard to their property, they are as free, sovereign, and independent as any other nation.

Georgia and the Treaty of Indian Spring, 2 Op. Atty. Gen. 110, 133-34 (1828).

83. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (denying tribal criminal authority over non-Indians); *Montana v. United States*, 450 U.S. 544, 566 (1981) (limiting civil jurisdiction on non-Indian owned fee land within the reservation boundaries unless conduct thereon “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe”). See *infra* Part III.
84. See COHEN’S HANDBOOK, *supra* note 2, at 241.
85. Williams, *Columbus’s Legacy*, *supra* note 8, at 361.
86. See *Montana*, 450 U.S. at 566.
87. *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 83-85 (1977).
88. See *Montana*, 450 U.S. at 566.
89. Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219, 264 (1986) [hereinafter Williams, *Algebra*].
90. U.S. CONST. art. II, § 2, cl. 2.
91. U.S. CONST. art. I, § 8, cl. 3.
92. Williams, *Algebra*, *supra* note 89, at 263.
93. See *United States v. Kagama*, 118 U.S. 375, 384-85 (1886).

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, as well as to the safety of those among whom they dwell. It must exist in that government, because it never existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.
94. See *Weeks*, 430 U.S. at 85.
95. See COHEN’S HANDBOOK, *supra* note 2, at 217.
96. See *Morton v. Mancari*, 417 U.S. 535, 554 (1974).
97. See *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85 (1977). Indeed, “the Court has never struck down a federal statute directly regulating tribes on the ground that Congress exceeded its authority to govern Indian affairs.” Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1139 (1990).
98. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); see *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (“The sovereignty that the Indian tribes retain . . . exists only at the sufferance of

- Congress and is subject to complete defeasance.”).
99. *See infra* notes 101-111 and accompanying text.
100. *See, e.g.*, Act of June 17, 1954, ch. 303, 68 Stat. 250 (Menominee); *Menominee Tribe v. United States*, 391 U.S. 404 (1968).
101. *See Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). For a judicial criticism of *Lone Wolf* and the plenary power doctrine, *see Red Lake Band of Chippewa Indians v. Swimmer*:
The plenary power doctrine’s effects on the rights of Indians have been deemed so devastating as to prompt one judge to refer to the date that the opinion in *Lone Wolf* was issued and the doctrine of plenary power developed as “one of the blackest days in the history of the American Indian, the Indians’ Dred Scott decision.”
740 F. Supp. 9, 12 (D.D.C. 1990) (quoting *Sioux Nation of Indians v. United States*, 601 F.2d 1157, 1173 (Ct. Cl. 1979)). As Justice Hugo Black stated, “[g]reat nations, like great men, keep their word.” *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting). Congress’ plenary power to abrogate treaties by statute is difficult to reconcile with their status as the supreme law of the land, U.S. CONST. art. VI, § 2. *See Morris, infra* note 133, at 65.
102. *See Menominee*, 391 U.S. 404..
103. *See Carpenter v. Shaw*, 280 U.S. 363, 367 (1930) (“Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.”).
104. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).
105. *See id.*
106. 316 U.S. 286 (1942).
107. *Id.* at 296-97 (citations omitted).
108. Alex Tallchief Skibine, *Gaming on Indian Reservations: Defining the Trustee’s Duty in the Wake of Seminole Tribe v. Florida*, 29 ARIZ. ST. L.J. 121, 156 (1997). For example, most Indian land is held in trust by the federal government for the benefit of tribes and individual allottees, although similar rights and responsibilities for any type of Indian country exist, *see United States v. John*, 437 U.S. 634 (1978); *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *Oklahoma Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114 (1993) (hereinafter *Sac & Fox Nation*). *See, e.g.*, *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996) (holding reservation land is Indian country in accordance with 18 U.S.C. § 1151(a)); *Housing Auth. v. Harjo*, 790 P.2d 1098 (Okla. 1990) (noting that dependent Indian communities are Indian country under 18 U.S.C. § 1151(b)); *Sac & Fox Nation*, 508 U.S. 114 (holding allotments are Indian country under 18 U.S.C. § 1151(c)).
109. *See Taiawagi Helton, Comment, Indian Reserved Water Rights in the Dual-System State of Oklahoma*, 33 TULSA L.J. 979, 988 n.99 (1998) (citing COHEN’S HANDBOOK, *supra* note 2, at 221-23; Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993) [hereinafter Frickey, *Marshalling*]):
The canons of construction developed from the trust relationship between the United States and the Indian nations. The canons first developed in cases involving treaties. Because of the federal government’s role as trustee with the tribes, courts must: a)

construe treaties and statutes related directly to Indians liberally in favor of tribes; b) resolve ambiguities in those statutes and treaties in favor of the tribes, and; c) construe treaties as the Indians would have understood them.

See also *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174-75 (1973) (reaffirming canon (a)); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832) (establishing Canon (b)); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979) (reaffirming Canon (c)).

110. *See* *Cape Fox Corp. v. United States*, 4 Cl. Ct. 223, 232 (1983).
111. *See* *Nevada v. United States*, 463 U.S. 110 (1983); *Navajo Tribe v. United States*, 9 Cl. Ct. 227, 244 (1985).
112. *See* *United States v. Mitchell*, 463 U.S. 206 (1983) [hereinafter, *Mitchell II*].
113. *See* *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390 (Ct. Cl. 1975). *See, e.g.*, 25 U.S.C. §§ 161(a), 161(b) (2003) (establishing federal trust management of tribal funds).
114. *See* *United States v. Mitchell*, 445 U.S. 535 (1980) [hereinafter, *Mitchell I*]; *Mitchell II*, 463 U.S. 206.

To state a claim cognizable under the Indian Tucker Act [28 U.S.C. § 1505 (2000)], *Mitchell I* and *Mitchell II* thus instruct, a Tribe must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties. *See* 463 U.S. at 216-217, 219. If that threshold is passed, the court must then determine whether the substantive law “can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s].” *Id.* at 219, 103 S. Ct. 2961. Although “the undisputed existence of a general trust relationship between the United States and the Indian people” can “reinforc[e]” the conclusion that the relevant statute or regulation imposes fiduciary duties, *id.*, at 225, 103 S. Ct. 2961, that relationship alone is insufficient to support jurisdiction under the Indian Tucker Act. Instead, the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions. Those prescriptions need not, however, expressly provide for money damages; the availability of such damages may be inferred.

United States v. Navajo Nation, 537 U.S. 488, 506 (2003). Despite accurately reciting the holdings in the *Mitchell* cases, five members of the Court appeared to state a preference for a specific, express textual source for the “substantive duty.” *See id.* at 1010. If this strict interpretation is followed, it will allow the federal government to rely on non-textual sources to exert power over tribes, *see* *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943); *United States v. Kagama*, 118 U.S. 375, 384-85 (1886), while requiring tribes to point to a specific textual source in order to enforce the government’s trust responsibility.

115. *See* *Talton v. Mayes*, 163 U.S. 376, 382-83 (1896).
116. *See* *Williams v. Lee*, 358 U.S. 217, 223 (1959).
117. *See* *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-63 (1978). For example, the government of the Isleta Pueblo retains both religious and secular roles, *see* SHARON O’BRIEN, *AMERICAN INDIAN TRIBAL GOVERNMENTS* 173 (1989), and the Hopi Constitution requires certification of secular leaders by the Kikmongwi, religious leaders of individual villages, *see* *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975); Charles F. Wilkinson, *Home Dance, the Hopi, and Black Mesa*

- Coal: Conquest and Endurance in the American Southwest*, 1996 B.Y.U. L. REV. 449, 459 (1996).
118. See Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 972 (1972).
119. See Indian Reorganization Act, 25 U.S.C. §§ 461-479 (2000). The current version of the act states in relevant part:
- (a) Adoption; effective date
Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when—
 - (1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and
 - (2) approved by the Secretary pursuant to subsection (d) of this section.
 - (b) Revocation
Any constitution or bylaws ratified and approved by the Secretary shall be revocable by an election open to the same voters and conducted in the same manner as provided in subsection (a) of this section for the adoption of a constitution or bylaws.
. . . .
 - (d) Approval or disapproval by Secretary; enforcement
 - (1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution, and bylaws or any amendments are contrary to applicable laws.
 - (2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.
 - (e) Vested rights and powers; advisement of presubmitted budget estimates
In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.
120. See *id.* § 476 (2003).
121. See *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 199 (1985).
122. Positive internal tribal law is a valuable source of Indian law, but little tribal law has developed in the arena of international relations. Accordingly, this section focuses on international law.
123. See ANAYA, *INDIGENOUS PEOPLES*, *supra* note 13, at 13-17.

124. *See id.*
125. According to Vattel, this autonomy arose due to the consensual creation of the political body by its members, rather than from conquest of one group by another. *See id.* at 14.
126. *See id.* at 15.
127. Some early international law theorists required a certain degree of “civilization,” stated in European terms, for nationhood, excluding states as advanced as China and Persia. *See, e.g.,* LASSA OPPENHEIM, INTERNATIONAL LAW § 71 (3d ed. 1920).
128. *See* ANAYA, INDIGENOUS PEOPLES, *supra* note 13, at 16, 19-23.
129. *See* COHEN’S HANDBOOK, *supra* note 2, at 50-51. “[T]he criteria for determining whether a war was ‘just’ were grounded in a European value system.” ANAYA, INDIGENOUS PEOPLES, *supra* note 13, at 12.
130. ANAYA, INDIGENOUS PEOPLES, *supra* note 13, at 11 (quoting VITORIA, *supra* note 24, at 139).
131. EMMERICH DE VATTEL, The Law of Nations or Principles of Natural Law 115-16 (1758) *cited in* ANAYA, INDIGENOUS PEOPLES, *supra* note 13, at 16.
132. Madhavi Sundar, *Piercing the Veil*, 112 YALE L.J. 1399, 1416 (2003).
133. Glenn T. Morris, *International Law and Politics: Toward a Right to Self-Determination for Indigenous Peoples*, in THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION AND RESISTANCE 80 n.21 (M. Annette Jaimes ed., 1992).
134. *Id.*
135. M. F. Lindley, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW: BEING A TREATISE ON THE LAW AND PRACTICE RELATING TO COLONIAL EXPANSION 14 (1926). International morality is as much at risk in the treatment of indigenous peoples as it was during the Italian attack on Ethiopia when the League of Nations and United Nations failed to respond to H.I.M. Haile Selassie’s pleas for international intervention.

It is collective security: it is the very existence of the League of Nations. It is the confidence that each State is to place in international treaties. It is the value of promises made to small States that their integrity and their independence shall be respected and ensured. . . . [I]t is international morality that is at stake.

Haile Selassie, Appeal to the League of Nations, June 1936. In his remarks to the United Nations in 1963, Selassie stated further:

The goal of the equality of man which we seek is the antithesis of the exploitation of one people by another with which the pages of history and in particular those written of the African and Asian continents, speak at such length.

. . . .

On the question of racial discrimination, [there is] this further lesson: That until the philosophy which holds one race superior and another inferior is finally and permanently discredited and abandoned; That until there are no longer first-class and second-class citizens of any nation; That until the color of a man’s skin is of no more significance than the color of his eyes; That until the basic human rights are equally guaranteed to all without regard to race; That until that day, the dream of lasting peace and world citizenship and the rule of international morality will remain but a fleeting illusion, to be pursued but never attained; And until the ignoble and unhappy regimes that hold our brothers in Angola, in Mozambique and in South Africa in subhuman

bandage have been toppled and destroyed; Until bigotry and prejudice and malicious and inhuman self-interest have been replaced by understanding and tolerance and good-will; Until that day, the African continent will not know peace. We Africans will fight, if necessary, and we know that we shall win, as we are confident in the victory of good over evil.

....

[I]s the [U.N.] Charter a mere collection of words, without content and substance, because the essential spirit is lacking?

Haile Selassie, Address to the United Nations, Oct. 6, 1963.

136. See COHEN'S HANDBOOK, *supra* note 2, at 53.
137. HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 397 (1625), *cited in* ANAYA, INDIGENOUS PEOPLES, *supra* note 13, at 12.
138. See *supra* notes 24-30 and accompanying text.
139. The Doctrine of Discovery was founded on two Papal Bulls issued by Pope Alexander VI in 1493, which permitted the domination of the "New World." See PAUL GOTTSCHALK, EARLIEST DIPLOMATIC DOCUMENTS OF AMERICA 21 (1978). Well before Marshall's reliance on the doctrine, Pope Paul III, influenced by the writing of Victoria, *supra* note 24, modified the divine law as follows in the Bull *Sublimus Deus* (1537):
- [T]he said Indians and all other people who have been or may later be discovered by Christians, are by no means to be deprived of their property, even though they may be outside the faith of Jesus Christ; and that they may and should freely and legitimately enjoy their liberty and possession of their property; nor should they in any way be enslaved; should the contrary happen, it shall be null.
- Morris, *supra* note 133, at 61.
140. See generally Morris, *supra* note 133, at 55-86. "[T]he Doctrine of Discovery did not diminish the sovereign rights of indigenous peoples, but was a mechanism of controlling competing European states in their negotiations with indigenous nations regarding territorial cessions." *Id.* at 64 (citing Howard R. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFF. L. REV. 637, 653 (1978))
141. A monopsony is a "buyer's monopoly" — the exercise of market power by buyers to artificially depress prices, rather than by sellers to artificially inflate prices. See ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY: ANTITRUST LAW AND ECONOMICS (1993); see also Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1071-72 (2000) ("*Johnson v. M'Intosh* was an essential part of the regime of efficient expropriation because it ensured that Europeans did not bid against each other to acquire Indian lands, thus keeping the prices low. . .").
142. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 576 (1823). See, e.g., Treaty with France, April 30, 1803, U.S.-Fr., art. VI, 8 Stat. 200, 202 (Louisiana Purchase). "Contrary to the teachings of most history courses, the Louisiana Purchase did not give the United States legal title to the land. It instead gave the fledgling nation the right, as between old world sovereigns, to negotiate with Indian nations in that territory to obtain title. Pursuant to the terms of the Louisiana Purchase, the United States entered into treaties with those tribes." Helton, *supra* note 109, at 991 (citations omitted).
143. *Id.* at 573.

144. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 544 (1832) (emphasis added).
145. As Marshall acknowledged in *Worcester v. Georgia*, the United States claim to tribal land was not based on any moral foundation, but on “power, war, conquest [despite the United States failure by that time to achieve conquest over any tribes west of the Appalachian Mountains and not all east of there, see WARD CHURCHILL, *STRUGGLE FOR THE LAND: INDIGENOUS RESISTANCE TO GENOCIDE, ECOCIDE, AND EXPROPRIATION IN CONTEMPORARY NORTH AMERICA* 44 (1993) [hereinafter CHURCHILL, *STRUGGLE*]], [which] give rights, which after possession, are conceded by the world; and which can never be controverted by those on whom they descend.” 31 U.S. (6 Pet.), at 543.
146. See Aureliu Cristescu, *The Historical and Current Development of the Right to Self-Determination on the Basis of the Charter of the United Nations and Other Instruments Adopted by the United Nations Organs, with Particular Reference to the Promotion and Protection of Human Rights and Fundamental Freedoms*, at 66-69, U.N. Doc. E/CN.4/Sub.2/404/Rev.1 (1981) (listing U.N. General Assembly and Security Council Resolutions on the right of self-determination); Gudmundur Alfredsson, *Greenland and the Law of Political Decolonization*, 25 GERMAN YEARBOOK OF INT’L L. 22 (1982) (discussing the recognition of the right to self-determination to colonies once treated as “domestic” to the colonizing state); ANDRES RIGO SURVEDA, *THE EVOLUTION OF THE RIGHT TO SELF-DETERMINATION* 66 (1973). See generally Morris, *supra* note 133, at 55-86.
147. See ANAYA, *INDIGENOUS PEOPLES*, *supra* note 13, at 43; see also Morris, *supra* note 133, at 73 n.102; Alfredsson, *supra* note 146, at 5-6.
148. ANAYA, *INDIGENOUS PEOPLES*, *supra* note 13, at 40.
149. *Id.*
150. ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 104 (1963).
151. International Covenant on Civil and Political Rights, Mar. 23, 1976, art. 1(1), 999 U.N.T.S. 171.
152. International Covenant on Economic, Social, and Cultural Rights, Jan. 3, 1976, art. 1(1), 993 U.N.T.S. 3. See also, e.g., Rio Declaration on Environment and Development, June 14, 1992, U.N. Conference on Environment and Development, U.N. GAOR, 47th Sess., princ. 22, U.N. Doc. A/CONF. 151/5/Rev. 1, 31 I.L.M. 874, 879 (1992) [hereinafter Rio Declaration]. See generally Howard R. Berman, *Perspectives on American Indian Sovereignty and International Law*, 1600-1776, in EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION 125 (1992).
153. The right to self-determination applies as well to colonies, see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, 1971 I.C.J. REP. 16, 31 (1971), reprinted in 10 I.L.M. 677 (1971); *The Western Sahara Case*, 1975 I.C.J. REP. 12, 31-32 (1975), reprinted in 14 I.L.M. 69 (1975), having three fundamental characteristics: “1. foreign domination, 2. the presence of a political/territorial entity in the colony, and 3. geographical separation from the colonizing power,” Morris, *supra* note 133, at 74 (citing Alfredsson, *supra* note 146, at 46). While indigenous people in the United States satisfy two of three criteria, see *id.*, the United States and Canada have been relatively successful at advocating for the “blue water” thesis of separation, requiring at least thirty miles of ocean between the colony and the occupying power. See *id.*; CHURCHILL, *STRUGGLE*, *supra* note 145, at 60. While this thesis was subject to criticism at its inception, see, e.g., BELGIUM GOVERNMENTAL INFORMATION CENTER, *THE SACRED MISSION OF CIVILIZATION: TO WHICH PEOPLES SHOULD THE*

- BENEFIT BE EXTENDED? THE BELGIAN THESIS 3 (1953); WARD CHURCHILL, SINCE PREDATOR CAME: NOTES FROM THE STRUGGLE FOR AMERICAN INDIAN LIBERATION 3-8 (1995) [hereinafter CHURCHILL, PREDATOR], the thesis certainly became less tenable after the United States and Canada supported the independence of colonized territories within the former Soviet Union but not separated by more than 30 miles of ocean from the U.S.S.R. See, e.g., Andrew Rosenthal, *U.S., Turning from Moscow, Would Grant Recognition to an Independent Ukraine*, N.Y. TIMES, Nov. 28, 1991, at A1.
154. See CHURCHILL, STRUGGLE, *supra* note 145, at 60; James Richard Crawford, *The Aborigine in Comparative Law*, 2 L. & ANTHRO. 5, 11 (1987).
155. See Rachel San Kronowitz et al., Comment, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 597-600 (1987).
156. Greco-Roman “Communities,” Collection of Advisory Opinions (Greece v. Bulgaria), 1930 P.C.I.J. (ser. B) no. 17, at 21 (July 1931).
157. Cristescu, *supra* note 146, at ¶ 279.
158. INTERNATIONAL COMM’N OF JURISTS, THE EVENTS OF EAST PAKISTAN, 1971 (A Rep. by the Secretariat) 70 (1972).
159. United Nations Declaration on the Rights of Indigenous Peoples, U.N. Subcommission on the Prevention of Discrimination and Protections of Minorities, art. 31, 11th Sess., U.N. Doc. E/CN.4/Sub.2/1994/56 (1994), reprinted in S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 214 (1996).
160. Discussed *infra* Part II.B.
161. See generally PRUCHA, FORMATIVE YEARS, *supra* note 30. There were, of course, notable exceptions like President Andrew Jackson. See *id.* at 234.
162. See FERGUS BORDEWICH, KILLING THE WHITE MAN’S INDIAN 38-39 (1996).
163. See Amanda K. Wilson, *Hazardous & Solid Waste Dumping Grounds Under RCRA’s Indian Law Loophole*, 30 SANTA CLARA L. REV. 1043, 1047 n.23 (1990).
164. David Lester, *The Environment from an Indian Perspective*, EPA JOURNAL, Jan.-Feb. 1986, at 27, 28.
165. Ward Churchill & Winona LaDuke, *Native North American: The Political Economy of Radioactive Colonialism*, in THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE 241 (M. Annette Jaimes, ed. 1992). The Bureau of Indian Affairs estimates the current gross value of coal and methane gas to be approximately \$1.7 trillion. See BIA, RESOURCES IDENTIFIED THROUGH THE MINERAL ASSESSMENT PROGRAM, 1 INDIAN MINERAL RESOURCES HORIZONS 7 (May 1992) [hereinafter BIA, MINERALS].
166. See BIA, MINERALS, *supra* note 165, at 1.
167. GETCHES ET AL., *supra* note 36, at 22.
168. Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1481 (1994).
169. GETCHES ET AL., *supra* note 36, at 15 (citing Joseph P. Kalt, *The Redefinition of Property Rights in American Indian Reservations: A Comparative Analysis of Native American Economic Development* (Discussion Paper Series #E-87-05, Energy and Env’tl Pol’y Center, John F. Kennedy Sch. of Gov’t, Harv. U., May 1997)).
170. Larry EchoHawk, *Factors Contributing to Juvenile Violence in Indian Communities*, 13 B.Y.U. J.

- PUB. L. 69, 71 (1998) (citing GETCHES, FEDERAL INDIAN LAW 15 (4th ed. 1998)).
171. GETCHES ET AL., *supra* note 36, at 15. According to the BIA, this rate has worsened. *See infra* note 175 and accompanying text (placing the 1997 unemployment rate for Native Americans nationwide at 50%).
172. CHURCHILL, PREDATOR, *supra* note 153, at 33.
173. *See* GETCHES ET AL., *supra* note 36, at 16.
174. *See id.*
175. Jackie Barone, *President Clinton Illuminates the Need for Investment in Native American Communities*, 24 AM. INDIAN L. REV. 503, 503 (2000); James Brooke, *Proposed Cuts in Indian Programs Hit Those Who Rely Most on Federal Aid*, N.Y. TIMES, Oct. 15, 1995, at A16.
176. *See* Matthew Atkinson, *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 OKLA. CITY U.L. REV. 379, 420 (1998).
177. *See id.*
178. *See* Margaret Knox, *Their Mother's Keepers: Native Americans and Environmentalism*, SIERRA, Mar.-Apr. 1993, at 81 (reporting 85% unemployment rate on Pine Ridge Reservation).
179. T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 326 (1992).
180. WARD CHURCHILL, *FANTASIES OF THE MASTER RACE: LITERATURE, CINEMA AND THE COLONIZATION OF AMERICAN INDIANS* xiii (1998) [hereinafter CHURCHILL, *FANTASIES*].
181. *See id.*
182. CHURCHILL, PREDATOR, *supra* note 153, at 33-34 (citing U.S. DEPT. OF HEALTH AND HUMAN SERVICES, PUBLIC HEALTH SERVICE, PUB. NO. HE20.9409.988, CHART SERIES BOOK (1988)) (citations omitted).
183. *See* GETCHES ET AL., *supra* note 36, at 16.
184. *See id.* at 17.
185. NATIONAL COUNCIL OF HEALTH STATISTICS, DEPT. HEALTH & HUMAN SVCS., U.S. MORTALITY RATES: MONTHLY VITAL STATISTICS REPORT, Table 11 (Mar. 22, 1995); *see also* RENNARD STRICKLAND, *TONTO'S REVENGE* 53 (1997) (reporting a suicide rate for Indian youths of 1,000 to 10,000 times [the source intends "percent"] higher than for non-Indian youths).
186. STRICKLAND, *supra* note 184, at 53.
187. *See* GETCHES ET AL., *supra* note 36, at 23.
188. *Id.* at 25.
189. *See* Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources*, 29 TULSA L.J. 541, 567 (1993).
190. Wood, *supra* note 168, at 1481 (citations omitted).
191. *See* GETCHES ET AL., *supra* note 36, at 23.
192. Wood, *supra* note 168, at 1481-83 (citations omitted). *See generally* Richard Du Bey et al., *Protection of the Reservation Environment: Hazardous Waste Management on Indian Lands*, 18 ENVTL. L. 449 (1988).
193. *See supra* notes 73-74 and accompanying text..
194. *See generally* Judith Royster and Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581 (1989). For a discussion of international norms regarding self-determination over lands

- and natural resources, *see* ANAYA, INDIGENOUS PEOPLES, *supra* note 13, at 104-07.
195. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 326 (1983).
196. *See* Montana v. United States, 450 U.S. 544, 547 (1981).
197. *See generally* WHAT CAN TRIBES DO?, *supra* note 2.
198. *See* Stephen Cornell, *Sovereignty, Prosperity and Policy in Indian Country Today*, 5 COMMUNITY REINVESTMENT 5, 6 (Fed. Reserve Bank of Kansas City 1997), reprinted in GETCHES ET AL., *supra* note 36, at 721.
199. *See* Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in WHAT CAN TRIBES DO?, *supra* note 2.
200. *See infra* Part IV.
201. One must be careful not to interpret this statement too broadly. Tribes, in fact, have exercised and continue to exercise an altogether remarkable level of inherent sovereignty given the “actual state of things.”
202. As William Inge noted, “[i]t is useless for the sheep to pass resolutions in favour of vegetarianism, while the wolf remains of a different opinion.” WILLIAM RALPH INGE, OUTSPOKEN ESSAYS, FIRST SERIES (1919). “Indicative of the depths of despair induced among native people . . . are extreme rates of alcoholism, drug addiction, familial violence and teen suicide prevailing in most indigenous communities.” CHURCHILL, FANTASIES, *supra* note 180, at xiii.
203. Abraham Maslow established the Hierarchy of Needs in 1970, from physiological needs through safety, then love and belongingness, to esteem, and finally, self-actualization needs. ABRAHAM H. MASLOW, MOTIVATION AND PERSONALITY (2d ed. 1970). Physiological needs include, *inter alia*, hunger, thirst, warmth, and pain avoidance. The categories of Love and Belongingness and Esteem are sociocultural needs, and self-actualization needs are growth-oriented needs, including cognitive understanding and aesthetics. SPENCER A. RATHUS, PSYCHOLOGY 340, 459 (5th ed. 1993).
204. *See supra* Part II.B.
205. In a quest for the moral basis for the application of federal law over indigenous peoples in the forty-eight contiguous states, the author has attempted, for several years, to identify any Indian pleased with the exchange of traditional life-ways (including matrifocality and egalitarianism) for “civilization,” reservations for nearly ninety-eight percent of the land mass, CHURCHILL, PREDATOR, *supra* note 153, at 112, and self-governance for “the protection of the United States.” To date, the search has failed to identify such a happy and willing ward, although high marks have been given for, in alphabetical order, corrugated cardboard, Daylight Savings Time, pizza, and reality television. Given their pre-Columbian existence in the Western Hemisphere, the following highly-praised items have been disqualified: democracy, practiced in numerous nations, most notably the Iroquois Confederacy, SHARON O’BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 17-20 (1989); DONALD A. GRINDE, THE IROQUOIS IN THE FOUNDING OF THE AMERICAN NATION (1977); chocolate, JACK WEATHERFORD, INDIAN GIVERS: HOW THE INDIANS OF THE AMERICAS TRANSFORMED THE WORLD 206-08 (as well as two-thirds of today’s vegetal foodstuffs, CHURCHILL, PREDATOR, *supra* note 153, at 249); the suspension bridge, *id.* at 248; and aspirin, WEATHERFORD, *supra*, at 185-86.
206. John Bartlett, FAMILIAR QUOTATIONS (10th ed. 1919).
207. *See* CHURCHILL, FANTASIES, *supra* note 180, at 149:
[A]ccepting the role of being a colonizer means agreeing to be a non-legitimate person, that is, a usurper. To be sure, a usurper claims his place and, if need be, will

defend it with every means at his disposal. . . He endeavors to falsify history, he rewrites laws, he would extinguish memories — anything to succeed in transforming his usurpation into legitimacy.

- Id.* (quoting ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* (1965)) (alterations in original).
208. The twisting of history for particular purposes is but one of the tools used by the Rehnquist Court in its pursuit of result-oriented jurisprudence; others include ignoring or misapplying the Canons of Construction, injecting a balancing of non-Indian interests where unsupported by precedent, and resurrecting assimilationist policies long since rejected by Congress. *See, e.g.*, David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001) [hereinafter Getches, *Beyond Indian Law*]; Getches, *Subjectivism*, *supra* note 77; Judith V. Royster, *Decontextualizing Federal Indian Law: The Supreme Court's 1997-98 Term*, 34 TULSA L.J. 329 (1999); Royster, *Legacy*, *supra* note 55; Russel L. Barsh & James Y. Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979); *see also* Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L. REV. 1, 24 (1995) (describing Rehnquist's Indian law opinions as "advocating and implementing a judicial termination policy"). The Rehnquist Court has arguably taken Indian law toward the surreal, having removed Marshall's concepts from context and to apply them in remarkably varied circumstances, only to then stretch those decontextualized concepts to the point that they strain credulity. *See generally* Getches, *Subjectivism*, *supra* note 77. Indeed, the current Court has gone so far afield that Marshall's opinions permitting conquest have come to be viewed as relatively pro-Indian. *See, e.g.*, Williams v. Lee, 358 U.S. 217, 219 (1959) (Black, J.) (describing Worcester v. Georgia as one of Marshall's "most courageous and eloquent" in its guarding of Indian authority); Getches, *Subjectivism*, *supra* note 77, at 1581 n.24; Frickey, *Marshalling*, *supra* note 109, at 433-34.
209. 435 U.S. 191 (1978).
210. *Id.* at 195.
211. Getches, *Subjectivism*, *supra* note 77, at 1597.
212. *See, e.g.*, Getches, *Beyond Indian Law*, *supra* note 207, at 274 (describing the rule in *Oliphant* as "aberrant"); Getches, *Subjectivism*, *supra* note 77, at 1598; Frickey, *Coherence*, *supra* note 2, at 1769 ("The modern decline of tribal geographical sovereignty can be traced from *Oliphant* . . ."); N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353 (1994); Royster, *Legacy*, *supra* note 207, at 43-48; Peter C. Maxfield, *Oliphant v. Suquamish: The Whole is Greater than the Sum of the Parts*, 19 J. CONTEMPORARY L. 391 (1993); Kevin Meisner, Comment, *Modern Problems of Criminal Jurisdiction in Indian Country*, 17 AM. INDIAN L. REV. 175, 191-93 (1992); Williams, *Algebra*, *supra* note 89, at 267-74; Note, *The Legal Trail of Tears: Supreme Court Removal of Tribal Court Jurisdiction over Crimes by and Against Reservation Indians*, 20 NEW ENG. L. REV. 247, 273 (1985-86); Catherine B. Stetson, *Decriminalizing Tribal Codes: A Response to Oliphant*, 9 AM. INDIAN L. REV. 51, 54 (1981); Russel L. Barsh & James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609, 616-35 (1979); Note, *Criminal Jurisdiction and Enforcement Problems on Indian Reservations in the Wake of Oliphant*, 7 AM. INDIAN L. REV. 291 (1979).
213. *See* Getches, *Subjectivism*, *supra* note 77, at 1595. *See also supra* notes 80-121 and accompanying

- text.
214. *Oliphant*, 435 U.S. at 204 (“Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, . . .”); *see id.* at 208 (holding the Treaty of Point Elliott, 12 Stat. 927 (1855) was insufficient to remove criminal jurisdiction over non-Indians).
215. *Id.* at 198.
216. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-41 (2003).
217. *See id.* at 193. The Court further conceded “Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts.” *Id.* at 211-12.
218. *See* Maxfield, *supra* note 211, at 402.
219. Getches, *Subjectivism*, *supra* note 77, at 1597.
220. *See supra* note 211.
221. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978).
222. *Id.* at 210.
223. Getches, *Subjectivism*, *supra* note 77, at 1596 n.97.
224. *See id.* (citing *Talton v. Mays*, 163 U.S. 376, 384 (1896)).
225. *See id.*; Maxfield, *supra* note 211, at 396-97.
226. *See Oliphant*, 435 U.S. at 211.
227. *Id.* at 193.
228. *Id.* at 211-12.
229. 109 U.S. 556, 571 (1883).
230. *Oliphant*, 435 U.S. at 210-11.
231. *Id.* at 194.
232. Royster, *Legacy*, *supra* note 207, at 46 n.241.
233. *See* Maxfield, *supra* note 211, at 402-39.
234. *See id.* at 402-05.
235. *Id.* at 399.
236. 2 Op. Atty. Gen. 693 (1834).
237. 7 Op. Atty. Gen. 174 (1855).
238. Maxfield, *supra* note 211, at 406-07.
239. HELL ON THE BORDER 22 (Jack Gregory & Rennard Strickland eds., 1971).
240. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 201 n.10 (1978).
241. *See Ex Parte Kenyon*, 14 F. CAS. 353, 355 (W.D. Ark. 1878) (citing Rev. Stat. 1873 § 2146).
242. 77 I.D. 113 (1970).
243. *Oliphant*, 435 U.S. at 201 n.11.
244. Maxfield, *supra* note 211, at 407-08.
245. *See id.* at 397 n.9:

So long as the complete and independent sovereignty of an Indian tribe was recognized, its criminal jurisdiction, no less than its civil jurisdiction, was that of any sovereign power. It might punish its subjects for offenses against each other or against aliens and for public offenses against the peace and dignity of the tribe. Similarly, it might punish aliens within its jurisdiction according to its own laws and customs. Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government.

- Powers of Indian Tribes 55 Interior Dec. 14, 57 (1934) (citation omitted).
246. 435 U.S. 313, 328 (1978).
247. L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 848 (1996).
248. 2 Op. Att’y Gen. 110, 134 (1828); *see supra* note 82.
249. *Oliphant*, 435 U.S. at 204-05.
250. AMERICAN INDIAN POLICY REVIEW COMMISSION, 1 FINAL REPORT III (1977) [hereinafter COMMISSION REPORT]; *see* Maxfield, *supra* note 211, at 409.
251. COMMISSION REPORT, *supra* note 251, at 114, 117, 152-54. The Oliphant Court criticized the Report as failing to deny “that for almost 200 years . . . the three branches of the federal government were in apparent agreement that Indian tribes do not have jurisdiction over non-Indians.” 435 U.S. at 206 n.15. Obviously, in finding that tribes retained such jurisdiction unless explicitly taken by Congress, the Commission found no such shared assumption. *See* Maxfield, *supra* note 211, at 409-10.
252. *See* H.R. Rep. No. 474, 23d Cong., 1st Sess., 36 (1834).
253. Maxfield, *supra* note 211, at 422.
254. *See* Meisner, Comment, *supra* note 211, at 191-93.
255. Maxfield, *supra* note 211, at 418 (citing Articles of a Treaty, January 9, 1789, U.S.-Wyandot, Delaware, Ottawa, Chippewa, Pattawatima and Sac Nations, art. IX, 7 Stat. 28, 30; Articles of a Treaty, January 31, 1786, U.S.-Shawano Nation, art. VII, 7 Stat. 26, 27; Articles of a Treaty, January 10, 1786, U.S.-Chickasaw Nation, art. IV, 7 Stat. 24, 25; Articles of a Treaty, January 3, 1786, U.S.-Choctaw Nation, art. IV, 7 Stat. 21, 22; Articles (Treaty with the Cherokee Nation), Nov. 28, 1785, art. V, 7 Stat. 18, 19).
256. For a critique of less significant sources upon which the Court relied, *see generally* Maxfield, *supra* note 211.
257. *See id.* at 431-32.
258. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 n.6 (1978).
259. 450 U.S. 544, 564-67 (1981). Like *Oliphant*, the Montana decision has been widely criticized by scholars in the field. *See, e.g.*, Royster, *Legacy*, *supra* note 207, at 46-50; Getches, *Subjectivism*, *supra* note 77, at 1608-13; John P. LaVelle, *Strengthening Tribal Sovereignty Through Indian Participation in American Politics: A Reply to Professor Porter*, 10 KAN. J.L. & PUB. POL’Y 533, 579 n.209 (2001) (criticizing the Court for “importing racist assumptions” into its decision-making); Carl G. Hakansson, *Indian Land-Use Zoning Jurisdiction: An Argument in Favor of Tribal Jurisdiction Over Non-Member Fee Lands Within Reservation Boundaries*, 73 N.D. L. REV. 721, 729-31 (1997); S. J. Bloxham, *Special Recent Developments, Tribal Sovereignty: An Analysis of Montana v. United States*, 8 AM. INDIAN L. REV. 175 (1980); Anthony A. Lusvardi, Note, *Montana v. United States — Effects on Liberal Treaty Interpretation and Indian Rights to Lands Underlying Navigable Waters*, 57 NOTRE DAME LAW. 689 (1982).
260. *Id.* at 565.
261. *Id.* at 566.
262. *Id.* at 563-65.
263. *Id.* at 564 n.13. Of course, as Professor Royster has noted, the Crow tribe had no reason to regulate non-Indian conduct on non-Indian fee land that had not yet been allotted. *See* Royster, *Legacy*,

- supra* note 207, at 48 n.260.
264. 522 U.S. 329 (1998).
265. *Id.* at 333.
266. See A.J. Taylor, Note, *A Lack of Trust: South Dakota v. Yankton Sioux Tribe and the Abandonment of the Trust Doctrine in Reservation Diminishment Cases*, 73 WASH. L. REV. 1163 (1998).
267. Treaty with Yankton Tribe of Sioux, April 19, 1858, 11 Stat. 743.
268. *Yankton Sioux Tribe*, 522 U.S. at 333-34.
269. See *id.* at 335 (alterations in original).
270. Ch. 119, 24 Stat. 388 (codified at 25 U.S.C. § 331 (2003)).
271. See *Yankton Sioux Tribe*, 522 U.S. at 337-38. As was sometimes the case in such matters, *see, e.g.*, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), there were allegations of fraud in obtaining tribal member signatures, 522 U.S. at 338, but Congress ratified the agreement regardless. Act of Aug. 15, 1894, 28 Stat. 286.
272. *Id.* at 337 n.1.
273. *Id.* at 341-42.
274. *Id.* at 342 (quoting *South Dakota v. Yankton Sioux Tribe*, 99 F.3d 1439, 1457 (1996)).
275. 99 F.3d at 1447.
276. Given that the savings clause so broadly stated a preference to preserve the provisions of the Treaty of 1858, the Eighth Circuit construed the remaining provisions narrowly so as to avoid unnecessary conflict with the Treaty. See *id.* at 1447.
277. *Id.* at 1457.
278. *Yankton Sioux Tribe*, 522 U.S. at 346. For support for this conclusion, the Court cited *Solem v. Bartlett*, 465 U.S. 463, 468 (1984), a case that held that a similar act did not diminish the reservation. The *Solem* Court stated just below the cited reference:
- Although the Congresses that passed the surplus land acts anticipated the imminent demise of the reservation and, in fact, passed the acts partially to facilitate the process, we have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act. Rather, it is settled law that some surplus land Acts diminished reservations, *see, e.g.*, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584; *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and other surplus land Acts did not, *see, e.g.*, *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962). The effect of any given surplus land Act depends on the language of the act and the circumstances underlying its passage.
- Id.* at 468-69. Unfortunately, the Court did not view the admittedly “unusual” language of the savings clause to protect the tribe from diminishment. *Yankton Sioux Tribe*, 522 U.S. at 348.
279. *Id.*
280. See *id.* at 345-46.
281. *Id.* at 347.
282. *Id.* at 347. As part of the proposed arrangement under the settlement, any adult member of the tribe was to be bribed with a \$20 gold medallion and those who were owed back wages for military service to the United States would finally be paid. See *id.* at 336 n.1 (citing 28 Stat. 314-18). Even

with these inducements, the federal negotiators had difficulty convincing the tribal members, so Commissioner John J. Cole resorted to threats:

I want you to understand that you are absolutely dependent upon the Great Father to-day for a living. Let the Government send out instructions to your agent to cease to issue these rations, let the Government instruct your agent to cease to issue your clothes. . . . Let the Government instruct him to cease to issue your supplies, let him take away the money to run your schools with, and I want to know what you would do. Everything you are wearing and eating is a gratuity. Take all this away and throw this people wholly upon their own responsibility to take care of themselves, and what would be the result? Not one-fourth of your people could live through the winter, and when the grass grows again it would be nourished by the dust of all the balance of your noble tribe.

Id. at 346-47 n.11. Justice O'Connor, writing for a unanimous court, sanctioned these threats as an inducement and limited the savings clause to the continuance of annuities, not the 1858 borders. *See id.* at 348.

283. These include an 1896 federal statute referring to “homestead settlers on the Yankton Indian Reservation,” *id.* at 354 (citing 29 Stat. 16), references to the lands still being “on the ‘Yankton Indian Reservation,’” *id.* at 354 n.5, several executive orders, and an Opinion of the Solicitor of the Department of the Interior, Felix S. Cohen, *id.* at 355 n.6.

284. *See id.* at 357. In reviewing the same issue for the Klamath River Reservation, the Court noted no need to examine the history surrounding a settlement act:

The presence of allotment provisions in the 1892 Act cannot be interpreted to mean that the reservation was to be terminated. This is apparent from the very language of 18 U.S.C. § 1151, defining Indian country “notwithstanding the issuance of any patent” therein. More significantly, throughout the period of 1871-1892 numerous bills were introduced which expressly provided for the termination of the reservation and did so in unequivocal terms. Congress was fully aware of the means by which termination could be effected.

Mattz v. Arnett, 412 U.S. 481, 504 (1973) (citing 15 Stat. 221 (1868) (“the Smith River reservation is hereby discontinued”); Act of July 1, 1892, ch. 140, 27 Stat. 63 (providing that the North half of the Colville Indian Reservation “be, and is hereby, vacated and restored to the public domain”).

285. In addition to the cases reviewed above, Justice Rehnquist employed a similar historical approach in his concurrence in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 176 (1980) (Rehnquist, J. concurring in part and dissenting in part). In his opinion, Justice Rehnquist relied on historical conceptions of tribal sovereignty in order to avoid the absence of a specific Congressional act limiting tribal sovereignty. *See Getches, Subjectivism, supra* note 77, at 1633-34:

He urged that early notions of tribal powers and immunities as reflected in historical records, generally reporting the perceptions of non-Indians, should determine the outcomes. Thus, unless a review of historical information showed actual tribal exercise of the specific type of jurisdiction, Rehnquist would require an act of Congress to preempt state law. . . . [In both *Oliphant* and *Colville*, he] indulged in a search for historical indicators as to how Indian sovereignty should be treated rather

- than a search for congressional limitations.
286. 616 A.2d 210 (1992), *cert. denied*, 507 U.S. 911 (1993). For a critique of the case, see Charles P. Lord & William A. Shutkin, *Environmental Justice and the Use of History*, 22 B.C. ENVTL. AFF. L. REV. 1 (1994).
287. *Id.* at 213 (quoting *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835)).
288. *Id.*
289. *Id.* (quoting *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 248 (1985)).
290. *Id.* (internal quotations omitted).
291. *Id.* at 214.
292. *Id.* at 221.
293. *Id.*
294. *Id.* at 218.
295. *Id.* at 215.
296. *Id.*
297. *Id.* The text of the Royal Proclamation of 1763, worth reprinting at length, stated in part:
Tribes of Indians . . . should not be . . . disturbed in the Possession of such Parts of our . . . Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds. We do therefore, . . . declare it to be our Royal Will and Pleasure . . . that no Governor . . . in America . . . grants Warrants of Survey, or pass Patents for any Lands . . . or upon any lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians. And, We . . . strictly forbid . . . all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained.
And, We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands, which not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.
Id. at 215 n.6 (omissions in original).
298. *Id.*
299. *Id.* at 216.
300. *Id.*
301. *See id.*
302. *Id.*
303. *Id.* at 217.
304. *Id.*
305. *See id.*
306. *Id.* at 218.
307. *Id.* at 219.
308. *See id.* at 220.
309. *Id.* at 218.
310. *See id.* at 215.
311. *See id.* at 218.

312. *See id.* at 219.
313. *Id.* at 220.
314. *Id.*
315. *See id.* at 220-21. Remarkably, the court acknowledged that Congress' understanding was based on characterization of the grants as valid by Vermont's representations, even though those characterizations were false. *See id.* at 219-20.
316. *See supra* note 209 and accompanying text.
317. *Id.* at 214.
318. *See supra* note 210 and accompanying text.
319. *Id.* at 221.
320. *Id.*
321. *See id.*
322. *See* S. James Anaya, *The Rights of indigenous Peoples and International Law in Historical and Contemporary Perspective*, 1989 HARV. INDIAN L. SYMP. 192 (1990):
The assertion of indigenous rights through domestic law is an effort to secure from within state structures adequate accommodation for the historical attributes of tribal communities. Faced with the limitations of domestic structures, indigenous groups have sought the same end from outside of them through recourse to international law and its presumptive authority to constrain the state.
323. Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 747 (2001).
324. *See* JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (William Rehg trans., 1996).
325. *See* BRUCE A. ACKERMAN, *SOCIAL JUSTICE AND THE LIBERAL STATE* (1980). The exercise may also avoid the oscillation between pro- and anti-market policies that have been prevalent the developing world. *See* Amy L. Chua, *Global Capitalism and Nationalist Backlash: The Link Between Markets and Ethnicity*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 17 (1999).
326. For an interesting analysis of the psychological factors associated with an individual's hopelessness — the sense that one's actions are futile — *see* MARTIN E.P. SELIGMAN, *LEARNED OPTIMISM: HOW TO CHANGE YOUR MIND AND YOUR LIFE* 48-70 (1998).
327. That is, to remember to see themselves as a people. *See* Rachel San Kronowitz et al., *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 600 (1987) (“[W]henver in the course of history a people has become aware of being a people, all definitions have proved superfluous.” (alterations in original)).
328. Patrice H. Kunesh, *Transcending Frontiers: Indian Child Welfare in the United States*, 16 B.C. THIRD WORLD L.J. 17, 17 (1996).
329. The full content and considerations of these inquiries will be explored in future articles.
330. This may include rules regarding and defining property, establishing obligations based on promises or harms, defining administrative and judicial processes, or establishing civic rights and responsibilities.
331. Although defining sustainable development is complicated, a simple description is found in the United Nations Brundtland Report, *Our Common Future*: development that “meets the needs of the present without compromising the ability of future generations to meet their own needs.” WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE* 8 (1987). For insight into some of the cultural considerations that will enter the discourse over balancing economic and

- environmental balancing, and a thorough discussion of the philosophical underpinnings of dominant environmental policies and a comparison of Native American and dominant culture environmental ethics, see Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VERMONT L. REV. 225 (1996). See also Dean B. Suagee, *Tribal Self-Determination and Environmental Federalism: Cultural Values as a Force for Sustainability*, 3 WIDENER L. SYMP. J. 229 (1998).
332. Thus, the “actual state of things” need not deter tribal citizens from exploring the possible roles of government.
333. Conference participants may recall that the author urged tribes to modify existing or create new constitutions as an act in furtherance of tribal autonomy. During the discussion, Professor Judith V. Royster raised the valuable question, “Why must tribal governments be constitutional?” In response to that question, the author has further expanded the thesis. Although the case may be made for constitutional governments, particularly in terms of compatibility with other members of the international community, the decision over the form of government ought to be left to the tribes.
334. In this case, “social” is used interchangeably with “cultural” for variety. Either term is intended to be interpreted broadly to include “the sum total of ways of living built up by a group of human beings, which is transmitted from one generation to another.” *Culture*, THE AMERICAN COLLEGE DICTIONARY 295 (Random House 1962).
335. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 546 (1832).
336. Ariel Sharon, Prime Minister of Israel, “made famous the phrase ‘facts on the ground’ to describe putting a settlement in the West to make it difficult to strike a deal to hand land over to Palestinians.” Alissa J. Rubin, *Tiny Israel Outposts Loom Large on Mideast Road Map*, June 6, 2003, L.A. TIMES A1.
337. Pub. L. No. 97-473 (codified as amended at 26 U.S.C. § 7871 (2003)). The Act was passed by Congress for the purpose of “strengthen[ing] tribal governments significantly by providing additional sources of financing and by eliminating the unfair burden of taxes.” 127 Cong. Rec. S5666, S5667 (daily ed. June 2, 1981) (remarks of Sen. Wallop (R-Wyo.)). The act allows individuals and businesses to deduct tribally-imposed taxes for federal income tax purposes, as well as charitable donations to tribal governments. 26 U.S.C. § 7871(a)(3). The act also gives tribal governments the same excise tax exemption enjoyed by states for purchases of fuel, telecommunications equipment, and specified manufactured goods. *Id.* § 7871(b).
338. See, e.g., Clean Water Act, 33 U.S.C. § 1377(e) (2002):
The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II . . . to the degree necessary to carry out the objectives of this section, but only if—
(1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
(2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and
(3) the Indian tribe is reasonably expected to be capable, in the Administrator’s

- judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.
339. 25 U.S.C. §§ 450a-450n (allowing tribes to assume administrative authority over federally funded programs). *See also, e.g.,* GETCHES ET AL., *supra* note 36, at 232.
340. The Blackfoot Confederacy was comprised of three independent tribes sharing a common language and culture. The southern Pikuni, or Peigans, eventually came to reside in Montana, while the Kainah, or Bloods, northern Pikuni, and Siksika settled in Alberta. HANA SAMEK, *THE BLACKFOOT CONFEDERACY 1880-1920: A COMPARATIVE STUDY OF CANADIAN AND U.S. INDIAN POLICY* 11 (1987). The DRAFT CONST. uses the terms Apatohsippiikani, Kainaiwa, Siksika, and Amskaapiikani. DRAFT CONST. art. 1.
341. SAMEK, *supra* note 338, at ix. The Nation's original territory was bounded on the north by the North Saskatchewan River in what is now Alberta, Canada and extended south to the Yellowstone River in what is now the State of Montana. The Nation's land holdings began at the Continental Divide in the West, and the eastern border was set at the confluence of the North and South Saskatchewan Rivers. *See id.* In the *Lame Bull Treaty* of 1855, the United States formally recognized that the territory of Blackfoot Nation extended as far north as the forty-ninth parallel. *Treaty with the Blackfeet*, Oct. 17, 1855, art. IV, 11 Stat. 657, *reprinted in* CHARLES J. KAPPLER, 2 *INDIAN AFFAIRS: LAWS AND TREATIES* 736, 737 (1904).
342. Telephone Interview with James M. Craven, Blackfoot Confederacy Solicitor General (Feb. 1, 2003).
343. *Cf.* Jennifer Nedelsky, *The Puzzle and Demands of Modern Constitutionalism*, 104 *ETHICS* 500, 503 (1994).
344. Telephone Interview with James M. Craven, Blackfoot Confederacy Solicitor General (Feb. 1, 2003).
345. *Id.*
346. *Id.*
347. *Id.*
348. The desired number of signatories will certainly satisfy the requirements for governmental revision in accordance with federal law. *See supra* Part II.B.1.
349. *See supra* Part II.B.2.
350. Telephone Interview with James M. Craven, Blackfoot Confederacy Solicitor General (Feb. 1, 2003).
351. S. AFR. CONST.
352. NETH. CONST.
353. *See, e.g.,* DRAFT CONST. arts. 5, 7, 9.
354. *See id.* art. 5 cl. 2.
355. *See, e.g., id.* art. 9, "All provisions and language of this Constitution shall be construed and interpreted to protect, enhance and foster the rights, property, resources, culture, traditions, survival and prosperity of the Blackfoot Nation and People."
356. Regarding the strong statements of national independence contained in the Draft Constitution, a critic may express concern that it is a utopian vision, part of a quixotic quest that is so inconsistent with the actual state of things as to be absurd. The initial response to such a concern may well be, "Who cares?" The present state of affairs is sufficiently grim that something needs to be done.

Even plans as provocative as attitudinal freedom need to be considered no matter how “unrealistic.” Moreover, as there is no moral foundation for neo-colonialism, there remains merely power and the “facts on the ground” with which we must contend. As Professor Williams passionately stated:

I can only take comfort from the fact the Uncle Tom’s Cabin was written despite the “actual state of things” (the ASOT), Rosa Parks rode where she damned well wanted despite the ASOT, Cesar Chavez passed around union cards despite the ASOT, Sitting Bull fought the Seventh Cavalry despite the ASOT, the Passamaquodies demanded Maine back despite the ASOT, Cromwell and the Puritans plotted to overthrow a King’s divine right and then chopped off his head despite the ASOT, and a bunch of radical exiles from the Norman Yoke got together in Philadelphia in 1776 and declared their independence from an Old World despot despite the ASOT. They all refused to live with the “actual state of things;” so too, Indian tribal people must refuse to learn to live with the Eurocentric myopia of a vision which cannot see beyond the actual state of things in Federal Indian law. . . . Indian people will never secure the most fundamental of human rights, the right to true self-determination, until the lie of words sustained by Federal Indian legal law and its blind obeisance to the Discovery Doctrine and the closely related Congressional plenary power doctrine can no longer be lived with as the “actual state of things.”

Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia*, 30 ARIZ. L. REV. 439, 456-57 (1988).

357. *See* DRAFT CONST. art. 6.
358. *See id.* arts. 3, 5 cl. 1. The reassertion of independence does not, however, waive claims against or responsibility for the United States and Canada. *See id.* arts. 6, 10.
359. *See id.* art. 10.
360. *See id.* art. 8.
361. *See id.* art. 3.
362. *Id.* art. 5 cl. 1.
363. *Id.* art. 44.
364. *Id.* art. 62.
365. The drafters largely severed determinations of citizenship from race. *See id.* arts. 1, 15, 16, 17. Citizenship in the Nation may be attained by recognition of an applicant having “some Blackfoot ancestors” or through naturalization. *See id.* art. 16. The requirement of a certain degree of Indian blood to qualify for tribal citizenship was a policy originated by the occupying governments, a policy that has been likened to a “formal eugenics code.” *See* CHURCHILL, STRUGGLE, *supra* note 145, at 49, 51, 421.
The Draft Constitution allows citizens to retain citizenship in other nations, but stresses that Blackfoot citizenship is paramount. *See id.* art. 17.
366. *Cf.* U.S. CONST. amends. I-X.
367. *See* DRAFT CONST. arts. 26, 27.
368. *See id.* art. 25. The Constitution avoids the internal contradictions of asserting freedom of religion (including non-religion) while specifically identifying the central sacred figure of a particular religious tradition. *Cf.* U.S. CONST.
369. *See id.* art. 27.

370. *See id.* arts. 32, 33.
371. *See id.* art. 76.
372. *See id.* art. 37. The right to consideration for habeas corpus relief is also guaranteed. *See id.* art 63. Due process rights for the accused are stressed again in the Judiciary Chapter. *See id.* art. 76.
373. *See id.* art. 5, cl. 2 (stating that the purposes for which one may “keep and bear arms” are “for hunting, personal protection, and militia responsibilities). The government has the power of conscription over citizens and non-citizens residing in the territory. *See id.* art. 31.
374. *See id.* art. 36.
375. *See id.* art. 34.
376. *See id.* arts. 29, 33.
377. *See id.* art. 5, cl. 2.
378. *See id.* art. 30.
379. *See id.* art. 5, cl. 2.
380. *See id.* art. 42.
381. *See id.* art. 43.
382. *See id.*
383. *See id.* arts. 39, 43.
384. 5 U.S.C. § 552 (2000).
385. *See* DRAFT CONST. art 60.
386. *See id.* arts. 5, 23 (establishing right to petition government).
387. *See id.* art. 40.
388. *Id.* art. 14.
389. *See id.* art. 3.
390. *Id.* art. 13.
391. *See id.* art 11, cl. 2.
392. *Id.* art. 45.
393. *See id.* arts. 46–50.
394. *See id.* art. 46.
395. *See id.* arts. 54–64.
396. *See id.* arts. 51–53.
397. *Id.* art. 47.
398. *Id.* art. 48. The Chief must be at least twenty-one years of age. *See id.* Provisions for impeachment are found in DRAFT CONST. art. 75:
Any officer holder of whatever level, including the Principal Chief and Advisors, may be impeached for cause to be adjudicated and reviewed for Constitutionality and Due Process by the Supreme Court of the Blackfoot Nation. Impeachment may be initiated after conviction of crimes to include (but not limited to) treason, moral turpitude, corruption, loyalties and allegiances not consistent with the survival and prosperity of the Blackfoot Nation, abuse of power and authority, perjury, corruption in elections and other impeachable offenses to be determined by the Principal Chief, Advisors and Representatives.
399. *Id.* art. 47.
400. *See id.* art. 50.

401. *Id.* art. 51.
402. *See id.*
403. *See id.* art. 52. Advisors must be at least twenty-one years of age. *See id.*
404. *See id.* art. 54. Like Advisors, Representatives must be at least twenty-one years of age. *See id.* art 55.
405. *Id.* art. 56.
406. *Id.* art. 55.
407. *See id.* art. 64.
408. *Id.* art. 70.
409. *See id.* art. 65. The differentiation between criminal and civil wrongs “is rejected as dangerous to the survival and prosperity of the Blackfoot Nation.” *Id.*
410. *Id.* art. 66.
411. *Id.* art. 70.
412. *See id.*
413. *Id.* art. 67.
414. *Id.* art. 74.
415. *See id.* art. 67.
416. *See* Kunesh, *supra* note 328, at 17.