The American Indian Law Program and Getches-Wilkinson Center for Natural Resources, Energy & the Environment *present*

Free, Prior and Informed Consent: Pathways for a New Millennium

University of Colorado Law School ~ November 1, 2013

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), along with treaties, instruments, and decisions of international law, recognizes that indigenous peoples have the right to give "free, prior, and informed consent" to legislation and development affecting their lands, natural resources, and other interests, and to receive remedies for losses of property taken without such consent. With approximately 150 nations, including the United States, endorsing the UNDRIP, this requirement gives rise to emerging standards, obligations, and opportunities – and creates considerable uncertainty -- for governments, industries, and investors who work with indigenous peoples.

In this conference, the very first to address "FPIC" on a global and national scale, Colorado Law convenes leading experts to discuss legal standards, best practices, and new partnerships with respect to FPIC implementation in natural resource development, climate change, and cultural heritage matters. Join us for a cutting-edge, high-level discussion of interest to attorneys, indigenous nations, governmental agencies, NGO's, environmental advocates, institutional investors, and industry leaders in energy, natural resources, and others.

Highlights include an opening keynote address by U.S. Assistant Secretary for Indian Affairs Kevin Washburn (invited) and an evening book lecture and signing by human rights advocate and author Walter Echo-hawk.

The conference is free and open to the public. All participants must register at:
https://cuboulder.qualtrics.com/SE/?SID=SV_77EcDjeHBZOlwFv

Approved for 8 CLE credits

Conference Location: Wittemyer Courtroom, Wolf Law Building, 2450 Kittredge Loop Road, Boulder, CO 80309

AMERICAN INDIAN LAW PROGRAM
University of Colorado Law School

GETCHES WILKINSON CENTER
FOR NATURAL RESOURCES, ENERGY, AND THE ENVIRONMENT

Conference Agenda ~ November 1, 2013

Unless otherwise noted, all events are in Wittemyer Courtroom.

8:30 **Breakfast**

9:00-9:10 **Welcome & Introduction by Dean Phil Weiser**

9:10-9:45 **Opening Keynote Address**
Kevin Washburn, Asst. Secretary for Indian Affairs, U.S. Dept. of Interior (invited)

9:45-11:00 **Introduction to "Consent" in Theory and Practice**
Richard Collins (Moderator), Colorado Law
Tim Coulter, Indian Law Resource Center
Matthew Fletcher, Michigan State University Law School
Calvin Lee, Navajo Nation Human Rights Commission
Rebecca Tsosie, Arizona State University College of Law

11:00-11:15 **Coffee Break: Boettcher Hall**

11:15-12:30 **FPIC in Land & Natural Resources**
Carla Fredericks (Moderator), Colorado Law
Rebecca Adamson, First Peoples Worldwide
Dan Morrison, First Peoples Worldwide
Shelley Alpern, Clean Yield Asset Management
Danika Billie Littlechild, International Indian Treaty Council
Nicholas Cotts, Newmont Mining Corporation

12:45-2:00 **Luncheon & Roundtable Discussion: "Hot Topics in FPIC" (Law School Café)**
Charles Wilkinson (Moderator), Colorado Law
Suzanne Benally, Cultural Survival
Kim Gottschalk, Native American Rights Fund
Ryan Seelau, Native Nations
Jennifer Weddle, Greenberg Traurig LLP

2:15-3:30 **Consent & Culture: Indigenous Lands & Traditional Knowledge**
Kristen Carpenter (Moderator), Colorado Law
Susan Anthony, U.S. Patent & Trademark Office
Preston Hardison, Tulalip Tribes
Angela Riley, UCLA Law School

3:45-5:00 **Climate Change & The Environment**
Brad Udall (Moderator), Colorado Law
Margaret Hiza Redsteer, U.S. Geological Service
Amelia Peterson, Governors' Climate & Forests Task Force
Roger Pulwarty, National Oceanic and Atmospheric Administration

5-6:00 **Reception: Boettcher Hall**

6-7:00 **Evening Lecture & Book Signing**
Walter Echo-Hawk, *In the Light of Justice: The Rise of Human Rights in Native America and the UN Declaration on the rights of Indigenous Peoples*

With special thanks to Dean Phil Weiser, CU NALSA, the Native American Rights Fund, CU Native Studies, Padraic McCoy, Circuit Media and:

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Free, Prior and Informed Consent: ILO 169 and the UNDRIP

Kelsey Peterson, American Indian Law Program Fellow
University of Colorado Law School Class of 2015

The principle of "free, prior and informed consent" is deeply tied to the concept of "self-determination," recognized as a right of all peoples in the United Nations Charter, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.[1] The United Nations' Declaration on the Granting of Independence to Countries and Peoples provides: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[2]

Two major instruments provide foundations for "free, prior, and informed consent" as it pertains specifically to indigenous peoples in international law: the International Labour Organization's Convention concerning Indigenous and Tribal Peoples in Independent Countries of 1989 ("ILO 169") [3] and the United Nations Declaration on the Rights of Indigenous Peoples of 2007 ("UNDRIP").[4] These two agreements include some different provisions and different language, but taken together, they emphasize free, prior, and informed consent as an emerging standard for governments and third parties interacting with indigenous peoples around the world.

Adopted in 1989, ILO 169 acknowledged the issues and challenges facing indigenous peoples around the world, including violations of their "fundamental human rights," and the "aspirations of these peoples" to self-governance, control of their ways of life, economic development and identity. ILO 169 outlines both the rights of indigenous groups and the obligations that governments have toward indigenous peoples.

ILO 169 includes one explicit use of "free and informed consent": in Article 16, free and informed consent is required, along with exceptional circumstances, to remove indigenous peoples from the lands they occupy. Beyond Article 16, ILO 169 recognizes the need to consult impacted indigenous peoples during government decisionmaking processes in several articles. For example, Article 15 outlines indigenous rights to participation in use, management and conservation of natural resources on their lands. In addition, Article 6 provides: "In applying the provisions of this Convention, governments shall: "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly and establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them." Under Article 6, these consultations shall "be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures." Other articles suggest meaningful consultation is required in a range of government decisions (alienation of land, education, and teaching of indigenous languages).

By its own terms, ILO 169 is only binding the ILO members who ratified it. As of 2013, twenty-two (22) counties had ratified ILO 169. The majority of those countries are in Central and South America, with a few in Europe (i.e. Norway, Denmark, Spain, and Netherlands) and a few in Asia and Africa (i.e.

[1] Charter of the United Nations, 24 October 1945, 1 UNTS XVI; International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 19, 1966, 993 U.N.T.S. 3. *See* also S. James Anaya, Indigenous Peoples in International Law 77-88 (1996).
[2] General Assembly Res. 1514 (XV), ¶ 2, UN. GAOR, 15th Sess. (Dec. 14, 1960), Art. 2.
[3] International Labour Organisation Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries 1989 (adopted by the General Conference of the International Labour Organisation, Geneva, June 29, 1989; entered into force, Sept. 5, 1991) [hereinafter ILO 169].
[4] Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, ¶ 12, U.N. Doc. A/RES/61/295 (Sept. 12, 2007) [hereinafter UNDRIP].

Nepal, Fiji, and Central African Republic). Notably but not surprisingly, the major settler governments (i.e. United States, Canada, Australia and New Zealand) did not ratify ILO 169. However, while ILO 169 is not binding on non-ratifying countries, it does serve as a set of best practices for the international community when making decisions that impact indigenous communities within their borders.

The UNDRIP furthers many of the same goals as ILO 169, but in many cases extends and broadens indigenous peoples' rights. Adopted by the UN General Assembly in 2007, the UNDRIP recognized that survival of indigenous communities depends on self-determination and cultural, spiritual and traditional practices.

The UNDRIP uses the language of "free, prior, and informed consent" ("FPIC") – contrasting with the terminology of "free and informed consent" and "consultation of ILO 169" – in a broad range of Articles. Article 10 provides: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return." Under Article 11, states must provide mechanisms to redress indigenous peoples who have lost cultural property taken without their FPIC. Article 19 requires states to obtain FPIC from indigenous peoples with respect to legislative or administrative measures that may affect those groups. Article 28 provides for redress when traditional territories are taken or damaged without the affected peoples' FPIC. Article 29 prohibits the storage or disposal of hazardous materials on indigenous peoples' territories without their FPIC. Article 32 requires states to obtain the FPIC of indigenous peoples before the approval of any resource development project of their lands or territories and to provide mechanisms for redress and measures for mitigation of any "environmental, economic, social, cultural or spiritual impact."

In addition to the express FPIC provisions of UNDRIP, the declaration as a whole uses strong language requiring the preservation of indigenous self-determination. Article 3 expressly recognizes the right of indigenous peoples to self-determination and that that right allows groups to freely pursue their own development. Article 18 recognizes the right for indigenous groups to "maintain and develop" their own decision making procedures and institutions. Article 29 recognizes the right of indigenous peoples to protect and conserve the environment on their lands and resources, including the responsibility of states to assist indigenous peoples in carrying out their environmental protection goals.

As a whole, while the UNDRIP potentially offers a more robust set of substantive obligations for states in their dealings with indigenous peoples, it does not carry the force of a treaty. While many more countries votes for UNDRIP than ratified ILO 169, the major settler states opposed the declaration. Since the vote to pass the UNDRIP, Canada, Australia and New Zealand changed their position and finally, in 2010, President Obama announced he would be reversing the Bush Administration's opposition to UNDRIP.

Taken together, the ILO 169 and UNDRIP outline the international community's move toward greater recognition and protection for indigenous peoples' rights worldwide. The scope and meaning of the term "free, prior, and informed consent" is currently developing through jurisprudence of bodies such as the Inter-American Court on Human Rights, statements of the UN Special Rapporteur on Indigenous Peoples Rights, as well as position papers and best practices by indigenous peoples, international organizations, industry associations, along with their advocates, partners, and others.[5]

[5] *See, e.g.*, David L. Deisley and Lloyd K. Lipsett, *Free Prior and Informed Consent: Observations on "Operationalizing" Human Rights for Indigenous Peoples*, 2013 NO. 2 RMMLF-INST PAPER NO. 2A (2013).

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Tribal Consent

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ARTICLE

TRIBAL CONSENT

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† Professor, Michigan State University College of Law. Director, Indigenous Law and Policy Center. J.D., University of Michigan Law School. Thanks to the panelists and attendees at the Third National People of Color Legal Scholarship Conference that offered comments and suggestions, most especially Kate Fort, Myriam Jaïdi, Bob Miller, and Ray Austin. Thanks also to the participants and commentators at the UCLA Critical Race Studies Speaker Series, especially Devon Carbado, Carole Goldberg, Jerry Kang, Gerald López, Angela Riley, and Addie Rolnick. Thanks to Tom Pack for the invitation to submit a paper to this journal. And *chi-miigwetch* as always to Wenona Singel. This paper is the third in a series of articles on American Indian tribal consent and resistance theory and practice. *See* Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973 (2010); Matthew L.M. Fletcher, *Resisting Congress: Free Speech and Tribal Law*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY (Kristen A. Carpenter, Matthew L.M. Fletcher, and Angela R. Riley eds., 2012).

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.[1]

American Indian law scholar Rick Collins first theorized the utility of consent theory in American Indian law and policy in his important essay, *Indian Consent to American Government*.[2] Professor Collins questioned whether Indian tribes ever "consented" to American government, and whether usual principles of consent theory "applied to Indians."[3] He noted that Indian treaties could have served as a proper vehicle for demonstrating consent, but so many of them involved "substantial coercion of the tribal party."[4] Collins concluded that while the United States often respected principles of consent with Indian tribes, violations of those consent principles have left some Indian tribes and individual Indians in "oppressive conditions."[5] Collins expressed dissatisfaction with strategies to eliminate these concerns about tribal consent such as the pursuit through the courts of true "tribal independence" due to the failures of such efforts in the past and poor likelihood of the success of those efforts in the future.[6]

Professor Collins' paper was prescient in many ways, especially in his conclusion that "[m]uch more tribal independence can be achieved within the existing system, by doing the hard work of building up tribal governments and improving tribal economies."[7] But the ability of Indian tribes to engage in that developmental process, while succeeding in many ways,[8] is significantly

1. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 19, U.N. Doc. A/RES/61/295 (Sep. 13, 2007).

2. Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989).

3. *Id.* at 371.

4. *Id.* at 373.

5. *Id.* at 386.

6. *Id.* at 386-87.

7. *Id.* at 387.

8. For studies of many tribal successes (and failures), see CHARLES F. WILKINSON, BLOOD STRUGGLE (2005), and HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION (2008).

hampered by the continued lack of tribal consent in modern American Indian law and policy. Now is an excellent time to return to Professor Collins' analysis —more than 20 years have passed since his prescription. I argue in this Article that the fundamental question of tribal consent continues to haunt Indian affairs, and will continue to do so unless it is rectified.

Consider the following hypotheticals that frame the outer limits of this discussion of consent theory and federal Indian law:

> A federally recognized Indian tribe[9] executes a treaty with the President of the United States, later ratified by the Senate, reserving a homeland for the tribe and its members for all time. The treaty requires the express consent of three-fourths of the adult males of the tribe to amend the treaty. The government seeks such consent at a later time for purposes of acquiring the tribal land base, procures the consent through arguably fraudulent means, and Congress enacts legislation effectuating the sale.[10]

> A non-Indian driving on a dirt road in the west crosses into Indian Country without even knowing it, although there is a sign posted at the reservation border that states: YOU ARE NOW ENTERING INDIAN COUNTRY AND CONSENT TO THE JURISDICTION OF THE TRIBE. The tribe in question has enacted an ordinance that holds any person who enters the reservation willingly has impliedly consented to tribal regulatory and adjudicatory authority.[11]

Both fact patterns involve issues of consent. Did the tribe consent to the sale of the land in the first case? According to the Supreme Court in *Lone Wolf v. Hitchcock*,[12] it doesn't even matter because Congress has plenary authority as trustee of tribal property to sell Indian lands (even to itself) and remit the

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9. A federally recognized Indian tribe is a legal term of art in federal Indian law. It means that the United States recognizes a legal and political relationship between the tribe and the federal government. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[4], at 140 (2005 ed.). There currently are 566 federally recognized tribes. *See* Press Release, Office of the Assistant Secretary-Indian Affairs, Echo Hawk Issues Reaffirmation of the Tejon Indian Tribe's Government-to-Government Status (Jan. 3, 2012), *available at* http://www.bia.gov/idc/groups/public/documents/text/idc015898.pdf (discussing the recent reaffirmation of the Tejon Tribe's status as a federally recognized Indian tribe); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 FED. REG. 66124, 66124 (Oct. 27, 2010) (listing the Shinnecock Indian Nation as the 565th tribe); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 FED. REG. 60810 (Oct. 1, 2010) (listing 564 Indian tribes).

10. This hypothetical is based on Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). *See generally* BLUE CLARK, LONE WOLF V. HITCHCOCK: TREATY RIGHTS & INDIAN LAW AT THE END OF THE NINETEENTH CENTURY 38-66 (1994).

11. This hypothetical is based on the recommendation of Indian affairs observers in the 1970s that tribes enacted implied consent ordinances in order to authorize assertion of tribal authority over nonmembers. *E.g.*, NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, JUSTICE AND THE AMERICAN INDIAN, VOL. 4: EXAMINATION OF THE BASIS OF TRIBAL LAW AND ORDER AUTHORITY 50-56 (1974).

12. 187 U.S. 553 (1903).

proceeds to the tribe (or to itself as guardian or trustee).[13] Consent is irrelevant.

Did the nonmember consent to the tribe's jurisdiction by entering the reservation? What if he had seen the sign and still crossed into the reservation anyway? According to the Supreme Court in cases such as *Atkinson Trading Co., Inc. v. Shirley*,[14] consent to tribal jurisdiction must be express, and is limited to the narrow subject areas of the express consent.[15] Otherwise the tribe has no jurisdiction. Literal, express consent is highly relevant.[16]

Tribal consent to federal statutes, regulations, and cases that decide matters critical to American Indian people and tribes long has been lacking. The nineteenth and twentieth century Supreme Court cases are replete with efforts by Indians and tribes to avoid the dictates of many of these laws and regulations that directly injured tribal interests, almost always to no avail.[17] Congress legislated, the Executive branch acted, and the Supreme Court either declined to act or upheld the law and its enforcement.[18] As recently as 1955, the Supreme Court has held that the taking of tribal property by federal agencies was a non-compensable taking.[19]

Federal Indian law—the law that governs federal-state-tribal relations[20] —

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13. *See id.* at 568 ("In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government."). *See also* United States v. Dann, 470 U.S. 39, 44-45 (1985) (holding that a tribal claim to land is extinguished under the Indian Claims Commission Act "when [judgment] funds are placed by the United States into an account in the Treasury of the United States for the Tribe pursuant to 31 U.S.C. § 724a").

14. 532 U.S. 645 (2001).

15. *See id.* at 656 (quoting E. RAVENSCROFT, THE CANTERBURY GUESTS; OR, A BARGAIN BROKEN act v, sc. 1.) ("A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another—it is not 'in for a penny, in for a Pound.'")

16. There was a time when consent was readily recognized. An 1834 legislative report includes the following language: "As to those persons not required to reside in the Indian Country, who voluntarily go there to reside, they must be considered as voluntarily submitting themselves to the laws of the tribes." H. R. Rep. No. 23-474, at 18 (1834), *excerpted in* MONROE E. PRICE, NATIVE AMERICAN LAW MANUAL 465 (1970).

17. For surveys of older cases, see RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 31-134 (1980), and DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 98-215 (2001).

18. The Court's invocation of aspects of the political question doctrine—as in, if the tribe loses, it can always petition Congress—is legion in Indian law cases. *See* Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN'S L. REV. 153, 178-79 n.131 (2008) (collecting dozens of cases).

19. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); *see also* WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 358-94 (2010); JOSEPH WILLIAM SINGER, PROPERTY § 15.4.1, at 766-69 (3rd ed. 2010) (criticizing *Tee-Hit-Ton*).

20. *See* DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR., AND MATTHEW L.M. FLETCHER, CASES AND MATERIALS ON FEDERAL INDIAN LAW 1-8 (6th ed. 2011).

has been dramatically altered in recent decades in part by the notion that non-Indians and non-tribal entities have not consented to assertions of tribal government authority over them.[21] This lack of consent is meaningful because Indian tribes are not beholden to the dictates of the American Constitution (nor could they be),[22] and so the nonmembers could be subject to governmental authority unfettered by individual constitutional rights.[23] The problem has best been identified by Professor Alex Aleinikoff as a "democratic deficit,"[24] wherein these nonmembers and nonmember-controlled entities have not participated in the tribal political process, and therefore should not be subject to tribal sovereign powers.[25] On the Supreme Court, Justice Kennedy long has been a champion of consent theory in relation to tribal government power, dating back to his days on the Ninth Circuit.[26]

All of this comes as the federal government slowly vacates many aspects of its on-the-ground governance, a process begun in the mid-1970s when Congress authorized Indian tribes to contract with the Bureau of Indian Affairs to administer on-reservation services.[27] Indian tribes now are the primary government authorities in Indian Country, a political fact that should seem inevitable but has been a long, long time in coming.[28] In an article describing an

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21. *E.g.* Duro v. Reina, 495 U.S. 676, 693 (1990). *See* Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 609-13 (2010).

22. *See* Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 337 (2008); Talton v. Mayes, 163 U.S. 376, 384-85 (1896).

23. However, Congress's enactment of the Indian Civil Rights Act is an effort to apply many (but not all) of the major individual rights of the American Constitution to those under tribal jurisdiction. 25 U.S.C. §§ 1301-1303 (2006). *See generally* THE INDIAN CIVIL RIGHTS ACT AT FORTY 133 (Kristen A. Carpenter, Matthew L.M. Fletcher, and Angela R. Riley eds., 2012).

24. T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 115 (2002).

25. Interestingly, in two recent cases that attracted a great deal of attention, nonmembers were eligible to sit on juries in tribal court cases where nonmembers were defendants. *See Plains Commerce Bank*, 554 U.S. at 316; Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005), *cert. denied*, 549 U.S. 952 (2006). At least some tribes are taking the "democratic deficit" seriously.

26. *See* United States v. Lara, 541 U.S. 193 (2004) (Kennedy, J., concurring); Duro v. Reina, 495 U.S. 676 (1990); Oliphant v. Schlie, 544 F.2d 1007, 1014-19 (9th Cir. 1976) (Kennedy, C.J., dissenting); *see also* Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623, 635 (2011) (discussing *Duro*).

27. *See generally* Philip S. Deloria, *The Era of Indian Self-Determination: An Overview*, *in* INDIAN SELF-RULE: FIRST-HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN 191 (Kenneth R. Philp ed., 1986); Michael P. Gross, *Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Indian Policy*, 56 TEX. L. REV. 1195 (1977).

28. *See* John C. Mohawk, *Indian Economic Development: An Evolving Concept of Sovereignty*, 39 BUFF. L. REV. 495, 495-97 (1991). The Bureau of Indian Affairs, and occasionally state agencies, were the primary governmental units in Indian Country going

early version of the legislation that would become the Indian Self-Determination and Education Assistance Act,[29] Bobo Dean wrote in the early 1970s that, for the first time, the "consent of the governed" would be a part of Indian affairs.[30] Self-determination meant that Indian people would be governed by Indian people, a concept that the Supreme Court had recognized as a matter of federal common law in 1959,[31] but had not quite reached Congress or the bureaucracy. So while tribal governments begin to develop and exercise their governance authority and competence, the nonmembers residing and working within Indian Country are largely free of tribal regulation.[32]

Of course, observers who argue that it makes sense to decide federal common law cases with consent theory in mind (Professor Aleinikoff excepted[33]) fail to note the incredible irony of importing consent theory into federal Indian law. The irony comes on two levels. First, consent theory is of course a pure fiction, in that no one person has ever "consented" to the American federal government's authority except in symbolic or meaningless ways.[34] Moreover, consent theory is not a favored part of modern American high political theory and has been subject to powerful and persuasive theoretical and practical attacks.[35]

The second source of irony is perhaps even more fundamental and simple; Indian nations and Indian people *literally* have not consented to most of the vastly broad and deep assertions of federal and state government that modern policymakers and judges assume exists.[36] Indian tribes were not invited to the

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back over 100 years. *See* STEPHEN J. ROCKWELL, INDIAN AFFAIRS AND THE ADMINISTRATIVE STATE IN THE NINETEENTH CENTURY 246-302 (2010); Duane Champagne, *Organizational Change and Conflict: A Case Study of the Bureau of Indian Affairs*, 7:3 AM. INDIAN CULTURE AND RES. J. 3, 4-7 (1983).

29. Act of Jan. 4, 1975, Pub. L. 93-638, 88 Stat. 2203 (1975) (*codified in relevant part at* 25 U.S.C. §§ 450f (2006)).

30. S. Bobo Dean, *The Consent of the Governed —A New Concept in Indian Affairs?*, 48 N.D. L. REV. 533, 538-39 (1971-72).

31. *See* Williams v. Lee, 358 U.S. 217, 220 (1959) ("Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on *the right of reservation Indians to make their own laws and be ruled by them.*") (emphasis added).

32. *See* N. BRUCE DUTHU, AMERICAN INDIANS AND THE LAW 6-7 (2008) (canvassing several cases involving torts of non-Indians against Indian people).

33. *See* ALEINIKOFF, *supra* note 24, at 144-45; *see also* Peter J. Spiro, *The Impossibility of Citizenship*, 101 MICH. L. REV. 1492, 1499-1500 (2003) (reviewing ALEINIKOFF, *supra* note 24).

34. *See* RONALD DWORKIN, LAW'S EMPIRE 192-93 (1986); C.W. Cassinelli, *The "Consent" of the Governed*, 12:2 W. POL. Q. 391, 391 (1959). *Contra* Steven D. Smith, *Radically Subversive Speech and the Authority of Law*, 94 MICH. L. REV. 348, 366-67 (1995) ("On the contrary, the notion that legitimate government may and must be based upon the consent of the governed still appears to command widespread support.").

35. *E.g.*, DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY (1989).

36. Examples of federal legislation restricting tribal governance and expanding state regulation into Indian Country includes the Major Crimes Act of 1885, 18 U.S.C. § 1153

constitutional convention, nor could they sign or ratify the Constitution.[37] Indian people, with relatively few exceptions largely relating to land tenure,[38] never consented to federal citizenship,[39] and to this day could be the only persons the Fourteenth Amendment excludes from citizenship (the so-called "Indians not taxed").[40] Indians who asserted treaty rights, for example, typically had been considered "uncivilized" and therefore ineligible for citizenship.[41] Indians who declined to "abandon their tribal relations," for another example, were in the same category.[42] It is further ironic that there is an established method for acquiring the factual consent of Indian tribes and individual Indians to government control through a treaty or other agreement,[43] but the United

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(2006), which extended federal criminal jurisdiction over "major crimes" into Indian Country; the General Allotment Act, ch. 119, 24 Stat. 388 (1887), which broke up tribal landholdings without the consent of tribal governments or individual Indians; and Public Law 280, 18 U.S.C. § 1162 (2006), which extended state jurisdiction into massive parts of Indian Country. For a powerful work of scholarship on the origins and foundations of thought justifying the imposition of outsider law on American Indians and Indian tribes, see ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT (1990).

37. The Supreme Court has often used this kind of phrasing in recent decades. *See, e.g.*, Kiowa Tribe of Oklahoma v. Mfg. Tech., Inc., 523 U.S. 751, 756 (1998) ("tribes were not at the Constitutional Convention"); Blatchford v. Native Village of Noatak, 501 U.S. 775, 782 (1991) (noting that Indian tribes could not have surrendered sovereignty "in a [Constitutional] convention to which they were not even parties"). *See also* Agua Caliente Band of Cahuilla Indians v. Superior Court, 40 Cal. 4th 239, 251 (2006) (quoting *Kiowa Tribe*).

38. General Allotment Act § 6, ch. 119, 24 Stat. 388 (1887). Other statutes are noted in Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 673 n. 6 (1989).

39. Congress extended *federal*, but not state, citizenship to American Indians in the Indian Citizenship Act of 1924. Ch. 233, 43 Stats. 253 (1924) (codified as amended at 8 U.S.C. §1401(b) (2006)). The distinction is important because many western states continued to deny American Indians the right to vote in state elections until the mid-1950s. *See* Willard Hughes Rollings, *Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West*, 5 NEV. L. J. 126, 135 (2004). *See also* DANIEL MCCOOL, SUSAN M. OLSON, AND JENNIFER L. ROBINSON, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 14-18 (2007). For scholarship on the lack of consent relating to American Indian citizenship in the United States, see Robert Porter, *The Demise of the Unguehoweh and the Rise of Native America: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107 (1999).

40. *See* Elk v. Wilkins, 112 U.S. 94 (1884).

41. *E.g.*, MATTHEW L.M. FLETCHER, THE EAGLE RETURNS: THE LEGAL HISTORY OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS 114-15 (2012) (describing how local officials refused to allow Grand Traverse Band members to vote in 1866 because they had treaty rights to hunt and fish).

42. *But see* Elk v. Wilkins, 112 U.S. 94 (1884), where the petitioner argued he had "severed his tribal relation to the Indian tribes" and was still denied the right to vote in Nebraska. *See id.* at 98, 109.

43. *See* ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800 (1997).

States often does not take the time or effort to acquire the needed consent.[44]

And yet Indian nations and individual Indians remain under the control and authority of federal and many state governments.[45] Anyone with even a superficial knowledge of American political theory would have to shake their head at the irony of a group of people subject to the control of a government only through what could charitably be described as acquiescence, and less charitably as violent conquest.[46] One key tenet of consent theory is that the lack of consent to government action in the context of conquest is mere tyranny.[47] Tyrannical, totalitarian governance by the United States has been at the heart of American Indian affairs over the last two centuries.[48]

To be sure, in numerous instances American Indian tribes have freely given their consent to American action, usually through some sort of treaty arrangement or federal-tribal agreement, typically codified in acts of Congress.[49] But all too often, the federal government (along with the states)

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44. It should be said, however, that tribal interests in recent decades have become formidable lobbyists and negotiators, and so lack of consent in much recent legislation is somewhat illusory. *See* DANIEL M. COBB, NATIVE ACTIVISM IN COLD WAR AMERICA: THE STRUGGLE FOR SOVEREIGNTY (2008); Andrew Ramonas, *Akin Gump's Tribal Campaigns: Firm's Specialized Practice Group Aided by Many American Indian Lobbyists*, NAT'L L. J., Aug. 15, 2011, at 1.

45. *See generally* Angelique EagleWoman, *Tribal Nation Economics: Rebuilding Commercial Prosperity in Spite of U.S. Trade Restraints—Recommendations for Economic Revitalization in Indian Country*, 44 TULSA L. REV. 383 (2009) (reviewing federal limits on reservation economies); Carole Goldberg, *In Theory, In Practice: Judging State Jurisdiction in Indian Country*, 81 U. COLO. L. REV. 1027 (2010) (reviewing state jurisdiction over Indian Country in Public Law 280 states); Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391 (2007-2008) (reviewing multiple cases recognizing state jurisdiction over Indian Country affairs).

46. *See generally* WILCOMB E. WASHBURN, RED MAN'S LAND—WHITE MAN'S LAW: A STUDY OF THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN 25-97 (1971).

47. *See* John Locke, *An Essay Concerning the True Original, Extent, and End of Civil Government*, *in* SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, & ROUSSEAU 1, 103-15 (Oxford University Press 1980) (1690).

48. *See, e.g.*, ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE (2005) (cataloguing the impacts of tyranny on American Indian women); Felix S. Cohen, *The Erosion of Indian Rights 1950-1953: A Case Study in Bureaucracy*, 62 YALE L. J. 348 (1953) (surveying federal bureaucratic acts of tyranny, including suppression of free speech and religious freedom, in Indian Country from 1950-1953, in the words and admissions of federal officials). *See generally* Robert A. Williams, Jr., *Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context*, 24 GA. L. REV. 1019 (1990).

49. *See generally* WILLIAMS, *supra* note 36 (describing history of treaty relations through 1800); Collins, *supra* note 2, at 372-73 (describing Indian consent through treaties, sovereign-to-sovereign agreements, and federal statutes allowing tribes to opt-in); G. William Rice, *25 U.S.C. §§71: The End of Indian Sovereignty or a Self-Limitation of Contractual Ability?*, 5 AM. INDIAN L. REV. 239 (1977) (arguing that the 1871 statute ending the treaty period of Indian affairs still allows for the United States and Indian tribes to enter into treaty-like agreements, and describing several such arrangements).

disregarded the limits of that consent to government action.[50] In recent decades, however, Congress and the Executive branch have dramatically improved their recognition and respect of the limits of tribal consent to federal government action (with some equally dramatic negative action as well).[51] Moreover, the last few presidential administrations have ordered federal agencies to consult with tribal governments before making significant policy choices affecting tribal interests.[52] And yet, the Supreme Court's decisions in recent decades have replaced Congress and the federal bureaucracy as the leading federal policymaking entity in many aspects of Indian affairs.[53] Many of the Court's decisions have enabled and actively encouraged state governments to oppose tribal sovereignty, putting tribes and states in a prisoner's dilemma game where states have all of the bargaining chips.[54] In short, Justice Kennedy's vision of

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50. Many of the lack of consent cases involve dispossession of Indian lands. *See generally* JANET A. MCDONNELL, THE DISPOSSESSION OF THE AMERICAN INDIAN, 1887-1934 (1991) (reviewing nonconsensual allotment and its impacts). Other consent cases involve the termination of Indian tribes by Congress. *See generally* Charles F. Wilkinson & Eric Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977).

51. A prime example of how modern congressional statutes have incorporated tribal consent into Indian affairs are "opt-in" statutes, such as the Tribal Law and Order Act (TLOA), which allow tribes to exert greater law enforcement authority if they provide adequate constitutional safeguards. *See* 25 U.S.C. §§ 1302(7)(a)-(d) (2006). Tribes that choose to continue exercising criminal jurisdiction under the older version of the Indian Civil Rights Act, with its one-year limitation on sentencing authority per offense, may do so. *E.g.*, Miranda v. Anchondo, 654 F.3d 911 (9th Cir. 2011) (upholding tribal court sentence for violent crimes under pre-TLOA version of Indian Civil Rights Act).

52. *E.g.*, Press Release, President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies: Tribal Consultation (Nov. 5, 2009), *available at* http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president. For a laundry list of other administrative materials on tribal consultation in the last several administrations, see Thomas Schlosser, *Orders and Policies Regarding Consultation with Indian Tribes*, MORISSET, SCHLOSSER & JOZWIAK, *available at* http://www.schlosserlawfiles.com/consult/PoliciesReConsult%20w-IndianTribe.htm (last visited March 18, 2012).

53. "Judicial plenary power" is a phrase introduced into the field by professor and tribal judge Frank Pommersheim. *See* Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 MONT. L. REV. 313, 328 (1997). *See generally* FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 211-56 (2009); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 214 (2002); Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55 S.D. L. REV. 48, 52 (2010); Frank Pommersheim, *Lara: A Constitutional Crisis in Indian Law?*, 28 AM. INDIAN L. REV. 299, 304 (2003-2004); Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 MONT. L. REV. 313, 328 (1997); Skibine, *supra* note 45, at 392-93; Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 412 (2003).

54. *See generally* Skibine, *supra* note 45, at 416-36. The best examples of granting wins to state governments that have intruded on tribal sovereignty because they can are Carcieri v. Salazar, 129 S. Ct. 1058 (2009) (holding that the Department of Interior cannot

consent in Indian affairs only works one way, and hearkens back to 19th century and early 20th century Indian affairs policies of assimilation and destruction of tribal governments and sovereignties.[55]

The first Part of this paper is a short history of the incorporation of Indian tribes into the American polity, largely without the consent of Indian tribes and Indian people. The second part moves beyond the discussion of the lack of tribal consent to federal and state governance, and how that lack of consent actually generated the legal and political justification for congressional (and federal) plenary power over Indian affairs. The third Part describes how express and literal consent has come to dominate federal common law on tribal authority over nonmembers. This Part explores the irony of introducing nonmembers in vast numbers into Indian Country without tribal consent, and then forcing tribal governments to acquire literal consent from those nonmembers in order to govern them. The lack of authority over nonconsenting nonmembers has led to sometimes devastating consequences for Indian people. The fourth, and last, Part argues for a theory of *tribal consent*. Unlike the vague and even fictional consent espoused by thinkers such as Justice Kennedy, and denigrated by critics who bemoan its limitations, tribal consent theory should be explored and integrated in federal Indian law. In fact, the United Nations Declaration of the Rights of Indigenous Peoples requires that states acquired the free and informed consent of indigenous governments and people before taking action detrimental to those peoples,[56] giving rise to a kind of *literal consent* theory and practice desperately needed in American Indian affairs.

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take land into trust for the Narragansett Tribe, despite seventy years of agency precedent affirming that authority); Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005) (affirming state authority to tax on-reservation gasoline sales after the State of Kansas unilaterally cancelled a viable tax agreement with the Nation); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (affirming state authority to tax nonmember entity doing business on tribal trust lands).

55. *See generally* ECHO-HAWK, *supra* note 19, at 161-216 (describing two important Supreme Court decisions from the 19th century that went a long way toward assimilating Indian people and destroying tribal governments: *Lone Wolf v. Hitchcock*, 118 U.S. 556 (1903), and *United States v. Sandoval*, 231 U.S. 28 (1913)).

56. Six times the United Nations Declaration on the Rights of Indigenous Peoples requires consent by indigenous peoples for state action. *See* United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1, at arts. 10, 11, 19, 28, 29, 32.

I. TRIBAL CONSENT PRIOR TO THE MODERN ERA OF INDIAN AFFAIRS (1789-1959)[57]

A. The Non-Consensual Incorporation of Indian Tribes into the American Polity

The Founders of the United States did not invite American Indian nations (or tribes) to the Constitutional Convention, nor did they ask Indian nations to ratify the Constitution.[58] Indian nations likely would not have chosen to ratify the Constitution,[59] as it does relatively little to recognize and preserve the sovereignty of Indian nations.[60] Indian tribes originally had almost no part to play in the dual-sovereignty system of federal and state government established by the Constitution.[61] The text of the Constitution expressly treats Indians and tribes as outsiders.[62] They were outsiders, just like foreign nations, although most Indian tribes were considered domestic, not foreign, nations after the 1830s.[63] And yet, like foreign nations, Indian tribes were parties to hundreds of Senate-ratified and President-proclaimed treaties with the United States, the same treaties that form the basis for modern American Indian law and policy.[64] These treaties established a blurry dividing line between the American and tribal sovereignties, a line that persists in various forms in the 21st century.[65]

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57. Charles Wilkinson argues that 1959 is the beginning of the "modern era" of American Indian law. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 1 (1987).

58. *See generally* RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION (2009) (no reference to Indians or Indian tribes at all in this history of the Constitutional Convention). Women, slaves, and non-landowners weren't invited either. *See generally* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 42-58 (3rd ed. 2008).

59. At the time of the Founding, scholars agree that Indian tribes were the equivalent of foreign nations. *E.g.*, Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1082-86 (2004); Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 821-25 (2007).

60. There is no *express* constitutional safeguard for tribal government authority contained in the Constitution, nor is there is an *express* limit on congressional authority in Indian affairs. *See* FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 44 (1995).

61. *See* ALEINIKOFF, *supra* note 24, at vii.

62. *See* U.S. CONST. art. I, § 8, cl. 3 (Indian commerce clause); art. I, § 2, para. 3 ("Indians not taxed" clause); POMMERSHEIM, *supra* note 53, at 165.

63. Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (labeling tribes "domestic dependent nations"). All federally recognized tribes now are "domestic," but our current situation was not complete until the final settling of the West. *See generally* EDWARD H. SPICER, A SHORT HISTORY OF THE INDIANS OF THE UNITED STATES 66-146 (Krieger reprint ed. 1983) (1969).

64. *See* POMMERSHEIM, *supra* note 53, at 63 ("more than 350"). *See generally* WILLIAMS, *supra* note 43; 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, 602-17 (1975).

65. Charles Wilkinson coined the phrase, "measured separatism," to describe the

Justice Kennedy recently suggested (though he was not the first[66]) that Indian tribes are an "extraconstitutional" part of the American constitutional structure.[67]

However, something amazing has happened in American constitutional law in the centuries that have followed. Indian tribes *are* a part of the American constitutional polity—they are the "Third Sovereign," as Justice O'Connor famously noted after visiting two American Indian tribal courts in 1999.[68] Somehow, Indian tribes have been at least partially incorporated into the American constitutional polity, playing a part alongside the states and the federal government.[69] Tribes operate federal government programs and services,[70] negotiate inter-governmental cooperative agreements with states and local governments,[71] and exercise government authority over numerous classes of American citizens,[72] including the authority to send people to prison.[73] All of

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negotiated line between Indian tribes and the American polity. WILKINSON, *supra* note 57, at 14-19.

66. Once again, Charles Wilkinson was likely the first. *See* WILKINSON, *supra* note 57, at 14. *See also* Frank Pommersheim, Lara*: A Constitutional Crisis in Indian Law?*, 28 AM. INDIAN L. REV. 299, 302 (2003-2004); Rebecca Tsosie, *Tribalism, Constitutionalism, and Cultural Pluralism: Where Do Indigenous Peoples Fit Within Civil Society?*, 5 U. PA. J. CONST. L. 357, 359 (2003).

67. United States v. Lara, 541 U.S. 193, 213 (2004) (Kennedy, J., concurring).

68. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L. J. 1 (1997).

69. *E.g.*, Indian Child Welfare Act, 25 U.S.C. § 1919 (2006) (authorizing intergovernmental agreements between tribes and states to regulate Indian child welfare cases); Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d) (2006) (requiring state governors and tribes to negotiate gaming compacts at the tribes' request); Clean Air Act, 42 U.S.C § 7601(d) (2006) (authorizing the EPA to treat tribes "as states" for the purpose of maintaining and protecting air resources).

70. *See generally* Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1262-78 (1995) (describing the rise of tribal self-governance from "638 contracts" to "self-governance contracts").

71. *See* CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 620-60 (4th ed. 2008); GETCHES, ET AL., *supra* note 20, at 634-35.

72. *E.g.*, Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (tribal civil regulatory authority over nonmembers living in "closed" portion of reservation); Merrion v. Jicarilla Apache Nation, 455 U.S. 130 (1982) (tribal taxing authority over nonmembers); Smith v. Salish Kootenai College, 434 F.3d 1127 (9th Cir.) (en banc), *cert. denied*, 547 U.S. 1209 (2006) (tribal civil jurisdiction over nonmember Indians); PacifiCorp v. Mobil Oil Corp., 8 Navajo Rep. 378 (Navajo Nation Supreme Court 2004) (tribal civil adjudicatory and regulatory jurisdiction over nonmembers); Nat'l Aerospace Museum v. Seneca Niagara Falls Gaming Corp., No. 0179-05-01 (Seneca Nation of Indians Court of Appeals 2007) (unreported) (tribal civil adjudicatory jurisdiction over nonmember entity), *excerpted in* MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW 524-26 (2011).

73. *E.g.*, United States v. Wheeler, 435 U.S. 313 (1978); Talton v. Mayes, 163 U.S. 376 (1896); Miranda v. Anchondo, 654 F.3d 911 (9th Cir. 2011); Means v. District Court of Chinle Judicial District, 7 Navajo Rep. 383 (Navajo Nation Supreme Court 1999); Eastern

this authority derives from an inherent sovereign authority possessed by all Indian tribes, but still subject to limitation by Congress or the Supreme Court—a structure that presumes tribal incorporation to the American political structure, despite the complete lack of a Constitutional amendment that would codify such an arrangement.[74]

How did this happen?

There is no easy answer to this question, but an understanding of the meandering and complicated route by which Indian tribes started out as purely outsiders but eventually found themselves a part of the American constitutional structure can be reached by a review of the history of American Indian affairs.[75]

B. Exclusion of Indian Tribes

Early American politics established the outsider status of Indian tribes in what would become the American constitutional polity. The weakened nascent American state had reason to fear the Indian military presence on the borders of the Western lands.[76] Decades later, Chief Justice John Marshall would imply that the infant American Republic had every reason to fear a massive Indian military offensive that could push the United States into the Atlantic Ocean.[77] President Washington articulated a strong policy favoring purchasing Indian

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Band of Cherokee Indians v. Torres, 4 Cherokee Rep. 9, 2005 WL 6437828 (Eastern Band of Cherokee Indians Supreme Court 2005) (tribal criminal jurisdiction over Mexican national).

74. Professor Pommersheim proposes just such an amendment. *See* POMMERSHEIM, *supra* note 53, at 295-312.

75. *See generally* FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS (1984); S. LYMAN TYLER, A HISTORY OF INDIAN POLICY (1973).

76. "The Indians are not mentioned in the treaty of 1783, yet they were a very influential factor in the negotiations." WALTER H. MOHR, FEDERAL INDIAN RELATIONS, 1774-1788, at 93 (1933).

77. Well, to be more accurate, the Indian tribes and the Americans were at a state of equipoise. Jack Blair, *Demanding a Voice in Our Own Best Interest: A Call for a Delegate of the Cherokee Nation to the United States House of Representatives*, 20 AM. INDIAN L. REV. 225, 227 (1995-1996). *See also* Worcester v. Georgia, 31 U.S. 515, 548 (1832) (noting the desire of Congress to avoid hostility); RICHARD C. BROWN, ILLUSTRIOUS AMERICANS: JOHN MARSHALL 213 (1868) ("The Indians were a fierce and dangerous enemy whose love of war made them sometimes the aggressors, whose numbers and habits made them formidable, and whose cruel system of warfare seemed to justify every endeavor to remove them to a distance from civilized settlements." (quoting Letter from Chief Justice Marshall to Justice Story (Oct. 29, 1828)); ROBERT KENNETH FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 54-55 (1968) ("Instead [Marshall] excused the displacement which had occurred by the most narrow argument possible: *the Indians' war-like savagery made their physical proximity a mortal danger to the conquering settlers*, and only to the extent of that danger might their lands be appropriated." (emphasis added)); Robert J. Miller, *American Indian Influence on the United States Constitution and Its Framers*, 18 AM. INDIAN L. REV. 133, 138 (1993) (arguing that the weak post-Revolutionary United States was ill-equipped to deal with "Indian troubles").

lands, and causing the "savage, as the wolf, to retire."[78] The United States in its early years dealt with Indian tribes as it would any foreign nation—through treaties and diplomacy,[79] and still occasionally war.[80]

And so, during the short period after the Revolution but before the ratification of the Constitution—the Confederation period—the Americans continued to engage Indian tribes as foreign nations.[81] They continued to enter into diplomacy and treaties, even as the tribes became weaker and weaker absent the economic and political buttressing of their British allies.[82] During this period, some Americans suggested offering a political stake in Congress to the Cherokees and other tribes, even dangling statehood.[83] The Articles of Confederation, in a famously contradictory provision, reserved Indian affairs to the federal government subject to state legislative prerogatives.[84] Indian tribes remained complete outsiders in the American polity.[85]

The text of the Constitution establishes that there would be little change in

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78. Letter from George Washington to James Duane (Sept. 7, 1783), *as reprinted in* GETCHES, ET AL., *supra* note 20, at 88.

79. *See* STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 114-49 (2005). *E.g.*, Treaty of Hopewell with the Cherokees, *excerpted in* GETCHES, ET AL., *supra* note 20, at 89-90.

80. *See* WILEY SWORD, PRESIDENT WASHINGTON'S INDIAN WAR: THE STRUGGLE FOR THE OLD NORTHWEST, 1790-1795 (1985).

81. *See* 1 PRUCHA, *supra* note 75, at 44-50, 52-58. *See, e.g.*, Richard B. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 488 n. 55 (1979) (listing a few Confederation-period treaties). The States were also active during the Confederation period in treating with Indian tribes, and interfering with federal-tribal treaty negotiations. *See* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1138 (1994); Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 3, 31-35 (2001).

82. The weakening of tribes in the western Great Lakes was especially acute. *See* Donald L. Fixico, *The Alliance of the Three Fires in Trade and War, 1630-1812*, 20:2 MICH. HIST. REV. 1, 19-23 (1994).

83. *See* Blair, *supra* note 77, at 227-28; H. David Williams, *Gambling Away the Inheritance: The Cherokee Nation and Georgia's Gold and Land Lotteries of 1832-1833*, 73 GA. HIST. Q. 519, 523 (1989). Even 100 years later, Congress was talking about statehood for the Oklahoma tribes; Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 983 (1981).

84. *See* ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 4 ("The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated . . . ."); *See also* Worcester v. Georgia, 31 U.S. 515, 558 (1832) (arguing that the reservation of state authority "annul[led]" the federal power); Robert S. Pelcyger, *Justices and Indians: Back to Basics*, 62 OR. L. REV. 29, 35-37 & n.38 (1983) (describing the need for, and proposals to ensure, federal control over Indian affairs).

85. *See* Ann E. Tweedy, *'Hostile Indian Tribes . . . Outlaws, Wolves, . . . Bears . . . Grizzlies and Things Like That?' How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense*, 13 U. PA. J. CONST. L. 687, 698-703 (2011).

the status of Indian tribes as political outsiders.[86] The Constitution mentioned Indian tribes only once, in a provision reserving exclusive congressional authority to regulate commerce *with* foreign nations and Indian tribes, and *among* states.[87] And so while tribes could therefore not be states or foreign nations under American constitutional law by virtue of the negative implication in the Commerce Clause,[88] they were *something*. Chief Justice Marshall's opinions in the Cherokee Cases recognized as such, but waffled between labeling tribes "domestic dependent nations" and "distinct, independent political communities."[89] Regardless, Indian tribes remained constitutional outsiders,[90] as evidenced by the Cherokees eventual "removal" to western lands in the Trail of Tears.[91]

The federal government cemented the outsider status of Indian tribes after the enactment of the Constitution by maintaining and expanding treaty relationships with tribes.[92] In all, over 200 treaties with Indian tribes remain at least partially extant, and perhaps over 400 such treaties reached at least the stage where the parties executed them (although the Senate might not have ratified every one).[93] There can be no greater expression of distance between the United States and another political entity than that of a treaty relationship under the Constitution.[94] Despite Congress's decision to stop treating with

86. *See generally* Clinton, *supra* note 53.

87. U.S. CONST. art. I, § 8, cl. 3. For a detailed history of the origins of the Indian Commerce Clause, and a survey of the scholarly debates surrounding its meaning, see Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897, 932-46 (2010). *See also* Lester Marston & David A. Fink, *The Indian Commerce Clause: The Reports of its Death Have Been Greatly Exaggerated*, 16 GOLDEN GATE U. L. REV. 205 (1986).

88. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 18 (1831) (Marshall, C.J.) ("In this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them.").

89. *Compare Cherokee Nation*, 30 U.S. at 17 (Marshall, C.J.) ("domestic dependent nations"), *with* Worcester v. Georgia, 31 U.S. 515, 557 (1832) ("distinct political communities"); *id.* at 559 ("distinct, independent political communities").

90. In 1830, Congress passed the Indian Removal Act, 4 Stat. 411, establishing federal policy in support of "removing" Indians to the western lands, authorizing the President to execute treaties with Indians to that effect, and even authorizing the President to use force against Indians who refused to comply with a removal treaty. *See generally* Alfred A. Cave, *Abuse of Power: Andrew Jackson and the Indian Removal Act of 1830*, 65 HISTORIAN 1330, 1331-36 (2003) (examining the enactment of the Indian Removal Act).

91. *See* THEDA PERDUE & MICHAEL D. GREEN, THE CHEROKEE NATION AND THE TRAIL OF TEARS (2007).

92. *See generally* WILLIAMS, *supra* note 43, at 14-39 (detailing origins and policies of American treaty policy).

93. *See* WILKINSON, *supra* note 65, at 8.

94. *See* Mike Townsend, *Congressional Abrogation of Indian Treaties: Reevaluation and Reform*, 98 YALE L. J. 793, 797-98 (1989).

Indian tribes in 1871,[95] Indian treaties remain the cornerstone of the relationship of Indian tribes and the federal government.[96] And, while many Indian tribes currently recognized as sovereigns by the United States do not have a treaty relationship (at least according to the United States),[97] as a practical matter the federal government deals with them as independent political entities akin to treaty tribes.[98]

The exclusion of Indian tribes from the American constitutional structure made good sense from the point of view of the Americans so long as "Indian Country" remained outside of the exterior boundaries of the United States.[99] American Indian law and policy during the eighteenth and nineteenth centuries, and likely as late as the 1960s, almost always involved efforts to exterminate the political existence of Indian tribes, not to mention the cultures of Indian communities.[100] But a difficult tension arose—and continues to exist—as Indian tribes became physically (but not legally) incorporated into the United States by virtue of refusing to disappear.[101]

The Constitution's Framers spent little time debating how to handle Indian affairs.[102] James Madison's *Federalist No.* 42 indicates that the Framers' main preoccupation was ensuring that the federal government would retain exclusive authority to deal in Indian affairs, keeping the states and American citizens at

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95. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (1871), *codified at* 25 U.S.C. § 71 (2006). *See generally* Rice, *supra* note 49.

96. *See* Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963, 974-79 (1996).

97. *See* Sharon O'Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship*, 66 NOTRE DAME L. REV. 1461, 1472-74 (1991).

98. *See* William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. 83*, 17 AM. INDIAN L. REV. 37, 43-44 (1992).

99. *See* Eric Kades, *The Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1110-18 (2000); *cf. generally* Ed White, *Early American Nations as Imagined Communities*, 56 AM. Q. 49, 63-67, 69-73 (2004) (contrasting "early American nations" with Indian tribes).

100. *See, e.g.*, MICHAEL PAUL ROGIN, FATHERS AND CHILDREN: ANDREW JACKSON AND THE SUBJUGATION OF THE AMERICAN INDIAN 113-250 (1975) (recounting program of removal and occasionally extermination of southeastern Indian tribes); Rennard Strickland, *The Genocidal Premise in Native American Law and Policy: Exorcising Aboriginal Ghosts*, 1 J. GENDER, RACE & JUSTICE 325, 326 (1998) (noting American policymakers saw "destruction as weapons of salvation").

101. *E.g.*, Matthew L.M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 53, 83 (2006) (arguing that American policy debates on same-sex marriage excluding the import of Indian tribes may create unanticipated consequences on the constitutional status of Indian tribes); Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within Our Federalism: Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667, 669-77 (2006) (discussing different theories of incorporation of Indian tribes into the constitutional structure, and their difficulties).

102. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107-08 (2005); Albert S. Abel, *The Commerce Clause in the Constitutional Convention and Contemporary Comment*, 25 MINN. L. REV. 423, 466 (1941).

bay.[103] As a policy matter, the early American Republic saw Indian affairs as involving primarily three questions: who would acquire Indian lands,[104] who would regulate trade with remaining Indian people and tribes,[105] and how to avoid Indian wars.[106] Of the three, the most pressing by far involved Indian lands,[107] and that fact alone demonstrates a major assumption of the Framers and the leaders of the early Republic—Indian tribes were unnecessary to the United States, and constituted a clear and direct competitor to the security of America.[108] The second policy point, driven home most specifically by Thomas Jefferson's efforts to regulate and develop trade with Indians, involved an effort to make the presence of Indian people (not tribes) more palatable (and valuable) to Americans.[109] Jefferson and others fervently hoped that Indian people would abandon their tribal relations and become civilized as a result of this trade; and if not, to disappear along with the tribes.[110] The third policy point, it goes without saying, again recognizes the serious threat that Indian tribes posed to the United States, a young and relatively poor government.[111] In

103. *See* FEDERALIST NO. 42 (James Madison) ("The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible."); *see also* Robert N. Clinton, *State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D. L. REV. 434, 435-36 (1981) (collecting additional historical materials suggesting the Framers intended to make Indian affairs exclusively a federal question).

104. *See generally* Robert A. Williams, Jr., *Jefferson, the Norman Yoke, and American Indian Lands*, 29 ARIZ. L. REV. 165 (1987) (analyzing the history of Indian lands purchases from 1763 to the early American Republic).

105. *See* Abel, *supra* note 102, at 466; Clinton, *supra* note 103, at 435-36; Robert Laurence, *The Indian Commerce Clause*, 23 ARIZ. L. REV. 203, 223-27 (1981).

106. *See* Kades, *supra* note 99, at 1131-41.

107. *See generally* THOMAS PERKINS ABERNETHY, WESTERN LANDS AND THE AMERICAN REVOLUTION 162-361 (1937) (recounting American political maneuvers regarding Indian lands in the west after the Revolution and before the Constitutional Convention).

108. *See* FEDERALIST NO. 24 (Alexander Hamilton) ("The savage tribes on our Western frontier ought to be regarded as our natural enemies, their [the British] natural allies, because they have most to fear from us, and most to hope from them.").

109. *See* R.S. Cotterill, *Indian Management in the South, 1789-1825*, 20 MISS. VALLEY HIST. REV. 333, 340-44 (1933).

110. *See* BERNARD W. SHEEHAN, SEEDS OF EXTINCTION: JEFFERSONIAN PHILANTHROPY AND THE AMERICAN INDIAN 3-4 (1973); Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian People*, 21 U. ARK. LITTLE ROCK L. REV. 941, 949 & n.31 (1999).

111. *See generally* SCOTT A. SILVERSTONE, DIVIDED UNION: THE POLITICS OF WAR IN THE EARLY AMERICAN REPUBLIC 25-118 (2004) (noting early American political concern about Indian tribes and their potential military threat).

sum, for the United States, Indian tribes, people, and lands constituted a national question, and potentially a vast revenue-generating endeavor.[112]

Over the course of the next two centuries, American law and policy in Indian affairs wavered from passive-aggressive efforts to undermine Indian tribes, to overtly aggressive (even violent and viciously oppressive) attacks on tribal governance. While the experience of every Indian tribe is unique, the experience of tribal communities such as the Anishinaabek in the Great Lakes region[113] and the Coast Salish communities of the Pacific Northwest[114] provide excellent snapshots of the federal government's efforts to hasten the political extinction of Indian tribes in the United States.[115]

The story of the Anishinaabek (primarily Ojibwe, Odawa, and Bodewadmi)[116] in the Great Lakes differs again, in that the tribes established a treaty relationship with the United States creating (but not necessarily) guaranteeing reservations.[117] The key treaties involved the massive cessions of lands by the tribes to the United States, the largest perhaps being the cession of about one-third of what would become the State of Michigan in the 1836 Treaty of Washington.[118] Hovering over these tribes during this period was the ever-present threat of removal to the west,[119] though largely due to the short growing season in their northernmost portions of their territories, the federal government was successful in removing only a fraction of these tribal communities.[120] These tribal communities remain in their home territories,

112. *See* Jennifer Roback, *Exchange, Sovereignty, and Indian—Anglo Relations*, *in* PROPERTY RIGHTS AND INDIAN ECONOMIES 5, 17-20 (Terry Lee Anderson ed. 1992).

113. *E.g.*, Heidi Kiiwetinepinesiik Stark, *Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada*, 34 AM. INDIAN CULTURE & RES. J. 145 (2010).

114. *E.g.*, Frank W. Porter, *In Search of Recognition: Federal Indian Policy and the Landless Tribes of Western Washington*, 14 AM. INDIAN Q. 113 (1990).

115. *Cf. generally* W.G. Rice, *The Position of the American Indian in the Law of the United States*, 16 J. COMP. LEGIS. & INT'L L. (3D SER.) 78, 84 (1934) (suggesting that American treaty rights would expire if the tribe expired).

116. *See generally* EDWARD BENTON-BENAI, THE MISHOMIS BOOK: THE VOICE OF THE OJIBWE (1979); Stark, *supra* note 113.

117. *See, e.g.*, CHARLES E. CLELAND, RITES OF CONQUEST (1992) (detailing histories of Michigan Indian tribes); MELISSA L. MEYER, THE WHITE EARTH TRAGEDY: ETHNICITY AND DISPOSSESSION AT A MINNESOTA ANISHINAABE RESERVATION 19 (1994) (mapping the Minnesota Indian reservations); RONALD N. SATZ, CHIPPEWA TREATY RIGHTS: THE RESERVED RIGHTS OF WISCONSIN'S CHIPPEWA INDIANS IN HISTORICAL PERSPECTIVE 13 (1991); Benjamin Ramirez-Shkwegnaabi, *The Dynamics of American Indian Diplomacy in the Great Lakes Region*, 27 AM. INDIAN CULTURE & RES. J. 53 (2003) (detailing Anishinaabek treaty negotiations throughout the Great Lakes).

118. Treaty with the Ottawa, Etc. art. I, Mar. 28, 1836, 7 Stat. 491. For a general map of treaty ceded waters, see CHIPPEWA OTTAWA RESOURCE AUTHORITY, 1836 TREATY FISHERY 3, *available at* http://www.1836cora.org/documents/1836TreatyFishery.pdf. *See also* United States v. Michigan, 471 F. Supp. 192, 202 (W.D. Mich. 1979) (another map).

119. *See* United States v. Michigan, 471 F. Supp. at 207-11.

120. *Compare, e.g.*, James M. McClurken, *Ottawa Adaptive Strategies to Indian*

though in reservations much smaller than the original homelands.[121] Coupled with aggressive cultural attacks such as boarding schools,[122] and through immersion in large numbers of non-Indians, many of these tribal communities (mostly those in Michigan) were unable to avoid administrative termination for significant time periods.[123] However, the revitalization of these tribes has been nothing short of remarkable in the last few decades. Starting in the late 1960s, numerous Indians from these communities in Michigan, Wisconsin, and Minnesota began exercising *off-reservation* treaty rights to hunt, fish, and gather.[124] These efforts have proven largely successful in cases such as *United States v. Michigan*,[125] *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*,[126] and *Minnesota v. Mille Lacs Band of Chippewa Indians*,[127] the only case from the Great Lakes area to reach the Supreme Court.

Similarly, the Coast Salish tribal communities in the Pacific northwest executed land cession treaties,[128] agreed to move to smaller reservation areas (often crowding into small reservations with several other tribes),[129] and then

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Removal, 12 MICH. HIST. REV., Spring 1986, at 29, 38-40 (detailing Michigan Ottawa strategies to avoid removal), *with, e.g.*, WILLIAM E. UNRAU, TRIBAL DISPOSSESSION AND THE OTTAWA UNIVERSITY FRAUD 35-58 (1985) (detailing Ohio Ottawa removal to lands west of the Mississippi River).

121. *See, e.g.*, Keweenaw Bay Indian Community v. State of Michigan, 784 F. Supp. 418, 420-21 (W.D. Mich. 1991) (recounting cession of lands via treaty by tribe); United States v. Michigan, 471 F. Supp. 192, 231-33 (W.D. Mich. 1979) (describing cession of lands and establishment of small reservations in 1836 treaty).

122. *See* THE TREE THAT NEVER DIES: ORAL HISTORY OF THE MICHIGAN INDIANS 52-54 (Pamela J. Dobson ed., 1978) (describing the Mount Pleasant Indian School, which was run like a military school where students received punishments so severe that scarring resulted from the beatings).

123. *E.g.*, Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney for the W. Dist. of Mich., 369 F.3d 960, 961-62 & n.2 (6th Cir. 2004) (detailing administrative termination of the Grand Traverse Band); TOMAC v. Norton, 433 F.3d 852, 865 (D.C. Cir. 2006) (noting administrative termination of Pokagon Band of Potawatomi Indians).

124. *See generally* LARRY NESPER, THE WALLEYE WAR: THE STRUGGLE FOR OJIBWE SPEARFISHING AND TREATY RIGHTS (2002); Diane H. Delekta, *State Regulation of Treaty Indians Hunting and Fishing Rights in Michigan*, 1980 DET. C. L. REV. 1097; Catherine M. Ovsak, *Reaffirming the Guarantee: Indian Treaty Rights to Hunt and Fish Off-Reservation in Minnesota*, 20 WM. MITCHELL L. REV. 1177 (1994);

125. 471 F. Supp. 192 (W.D. Mich. 1979), *modified by*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981).

126. 700 F.2d 341 (7th Cir.), *cert. denied sub nom.*, Besadny v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians, 464 U.S. 805 (1983).

127. 526 U.S. 172 (1999).

128. *See generally* Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 426-33 (1998); Kent Richards, *The Stevens Treaties, 1854-1855*, 106 OR. HIST. Q. 342 (2005).

129. *See* O. Yale Lewis III, *Treaty Fishing Rights: A Habitat Right as Part of the Trinity of Rights Implied by the Fishing Clause of the Stevens Treaties*, 27 AM. INDIAN L. REV. 281, 289-90 (2002-2003).

all but withered away[130] until the 1960s when individual Indians began to assert off-reservation treaty rights.[131] But in cases such as *United States v. Washington*,[132] *Sohappy v. Smith*,[133] and various water rights cases such as the Snake River general stream adjudication,[134] Indian tribes in the region were able to re-establish the viability of their tribal governments.[135] In recent decades, these tribes have been leaders in managing scarce fishing resources and preserving fisheries and wildlife habitats in the region.[136]

The stories of these tribes and many others like them are indicative of the incredible survival of tribal governments through the entirety of American history. Despite a clear lineage of federal law and policy supporting the extermination of Indian tribes, many hundreds of have survived.

C. Living with (and Incorporating) Indian Tribes

Currently, there are 566 federally recognized Indian tribes,[137] despite two centuries Indian law and policy geared toward destroying tribal governments and the cultures of Indian people.[138] Starting in 1934, with the Indian

130. *Cf.* Blumm & Swift, *supra* note 128, at 433-35 (describing decline of Indian fishing activities after the establishment of the treaty right); Donald L. Parman, *Inconstant Advocacy: The Erosion of Indian Fishing Rights in the Pacific Northwest, 1933-1956*, 53 PAC. HIST. REV. 163, 166-72 (1984) (detailing challenges to Indian fishing rights).

131. *See generally* CHARLES WILKINSON, MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY (2000) (a history of *United States v. Washington* and Billy Frank, Jr., a key leader in the treaty fishing movement); Bradley G. Shreve, *"From Time Immemorial": The Fish-In Movement and the Rise of Intertribal Activism*, 78 PAC. HIST. REV. 403 (2009) (discussing the origins of the "fish-in movement").

132. 384 F. Supp. 312, 343 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676, 689 (9th Cir. 1975); Washington v. Wash. Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

133. 302 F. Supp. 899 (D. Or. 1969).

134. In re Snake River Basin Water Sys., 764 P. 2d 78 (Idaho 1988), *cert. denied sub nom.*, Boise-Kune Irr. Dist. v. United States, 490 U.S. 1005 (1989).

135. *E.g.*, SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 189-95 (1989) (detailing development of the Yakima tribal government in part as a result of treaty rights). *Cf. generally* Daniel H. Israel, *The Reemergence of Tribal Nationalism and Its Impact on Reservation Resource Development*, 47 U. COLO. L. REV. 617 (1975).

136. *See* Blumm & Swift, *supra* note 128, at 460-62; Michael C. Blumm & Jane G. Steadman, *Indian Treaty Rights and Habitat Protection: The Martinez Decision Supplies a Resounding Judicial Reaffirmation*, 49 NAT. RESOURCES J. 653, 698-99 (2009). *See also* Ronald L. Trosper, *Northwest Coast Indigenous Institutions that Supported Resilience and Sustainability*, 41 ECOLOGICAL ECON. 329 (2002) (articulating principles of tribal ecological management).

137. *See supra* note 9.

138. *See* United States v. Lara, 541 U.S. 193, 219 (2004) (Thomas, J., concurring in the judgment); Frank Pommersheim, *A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts*, 27 GONZ. L. REV. 393, 403 (1991-1992). Kaighn Smith, Jr., *Tribal Self-Determination and Judicial Restraint: The Problem of Labor and Employment Relations within the Reservation*, 2008 MICH. ST. L. REV. 505, 506 (2008).

Reorganization Act,[139] Congress legislated with an eye toward recognizing Indian tribes as viable, permanent entities.[140] But Congress quickly deviated from that path,[141] and it was not until probably the late 1960s and early 1970s that the federal government's policymaking branches of government finally concluded through law and policy choices that Indian tribes were here to stay.[142] Ironically, the Supreme Court acknowledged the permanent sovereignty of Indian tribes and the likelihood that they would be around years before, perhaps as early as 1959.[143]

The presence of Indian tribes within the borders of the United States has

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139. Indian Reorganization (Wheeler-Howard) Act, Pub. L. No. 73-383, 48 Stat. 984 (1934) (*codified at* 25 U.S.C §§ 461-479 (2006)).

140. *See* 25 U.S.C. §§ 476, 477 (2006) (reorganization of tribal governments as constitutional entities and chartering federal corporations for tribal economic development purposes).

141. Within a decade, Congress turned toward holding hearings in support of a repeal of the Indian Reorganization Act. *See* Repealing the So-Called Wheeler-Howard Act, S. Res. 1031, 78th Cong. (1944); Kenneth R. Philp, *Termination: A Legacy of the Indian New Deal*, 14:2 W. HIST. Q. 165, 171 (1983).

142. *See generally* Michael C. Walch, *Terminating the Termination Policy*, 35 STAN. L. REV. 1181 (1983). The enactment in 1975 of the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2003 (1975) (*codified* as amended *at* 25 U.S.C. § 450), effectively establishes Indian tribes as federal administrators of federal programs in Indian Country.

143. *See* Williams v. Lee, 358 U.S. 217 (1959). *See generally* Dewi Ione Ball, Williams v. Lee (1959) *50 Years Later: A Reassessment of One of the Most Important Cases in the Modern-Era of Federal Indian Law*, 2010 MICH. ST. L. REV. 391 (2010); Bethany R. Berger, Williams v. Lee *and the Debate over Indian Equality*, 109 MICH. L. REV. 1463 (2011). Professor Ball's unearthing of Supreme Court memoranda provides interesting colloquies between the Justices in the *Williams* case that suggests the Court recognized tribal sovereignty in the Navajo Nation:

> [i]n 1953, Congress undertook some major legislation in this area. It passed a bill giving state courts jurisdiction over civil and criminal matters involving Indians on reservations but it specified the states involved—and Arizona was not included The legislative history of the bill is most informative. In discussing the bill the House Committee stated: "As a practical matter, the enforcement of law and order among the Indians in the Indian Country has been left largely to the Indian groups themselves." This would appear to be persuasive proof of Congress' intent and understanding of the present state of the law.

Ball, *supra*, at 398 (quoting Bench Memorandum, 1958 Term, Williams v. Lee, No. 39, Certiorari to Supreme Court of Ariz. at 6-7 (on file with the Library of Congress, Washington, D.C., Earl Warren Papers, Manuscript Division, Box 188)). *See also id.* at 399 ("Importantly for the Navajo, Chief Justice Earl Warren and Justice William J. Brennan supported the presumption of inherent tribal sovereignty. Without the introduction of state legislation to confirm the actions of Congress, Warren said, '[the] 1953 Act gave jurisdiction conditionally—[A]rizona does not want to carry expense of that change.'") (quoting Conference, Williams v. Lee, No. 39 (Nov. 21, 1958) (on file with the Library of Congress, Washington, D.C., William O. Douglas Papers, Manuscript Divisions, Box 1201)). Justice Black expressed his support for tribal nations in the mid-1960s as well: "Justice Hugo Lafayette Black was generally supportive of Native American rights, as was Justice William O. Douglas. In a letter to Murray Lincoln, Chief Justice of the Navajo tribe, dated June 14 of 1965, Justice Hugo Black wrote, '[y]ou know, I am also sure, the great interest and sympathy I feel for the Tribes that seek to preserve their ways of life.'" *Id.*

created a kind of constitutional conundrum. As noted earlier, the Framers appeared to assume that at some point, Indian tribes would phase out of existence. But here they are in the twenty-first century, many of them operating robust and large government bureaucracies,[144] enforcing criminal laws,[145] and managing million- and billion-dollar business concerns.[146] Thousands, and perhaps hundreds of thousands, of non-Indian Americans rely upon Indian tribes for employment and business opportunities.[147] Even if the federal government or anyone else desired to pursue the eradication of Indian tribes, it would not be politically or economically viable. But while Indian tribes are here to stay as political bodies, and as economic engines, it is not so clear how they are incorporated into the American constitutional polity, if at all.

This last fact puts Indian tribes in a particular quandary. If they are not "under" the Constitution, then what are they? They certainly are not "foreign nations," and they even more certainly are not "States."[148]

Despite all of the bad history of American Indian affairs, Indian tribal sovereignty is at its peak since long before the establishment of the United States.[149] Indian tribes retain enormous authority over their own territories and members.[150] They have immunity from suit in federal and state courts,[151] except

144. *See* FLETCHER, *supra* note 72, chap. 13 (examining tribal administrative practices); JONATHAN B. TAYLOR, DETERMINANTS OF DEVELOPMENT SUCCESS OF NATIVE NATIONS OF THE UNITED STATES 4 (2008) *available at* http://nni.arizona.edu/resources/inpp/determinants_of_development_success_english.pdf ("The demands of self government require performing certain jobs well. Without the staffs to design the wildlife protection plan, maintain the land title records, or operate the police dispatch system, Native nations fail to achieve their own objectives").

145. *See* United States v. Wheeler, 435 U.S. 313 (1978); CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE (2004).

146. *E.g.*, Nicholas M. Jones, Comment, *America Clinches Its Purse Strings on Government Contracts: Navigating Section 8(A) of the Small Business Act through a Recession Economy*, 33 AM. INDIAN L. REV. 491, 491-92 (2008-2009) ("Specifically, the Department of Defense granted and continues to grant billions of dollars worth of contracts to tribal businesses through advantageous and often extremely truncated bidding processes."); Alan P. Meister, Kathryn R.L. Rand & Steven Andrew Light, *Indian Gaming and Beyond: Tribal Economic Development and Diversification*, 54 S. D. L. REV. 375, 376 (2009) (noting billion-dollar Indian gaming enterprises).

147. About 3600 people work at the Seneca Nation's casinos alone. *See* Tom Precious, *Senecas Fear Job Loss Under Plan for Casinos*, BUFF. NEWS, Sept. 7, 2011, *available at* http://www.buffalonews.com/city/capital-connection/albany/article546967.ece. Thousands more work at Foxwoods Resort Casino, owned by the Mashantucket Pequot Nation. *See* DAVID W. WILKINS & HEIDI KIIWETINEPINESIIK STARK, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 147 (3rd ed. 2011).

148. *See* Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

149. *See* CHARLES F. WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS (2005).

150. *E.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (tribal membership); United States v. Wheeler, 435 U.S. 313 (1978) (criminal jurisdiction over tribal members); Bugenig v. Hoopa Valley Tribe, 5 NICS App. 37 (Hoopa Valley Trib. Ct. App. 1998) (zoning regulation over nonmember); Means v. Dist. Ct. of Chinle Jud. Dist., 7 Navajo Rptr.

as against the United States. They prosecute Indian criminal offenders;[152] they establish rules of contract,[153] probate,[154] domestic relations,[155] and land use;[156] and they even partially regulate the activities of people who are not Indians.[157] Indian tribal courts have developed some of the most forward-thinking criminal diversion courts, including drug courts[158] and the famous peacemaker courts at Navajo,[159] in Alaska,[160] and elsewhere.[161]

Indian tribes are experts at administering federal programs and handling federal and private grant money. Congress has repeatedly recognized the tribal sovereignty of Indian tribes by listing them as sovereigns eligible to enforce the Clean Air Act[162] and other federal environmental regimes.[163] Congress authorized tribal courts to enforce court orders and judgments under the Violence against Women Act[164] and made federal and state courts grant full

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383 (Navajo 1999) (criminal jurisdiction over nonmembers).

151. *See* Kiowa Tribe v. Mfg Techs., Inc., 523 U.S. 751 (1998); Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509-10 (1991); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978).

152. *E.g.*, People of the Little River Band of Ottawa Indians v. Champagne, 35 Indian L. Rep. 6004 (Little River Band of Ottawa Indians Ct. App. 2007). And, occasionally, very occasionally, tribes prosecute non-Indian offenders, too. *See* E. Band of Cherokee Indians v. Torres, Nos. CR 03-1443, CR 03-1529, CR 03-1530, CR 03-1531, CR 03-1819, 2005 N.C. Cherokee Sup. Ct. LEXIS 6 (Cherokee Sup. Ct. of N.C. 2005).

153. *E.g.*, Pablo v. Confederated Salish & Kootenai Tribes, 1994 Mont. Salish & Kootenai Tribes LEXIS 7 (Confederated Salish & Kootenai Trib. Ct. App. 1994).

154. *E.g.*, Estate of Sampson, 3 Mash. Rep. 430, No. PB 2000-100, 2002 WL 34247993 (Mashantucket Pequot Trib. 2002).

155. *E.g.*, Husband v. Wife, 3 Mash. App. 37, No. MPCA 2001-1065, 2003 WL 25586059 (Mashantucket Pequot Ct. App. 2003).

156. *E.g.*, Gobin v. Tulalip Tribes of Washington, 6 NICS App. 120 (Tulalip Trib. Ct. App. 2003).

157. *E.g.*, Skokomish Tribe v. Mosbarger, 7 NICS App. 90 (Skokomish Trib. Ct. App. 2006) (traffic enforcement); Rose v. Adams, No. 95-27, 2000 Crow 1, (Crow Ct. App. 2000) (tax); Hoover v. Colville Confederated Tribes, 29 Indian L. Rep. 6035 (Colville Confederated Trib. Ct. App. 2002) (land use).

158. *See* Ronald Eagleye Johnny, *The Duckwater Shoshone Drug Court, 1997-2000: Melding Traditional Dispute Resolution with Due Process*, 26 AM. INDIAN L. REV. 261 (2001-2002).

159. *See* Raymond D. Austin, *Freedom, Responsibility and Duty: ADR and the Navajo Peacemaker Court*, 32 JUDGES J. 8 (1993).

160. *See* Harvard Project on American Indian Economic Development, Kake Circle Peacemaking (2003), *available at* http://hpaied.org/images/resources/publibrary/Kake%20Circle%20Peacemaking.pdf.

161. *See* Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875 (1999).

162. *See* 42 U.S.C. § 7601(d) (2006); Arizona Public Service Co. v. EPA, 211 F.3d 1280 (D.C. Cir. 2000).

163. *See* GETCHES, ET AL., *supra* note 20, at 635-47. *See generally* JAMES M. GRIJALVA, CLOSING THE CIRCLE: ENVIRONMENTAL JUSTICE IN INDIAN COUNTRY 143-73 (2008).

164. *See* 18 U.S.C. § 2265(a) (2006); Sarah Deer & Melissa L. Tatum, *Tribal Efforts to Comply with VAWA's Full Faith and Credit Requirements: A Response to Sandra*

faith and credit to tribal court orders and judgments under the Indian Child Welfare Act.[165] Congress forced states to negotiate with Indian tribes over casino-style gaming,[166] despite the Supreme Court's efforts to preserve state sovereign immunity in this area.[167] Even in areas where Congress hasn't spoken, state and federal courts and governments grant enormous deference to tribal law and court judgments,[168] though certainly not all the time.[169] For example, some federal and state courts will count tribal court criminal convictions and inmate time served in their own calculations in sentencing.[170]

Of note, many states and local governments have entered into agreements with Indian tribes over taxation,[171] law enforcement,[172] jail space,[173] land use and zoning,[174] economic development,[175] enforcement of foreign judgments,[176]

Schmeider, 39 TULSA L. REV. 403 (2004); Melissa L. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 KY. L.J. 123 (2001-2002).

165. *See* 25 U.S.C. § 1911(d) (2006); B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes against the Vagaries of State Courts*, 73 N. D. L. REV. 395, 434-48 (1997).

166. *See* 25 U.S.C. § 2710(d)(3) (2006). *See generally* Ezekiel J.N. Fletcher, *Negotiating Meaningful Concessions from States in Gaming Compacts to Further Tribal Economic Development: Satisfying the "Economic Benefits" Test*, 54 S.D. L. REV. 419 (2009); Zeke Fletcher, *Indian Gaming and Tribal Self-Determination: Reconsidering the 1993 Tribal-State Gaming Compacts*, 89 MICH. B. J., Feb. 2010, at 38.

167. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

168. *E.g.*, Attorney's Process and Investigation Servs., Inc. v. Sac & Fox Tribe, 609 F.3d 927 (8th Cir. 2010) (recognizing tribal civil jurisdiction over nonmember business), *cert. denied*, 131 S. Ct. 1003 (2011); Smith v. Salish Kootenai Coll., 434 F.3d 1127 (9th Cir.) (en banc) (recognizing tribal court jurisdiction over nonmember tort defendant), *cert. denied*, 547 U.S. 1209 (2006); State v. Native Village of Tanana, 249 P.3d 734 (Alaska 2011) (recognizing tribal court jurisdiction over Indian child welfare cases); *see also* In the matter of review of Wis. Stat. § 80.1.54, discretionary transfer of cases to tribal court, 2011 WI 53 (2011), *available at http://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=67197* (the Wisconsin Supreme Court asked those affected by discretionary transfer of cases to tribal court to comment in writing before 2016).

169. *E.g.*, Strate v. A-1 Contracting, 520 U.S. 438 (1997).

170. *E.g.*, United States v. Cavanaugh, 643 F.3d 592 (8th Cir. 2001); State v. Spotted Eagle, 71 P.3d 1239 (Mont. 2003).

171. *See* Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY L. REV. 1 (2004); Brief of Amici Curiae National Intertribal Tax Alliance et al. at 6-8, 10-18, Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005) (No. 04-631), 2005 WL 1673219, at *5-8, *10-18.

172. *E.g.*, State v. Manypenny, 682 N.W.2d 143 (Minn. 2004) (upholding county-tribe law enforcement cooperative agreement); Mutual Aid Act, N. M. STAT. ANN. §§ 29-8-1 to -3 (West 2011) (authorizing any local government to enter into a law enforcement cooperative agreement with an Indian tribe).

173. *E.g.*, Contract for Prisoner Housing between the Grand Traverse Band of Ottawa and Chippewa Indians and the Benzie County Sheriff's Office (Jan. 1, 2006), *reprinted in* 31st Annual Federal Bar Association Indian Law Conference Course Materials at 195 (April 6-7, 2006).

174. *E.g.*, Intergovernmental Agreement on Cooperative Land Use and Planning

child welfare,[177] and dozens of other subjects.[178] Some states have even published guides on tribal-state relations.[179] Hundreds, if not thousands, of these agreements exist and are in operation at this moment.

These factors point to a very real constitutional fact—Indian tribes have somehow been incorporated into the American dual-sovereignty structure of government without a constitutional amendment to define the incorporation.[180] The Supreme Court's decisions are the strongest legal authority establishing the incorporation of Indian tribes into the American constitutional polity, though its pronouncements are haphazard at best. The Court's major holdings are: (1) that Indian tribes are not beholden at all to the Constitution;[181] (2) Indian tribes are immune from suit and from state and local taxation and regulation;[182] (3) inherent tribal sovereignty allows tribes to make laws on tribal membership and other subjects that otherwise would be prohibited by state or federal law;[183] (4) Indian tribes have the power to prosecute criminal offenders;[184] and (5) Indian treaty rights are extant until Congress abrogates them.[185] Congress and the Executive branch have largely acquiesced to these rulings, with rare

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between the Wampanoag Tribe of Gay Head (Aquinnah) and the Town of Aquinnah (2006), *available at* http://www.wampanoagtribe.net/Pages/Wampanoag_News/tribe%20approved%20MOU.pdf ; *see also* Cooperative Agreement between the U.S. Department of Interior—Bureau of Land Management and the Agua Caliente Band of Cahuilla Indians for the Santa Rosa and San Jacinto Mountains (1999), *available at* http://www.standupca.org/off-reservation-gaming/contraversial-applications-in-process/agua-caliente/tribal_coop_agreement_1999.pdf.

175. *Cf.* Lore Graham, *Securing Economic Sovereignty through Agreement*, 37 NEW ENG. L. REV. 523 (2003).

176. *E.g.*, MICH. CT. R. 2.615 (2008) (reciprocal comity); MINN. GEN. R. PRAC., Rule 10.02 (2011) (discretionary); WIS. STAT. ANN. § 806.245 (2011) (full faith and credit).

177. *E.g.*, Minnesota Dept. of Social Services, Tribal/State Indian Child Welfare Agreement as Amended in 2007 (February 2007), *available at* http://www.icwlc.org/docs/9-icwa_2007_tribal_state_agreement_dhs-5022-eng-2-07.pdf.

178. *E.g.*, Agreement for Animal Control Services (2004), *reprinted in* 31st Annual Federal Bar Association Indian Law Conference Course Materials at 191 (April 6-7, 2006).

179. *E.g.*, Governor's Office of Indian Affairs, State of Montana, *Tribal Relations Handbook: A Guide for State Employees on Preserving the State-Tribal Relationship* (Dec. 2009), *available at* http://tribalnations.mt.gov/docs/Tribal_Relations_Handbook.pdf. *See* SUSAN JOHNSON, JEANNE KAUFMANN, JOHN DOSSETT, AND SARAH HICKS, GOVERNMENT TO GOVERNMENT: UNDERSTANDING STATE AND TRIBAL GOVERNMENTS (Sia Davis, ed. 2009), *available at* http://www.nijc.org/pdfs/TTAP/NCSLGovttoGovt.pdf.

180. *See* POMMERSHEIM, *supra* note 53, at 139-43.

181. *See* Talton v. Mayes, 163 U.S. 376 (1896).

182. *See* Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751 (1998); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); Kansas Indians, 72 U.S. 737 (1867).

183. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

184. *See* United States v. Wheeler, 435 U.S. 313 (1978).

185. *See* Washington v. Wash. Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

exceptions.[186]

The Supreme Court only recognizes tribal sovereign rights in tribes that are federally recognized, however.[187] Federal recognition of a tribe's sovereignty grants a tribe the right to participate in the federal government's programs and services provided to Indian people nationally, but it also amounts to a critical political lifeline from the federal government to Indian tribes, who otherwise would not be able to assert their sovereignty validly under federal law.[188]

There are several ways Indian tribes can acquire the status of a federally recognized tribe. The clearest road to federal recognition is through the creation of a treaty relationship with the United States.[189] A treaty relationship means that the United States negotiated with an Indian tribe over issues of fundamental sovereign interests, such as land and governmental authority and responsibilities.[190] The Senate then executed agreement, followed by a Presidential declaration of the treaty's effective date.[191] All of this is conducted under the procedures established in Article II of the Constitution, rendering Indian treaties the supreme law of the land under Article VI (subject, of course, to congressional amendment and abrogation).[192]

Other means by which Indian tribes can become recognized by the federal government are through Acts of Congress,[193] certain legal actions or opinions of the Executive branch,[194] and more recently through the Federal Acknowledgment Process administered by the Bureau of Acknowledgment and Research in the Bureau of Indian Affairs.[195] Each of these requires some affirmative act by the relevant Indian tribe to pursue federal recognition, just like treaty tribes. It could be a lawsuit,[196] a petition to the Bureau of Indian

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186. *E.g.*, United States v. Lara, 541 U.S. 193, 199 (2004) (describing Congress's efforts to overturn *Duro v. Reina*, 495 U.S. 676 (1990)).

187. *Cf.* Carcieri v. Salazar, 555 U.S. 379 (2009) (holding that Indian tribes not federally recognized in 1934 may not be eligible for certain federal services, including having their lands held in trust by the federal government).

188. *See* 25 C.F.R. § 83.2 (2011); Samish Indian Nation v. United States, 419 F.3d 1355, 1358 (Fed. Cir. 2005); Roberto Iraola, *The Administrative Tribal Recognition Process and the Courts*, 38 AKRON L. REV. 867, 867-68 (2005).

189. *E.g.*, Treaty with the Ottawas, Etc., *supra* note 118.

190. *See, e.g.*,Treaty with the Ottawa, Etc., *supra* note 118, art. I (cession of Indian claims to land); art. II (establishment of reservations); art. XIII (right to hunt on ceded lands).

191. *See* Treaty with the Ottawa, Etc., *supra* note 118.

192. *See* U.S. CONST. art. II, § 2, cl. 2 (treaty clause); art. VI, cl. 2 (supremacy clause).

193. *E.g.*, Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act, 25 U.S.C. § 1300k (2006); Pokagon Band of Potawatomi Indians Act, 25 U.S.C. § 1300j (2006).

194. *E.g.*, U.S. GENERAL ACCOUNTING OFFICE, GAO-02-49, IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS 25 (Nov. 2001) (Sault Ste. Marie Tribe of Chippewa Indians).

195. *See id.* at 25-26 (listing tribes recognized under 25 C.F.R. § 83).

196. *E.g.*, Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

Affairs,[197] or support of a congressional bill.[198]

It is important next to consider what exactly Indian tribes are agreeing to when they acquire federal recognition. Treaty tribes—that is, signatories to the treaties executed and ratified between the earliest treaty (1778)[199] and the last treaties (1868)[200]—generally consented to what Chief Justice Marshall described in international law terms as "protection" under the federal government.[201] Under international law, that meant basically that the tribe had agreed to turn over its external sovereign rights to form military and other alliances with nations other than the United States—and nothing more.[202] Later treaties would provide for a greater intrusion in the internal sovereignty of Indian tribes, but not so much that they would lose their fundamental sovereign existence.[203]

While tribal sovereignty for treaty tribes is reserved in the treaties, for Indian tribes that are not treaty tribes, sovereignty could be ambiguous. The solution to this problem comes from the means by which the Supreme Court has decided its Indian cases over the years, and through congressional enactments related to the Indian Reorganization Act.[204] From the earliest Indian law cases, the Court has applied a sort of "least favored nation" analysis to treaty terms.[205] In large part, the Court will interpret tribal sovereignty and,

197. *E.g.*, Petition of the Grand Traverse Band of Ottawa and Chippewa Indians to the Secretary of Interior for Acknowledgement of Recognition as an Indian Tribe (1978).

198. *E.g.*, *Michigan Indian Recognition*, Hearing before the Subcommittee on Native American Affairs of the Committee on Natural Resources, House of Representatives, 103rd Cong. (1993).

199. *See* Treaty with the Delawares, U.S.-Delawares, Sept. 17, 1778, 7 Stat. 13.

200. *See* Treaty with the Nez Percés, U.S.-Nez Percés, Aug. 13, 1868, 15 Stat. 693; Treaty with the Navajo, U.S.-Navajo, June 1, 1868, 15 Stat. 667; Treaty with the Northern Cheyenne and Northern Arapaho, May 10, 1868, 15 Stat. 655; Treaty with the Crows, U.S.-Crows May 7, 1868, 15 Stat. 649; Treaty with the Cherokee, U.S.-Cherokee, Apr. 27, 1868, 16 Stat. 727; Treaty with the Ute, U.S.-Ute, Mar. 2, 1868, 15 Stat. 619.

201. *See* Worcester v. Georgia, 31 U.S. 515, 560-61 ("The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence-its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. 'Tributary and feudatory states,' says Vattel, 'do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state.' At the present day, more than one state may be considered as holding its right of self government under the guarantee and protection of one or more allies.").

202. *See* Worcester v. Georgia, 31 U.S. 515, 560-61; Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567, 574-77 (1995).

203. *See* Wiessner, *supra* note 202, at 577-80.

204. *See* Act of May 31, 1994, Pub. L. 103-263, § 5(b), 108 Stat. 707 (*codified at* 25 U.S.C. §§ 476(f), (g) (2006)).

205. *See* Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N. D. L. REV. 627, 658 (2004) (discussing United States v. Kagama, 118 U.S. 375, 384 (1886)).

often, treaty language in accordance with the least favorable (to tribes) federal court precedents or with its own perceptions or knowledge of Indian affairs, despite the actual language of the treaty or the factual realities on the ground.[206] In short, when the Court limits the tribal governmental authority of one tribe, all tribes suffer the same limitation whether they should be or not.[207] Similarly, though more happily for tribal interests, Congress's amendments to the Indian Reorganization Act allowed tribes to take advantage of most of the Act's favorable tribal government provisions even if they voted not to reorganize under the Act (or were not allowed).[208] In short, non-treaty tribes are looped in with treaty tribes for purposes of determining the contours of tribal sovereignty, for better or worse.

The reality of federal recognition is more complicated than mere eligibility to run federal programs and coordinate with state and local governments on community governance. Federal recognition comes with additional burdens, not the least of which is a federal plenary power over Indian affairs[209]—including the *internal* affairs of Indian tribes[210]—that has created an enormous mess in Indian Country.[211] While some aspects of tribal sovereignty appear not to be within the federal grasp—such as tribal citizenship rules[212] or internal

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206. *See generally* Dean B. Suagee, *The Supreme Court's "Whack-A-Mole" Game Theory in Federal Indian Law, A Theory that Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RESOURCES J. 90 (2002); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L. J. 1 (1999); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996).

207. For example, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), which held the Suquamish Tribe could not exercise criminal jurisdiction over non-Indians, applies to all Indian tribes.

208. *See* Act of May 24, 1990, Pub. L. 101-301, § 3(a), 104 Stat. 211 (*codified at* 25 U.S.C. § 478-1 (2006)).

209. *See* United States v. Lara, 541 U.S. 193, 200 (2004); Washington v. Confederated Tribes and Bands of the Yakima Indian Nation, 439 U.S. 463, 501 (1979); Clinton, *supra* note 53, at 162-234; Alex Tallchief Skibine, *Reconciling Federal and State Power Inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination*, 1995 UTAH L. REV. 1105, 1118-37 (1995).

210. *E.g.*, Cohen, *supra* note 48 (describing many aspects of federal plenary power over the day-to-day lives of American Indians in the early 1950s); Alex Tallchief Skibine, *Integrating the Indian Trust Doctrine into the Constitution*, 39 TULSA L. REV. 247, 256-58 (2003) (describing the power of Congress to interfere with tribal self-government); *see also* Clinton, *supra* note 53, at 235-252 (rejecting federal plenary power over internal Indian affairs).

211. *See generally* Riley, *supra* note 59, at 827-30; Skibine, *supra* note 53, at 1137-55.

212. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (membership); *see also id.* at 55-56 ("They have power to make their own substantive law in internal matters, see *Roff v. Burney* [168 U.S. 218 (1897)] (membership); *Jones v. Meehan* [175 U.S. 1, 29 (1899)] (inheritance rules); *United States v. Quiver* [241 U.S. 602 (1916)] (domestic relations), and to enforce that law in their own forums, *see, e. g., Williams v. Lee* [358 U.S.

governance disputes[213]—virtually all aspects of tribal sovereignty *even in the modern era* are subject to the review and occasionally control of federal (and sometimes state) courts. The most egregious example of this review and control is over civil disputes in tribal courts where the defendant is a nonmember.[214] No Indian tribe has ever consented to such federal court review, and no Act of Congress has ever authorized such review.[215] And still, such review is pervasive in Indian Country, with federal courts all over the country confronted with complicated questions of tribal court jurisdiction, questions about which federal court judges admit to having no special expertise or even experience.[216] Federal intrusion on tribal sovereignty without the express (or even implied) consent of those tribal nations is the core subject area of this Article.

We will return to a fundamental question—what exactly did Indian tribes consent to in order to acquire what we now call federal recognition?

II. THEORIES OF FEDERAL CONTROL OVER INDIAN AFFAIRS

Congress has plenary control over Indian affairs, to the exclusion of the States and other nations, according to the constitutional common law of the Supreme Court.[217] As a part of the exercise of its plenary power, Congress has delegated enormous and general authority to deal in Indian affairs to the President and to the Secretary of Interior.[218] With virtually no significant

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217 (1959)].").

213. *E.g.*, Bowen v. Doyle, 880 F. Supp. 99 (W.D. N.Y. 1995) (enjoining state court from asserting jurisdiction over internal tribal political affairs).

214. *See* Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987); National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985).

215. *See National Farmers Union*, 471 U.S. at 854-55 (quoting Attorney General Cushing, 7 OP. ATTY. GEN. 175, 179-81 (1855): "But there is no provision of treaty, and no statute, which takes away from the Choctaws jurisdiction of a case like this, a question of property strictly internal to the Choctaw nation; nor is there any written law which confers jurisdiction of such a case in any court of the United States. . . . The conclusion seems to me irresistible, not that such questions are justiciable nowhere, but that they remain subject to the local jurisdiction of the Choctaw. . . . Now, it is admitted on all hands ... that Congress has 'paramount right' to legislate in regard to this question, in all its relations. *It has legislated, in so far as it saw fit, by taking jurisdiction in criminal matters, and omitting to take jurisdiction in civil matters. . . . By all possible rules of construction the inference is clear that jurisdiction is left to the Choctaws themselves of civil controversies arising strictly within the Choctaw Nation.*") (emphasis added).

216. *See* Sarah Krakoff, *Tribal Civil Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187 (2010).

217. *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 25-80 (2002).

218. *See* 25 U.S.C. §§ 2, 9 (2006). *See generally* Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1 (2004).

exception, the Supreme Court has upheld every exercise of Congress's legislative authority to deal in Indian affairs.[219] And, only in rare circumstances, has the Court struck down an act of the Executive branch as lacking authorization.[220]

The Constitution is all but silent as to Indian affairs, with the lone provision authorizing federal action being the so-called Indian Commerce Clause.[221] Article I, Section 8, Clause 3 authorizes Congress to regulate commerce with Indian tribes, along with commerce with foreign nations and among the several States.[222] Given the very broad definition of "commerce" that the Supreme Court has recognized through the Necessary and Proper Clause,[223] Congress's authority in Indian affairs is mighty.

Congress might not have the incredible—well-nigh absolute in some instances[224]—authority that its plenary power confers over Indian affairs without the authority voluntarily relinquished to it in hundreds of Indian treaties. In fact, given the Supreme Court's "least favored nation" canon of interpreting Indian treaties,[225] the Court has significantly bolstered congressional power over Indian affairs by asserting that Congress has acquired additional authority to deal in Indian affairs via the treaty power.[226] While other provisions of the Constitution, in particular the Property Clause[227] and the Territory Clause,[228] have been advanced as possible sources of congressional authority, it is the Indian Commerce Clause and the treaty power that have been the clearest sources of authority.[229]

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219. *E.g.*, United States v. Kagama, 118 U.S. 375 (1886) (Major Crimes Act). The Supreme Court now employs the rational basis test in reviewing congressional enactments in Indian affairs; *see* Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 83 (1977).

220. *E.g.*, Cherokee Nation of Oklahoma v. Leavitt, 543 U.S. 631 (2005) (rejecting federal government's interpretation of self-governance compact legislation).

221. U.S. CONST. art. I, § 8, cl. 3.

222. *See id.*

223. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.3, at 247-78 (4th ed. 2011).

224. Professor Prakash quotes the Oklahoma Supreme Court for defining federal plenary power as "absolute," labeling it "an undoubted overstatement." Prakash, *supra* note 59, at 1077 n.44 (quoting Mashunkashey v. Mashunkashey, 134 P.2d 976, 979 (Okla. 1942)).

225. Fletcher, *supra* note 205, at 658.

226. *See* United States v. Lara, 541 U.S. 193, 200-01 (2004) (citing Missouri v. Holland, 252 U.S. 416, 433 (1920)).

227. *See Lara*, 541 U.S. at 200 (citing FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 209-10 (1982 ed.)).

228. *See* Cleveland, *supra* note 217, at 26; Nathan Speed, Note, *Examining the Interstate Commerce Clause through the Lens of the Indian Commerce Clause*, 87 B.U. L. REV. 467, 477-78 (2007).

229. *See Lara*, 541 U.S. at 200.

A. A Quick History of the Rise of Congressional Plenary Power over Indian Affairs

Congressional plenary power over Indian affairs has three components. The first is probably the easiest as a matter of law, and perhaps the most controversial as a matter of politics—the exclusion of states from Indian affairs.[230] As noted above, Chief Justice Marshall wrote that state law has "no force" in Indian Country.[231] The Indian Commerce Clause serves to exclude state governments from enacting their own major Indian affairs laws, certainly if they conflict with federal law or policy.[232] Moreover, the various Indian treaties taken singly and together, at least since 1789 (the year the states ratified the Constitution), completely foreclose state input into Indian affairs.[233] Generally, courts usually will not recognize significant state authority into Indian affairs without apparent consent (or at least clear acquiescence) from Congress.[234] While a small group of law professors and state attorneys general debate whether this is the case,[235] the law is clear in excluding states from Indian affairs absent congressional consent.[236]

The second component is related, and is the congressional plenary power over what I term *external* Indian affairs; that is, the relationship between Indian tribes and the federal government and the states. Congressional plenary power over external Indian affairs dates back to earliest days of the American Revolution, when the Continental Congress first attempted to assert diplomatic and military authority over Indian affairs.[237] The nascent United States was only doing what the British had been expressly doing since 1763, which was to preclude the colonies and Americans from engaging Indian tribes and Indian people in commerce, trade, and virtually all forms of "intercourse" without

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230. *E.g.*, Indian Child Welfare Act, 25 U.S.C. § 1901-1963 (2006); Bryan v. Itasca County 426 U.S. 373 (1976); Williams v. Lee, 358 U.S. 217 (1959).

231. Worcester v. Georgia, 31 U.S. 515, 561 (1832).

232. *E.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

233. For example, state agreements to purchase lands after 1789 are invalid on their face. *See* Oneida Indian Nation of N.Y. v. Oneida County, 414 U.S. 661 (1974); Oneida County v. Oneida Indian Nation of N.Y., 470 U.S. 226 (1985). *See also* Jack Campisi, *The Trade and Intercourse Acts: Land Claims on the Eastern Seaboard, in* IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS 337 (1985).

234. *See* Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995); Okla. Tax Comm'n v. Sac and Fox Tribe, 508 U.S. 114 (1993); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983). *But see* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

235. *See* Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICH. L. REV. FIRST IMPRESSIONS 55, 59-60 (2010); Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201 (2007); Prakash, *supra* note 59, at 1110-20.

236. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 9, § 6.01[1], at 499.

237. *See generally* MOHR, *supra* note 76, at 37-91.

national government consent and regulation.[238] The national authority carried over into the Articles of Confederation period, though not without complexity, given the contradictory character of Article IX, which seemed to grant significant Indian-affairs power to both Congress *and* the states.[239] James Madison's proposed fix to the Articles reached its final form in the Indian Commerce Clause, preserving congressional authority over Indian commerce, and thereby, through the Necessary and Proper Clause, all Indian affairs.[240]

Contrast this component with the third component—congressional plenary power over *internal* Indian affairs, including the authority of Indian tribes to govern themselves.[241] There is little controversy at all about the plenary power of Congress over external Indian affairs, which tends to serve both the federal government and Indian tribes well. But internal tribal affairs are another matter.

Congress and the federal government generally did not want, or need, to control the inner workings of Indian tribes for many decades after the formation of the Union. From the Founding until as late as 1885,[242] Congress largely refused to regulate Indian tribes themselves, instead focusing on forcing tribes to cede land and remove to the west.[243] Under the Constitution, this made sense. The Constitution is written with an implied understanding that Indian tribes usually are—and will remain—outside of the constitutional governance structure and, outside of the geographic bounds of the United States.[244]

But by 1885, when Congress enacted the Major Crimes Act that extended

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238. *See* MOHR, *supra* note 76, at 1-36. Congress eventually codified its policy choices in the Trade and Intercourse Acts. *See* AMAR, *supra* note 102, at 108 n.* ("It also bears notice that the First Congress enacted a statute regulating noneconomic interactions and altercations—"intercourse"—with Indians; see An Act to regulate trade and intercourse with the Indian tribes, July 22, 1790, 1 Stat. 137. Section 5 of this act dealt with crimes—whether economic or not—committed by Americans on Indian lands."); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 24-26 (2010).

239. *See* FEDERALIST NO. 42 (James Madison); Clinton, *supra* note 103, at 435.

240. *See* Clinton, *supra* note 81, at 1064-1164 (detailing the history of the adoption of the Indian Commerce Clause).

241. *E.g.*, Goodface v. Grassrope, 708 F.2d 337 (8th Cir. 1983) (rejecting federal authority to decide internal tribal disputes); Kaighn Smith, Jr., *Civil Rights and Tribal Employment*, 47 FED. LAW., March/April 2000, at 34 (summarizing tribal employment scenarios). *Compare* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (finding no federal court cause of action to enforce the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq.), *with* Indian Bill of Rights, 25 U.S.C. § 1302 (2006) (limiting tribal government authority over persons within tribal jurisdiction).

242. Congress enacted the Major Crimes Act in 1885, the first significant federal legislative incursion into internal Indian affairs. *See* Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 790-808 (2006) (describing history leading to Major Crimes Act).

243. *See* Ralph W. Johnson, *Indian Tribes and the Legal System*, 72 WASH. L. REV. 1021, 1022-23 (1997); James R. Kerr, *Constitutional Rights, Tribal Justice, and the American Indian*, 18 J. PUB. L. 311, 313-314 (1969).

244. *See* Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TUL. L. REV. 509, 561-62 (2007).

federal criminal jurisdiction into Indian Country, the geographic reality was that the remaining Indian tribes were within the territorial boundaries of the United States.[245] Quickly following the Major Crimes Act, in 1887 Congress passed the Dawes Act, or the General Allotment Act,[246] which instructed the Department of Interior to prepare to "allot" Indian reservations with the dual purpose of "civilizing" Indians and of breaking up the tribal land mass within the United States.[247] Once again, Congress had legislated directly to interfere with internal tribal relations, this time to rewrite the rules of land ownership and possession inside of Indian Country.[248]

The Executive branch, typically without congressional authorization, had already been interfering with internal tribal affairs for years.[249] The Bureau of Indian Affairs enacted regulations creating Courts of Indian Offenses to enforce the similarly promulgated Law and Order Codes applied to Indian reservations.[250] The Bureau appointed Indian people to serve both as tribal judges and tribal police, giving the project the veneer of tribal sovereignty, but the reality was that these legal structures were entirely of the Bureau's concoction.[251] The lower federal courts went along with the charade, rejecting the claims of Indians prosecuted under the codes and in tribal courts who alleged the court had no authority.[252]

The most recent, significant, overt effort to interfere with tribal affairs came from the enaction of the 1968 Indian Civil Rights Act (ICRA)[253] in which Congress instructed Indian tribal governments to comply with an altered

245. *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 has existed anywhere else; *because the theater 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.") (emphasis added).

246. Ch. 119 24 Stat. 388 (1887). *See generally* WILCOMB E. WASHBURN, THE ASSAULT ON TRIBALISM: THE GENERAL ALLOTMENT LAW (DAWES ACT) OF 1887 (1975).

247. *See* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L. J. 1, 7-14 (1995).

248. *See generally* Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559 (2001).

249. *See American Indian Religious Freedom: Hearings before the United States Senate Select Committee on Indian Affairs*, 95th Cong. (1978) (detailing federal interference with American Indian religions); Cohen, *supra* note 48 (federal interference with day-to-day lives of American Indians in the early 1950s).

250. *See* VINE DELORIA, JR., AMERICAN INDIANS, AMERICAN JUSTICE 113-16 (1983); WILLIAM T. HAGEN, INDIAN POLICE AND JUDGES 104-25 (1966); NATIONAL AMERICAN INDIAN COURT JUDGES ASSN., INDIAN COURTS AND THE FUTURE 7-13 (David H. Getches, ed. 1979); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N. M. L. REV. 225, 235 (1994).

251. *See* HAGEN, *supra* note 250, at 160-63; Kerr, *supra* note 243, at 321.

252. *See* United States v. Clapox, 35 F. 575 (D. Or. 1888).

253. Pub. L. 90-284, Title II, § 201, 82 Stat. 77 (1968) (codified at 25 U.S.C. § 1301 et seq.).

version of the Bill of Rights.[254] Only in recent decades have Congress and the Bureau loosened the reins on tribal governments, still reserving for themselves significant apparent authority to direct interior tribal law and policy, especially at early stages in a tribal government's formation and development.[255]

The key Supreme Court cases that effectively ratified the authority of Congress and the Executive branch to interfere in internal tribal relations were *United States v. Kagama*,[256] and *Lone Wolf v. Hitchcock*.[257] *Kagama* and *Lone Wolf* rejected direct challenges to the authority of Congress to enact the Major Crimes Act and to allot an Indian reservation, respectively. There are two key modes of jurisprudence that undergird congressional plenary power over *internal* tribal affairs, though they are closely related, and even a bit dependent on each other, but the next two Parts will parse them out separately for clarity's sake.

B. "Protection" and the Guardian-Ward Relationship—The Common Law Authority for Congressional Plenary Power over Indian Affairs

The United States Supreme Court has supplied many common law decisions announcing various forms of the political relations between the United States and Indian tribes, articulating various forms of federal dominance. In the Marshall Trilogy, Chief Justice Marshall introduced into the American constitutional lexicon the notion that Indian tribes and Indian people were like the little brothers and sisters to the federal government by comparing federal-tribal relations to that of a guardian-ward relationship.[258] The original source, generally speaking, of the notion that a national government could control the lives and governments of Indigenous people in such a manner is the Doctrine of Discovery, which presumes that Indian people are not legally (or spiritually) competent to control their own destinies.[259] Robert A. Williams, Jr.'s critically important work, *The American Indian in Western Legal Thought*,

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254. *See generally* Arthur Lazarus, Jr., *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 N.D. L. REV. 337 (1969); Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969).

255. *See* 25 U.S.C. § 476(c)(2)(B). *See also* Timothy W. Joranko & Mark C. Van Norman, *Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments*, 29 GONZ. L. REV. 81 (1993-1994).

256. 118 U.S. 375 (1886).

257. 187 U.S. 553 (1903).

258. *See* Angelique EagleWoman, *A Constitutional Crisis When the U.S. Supreme Court Acts in a Legislative Manner? An Essay Offering a Perspective on Judicial Activism in Federal Indian Law and Federal Civil Procedure Pleading Standards*, 114 PENN ST. L. REV. STATIM 41, 43 (2010), *available at* http://www.pennstatelawreview.org/114/114_Penn_Statim_41.pdf (quoting Cherokee Nation v. Georgia, 30 U.S. 1, 59 (1831)); Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691, 698 (2004) (same).

259. *See generally* ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY (2006).

is the most thorough legal history of the origins of the Doctrine of Discovery.[260]

The British, and then the Americans, codified the major aspects of the Doctrine of Discovery in the 1763 Proclamation[261] and in the Trade and Intercourse Acts, first enacted in 1790.[262] These statutes forbade any person from engaging in trade (or intercourse) with Indians and Indian tribes without the consent of the national government.[263] Of note, all land sales and transactions involving Indians or tribes were void, absent consent of the national sovereign.[264] But, between the establishment of the United States and the first Trade and Intercourse Act (approximately 1775-1790), there was a gap, in which no valid statute controlled trade and land transactions with Indian nations.

Chief Justice Marshall constitutionalized the Doctrine of Discovery in *Johnson v. M'Intosh*,[265] where the Supreme Court held that land transactions between Indians and non-Indians, during the period in which, arguably, there was no statutory prohibition, were still void as a matter of federal common law.[266] Alternatively, *Johnson* stands for the proposition that Congress is authorized to codify the Doctrine of Discovery, and that the United States stands in the place of Britain in relation to any land transactions taking place under the 1763 Proclamation.[267] The major take-away from *Johnson* is that Indian tribes and Indian people cannot own clear title to their own lands;[268] that

260. *See* WILLIAMS, *supra* note 36. *See also* Williams, *supra* note 104; Kevin J. Worthern, *Sword or Shield: The Past and Future Impact of Western Legal Thought on American Indian Sovereignty*, 104 HARV. L. REV. 1372 (1991) (reviewing WILLIAMS, *supra* note 36); Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1 (1983).

261. *See* WILLIAMS, *supra* note 36, at 235-38.

262. *See* Indian Non-Intercourse Act, 25 U.S.C. § 177 (2006) (originally enacted as Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137). *See generally* FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834 (1970).

263. *E.g.*, Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899, 901-02 (D. Mass. 1977) (quoting Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960)).

264. *E.g.*, Ewert v. Bluejacket, 259 U.S. 129, 138 (1922) ("The purchase by Ewert, being prohibited by the statute, was void.") (quoting Waskey v. Hammer, 223 U.S. 85, 94 (1911)).

265. 21 U.S. 543 (1823).

266. *See id.* at 604-05.

267. *See id.* at 598; *see also id.* at 592 ("This opinion conforms precisely to the principle which has been supposed to be recognised by all European governments, from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.").

268. *See id.* at 587 ("An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the erown [sic] to extinguish that right. This is incompatible with an absolute and complete

instead Indian tribes and people only have a "right of occupancy,"[269] leaving superior title to the lands to the United States. *Johnson* expressly holds that Indian tribes and Indian people are inferior entities and people,[270] justifying congressional intervention in Indian affairs, and the limit on Indian land titles.[271]

A decade later in the *Cherokee Cases*,[272] the Supreme Court firmly and expressly established the guardian-ward structure of federal Indian affairs.[273]

Chief Justice Marshall's lead opinion in *Cherokee Nation v. Georgia* held that Indian tribes were neither states nor foreign nations.[274] The question presented in *Cherokee Nation* was whether an Indian tribe could invoke a provision in the Constitution that allows either a state or a foreign nation to sue in the Supreme Court under the Court's original jurisdiction.[275] Rather than merely conclude that the Cherokee Nation was neither, and ending his opinion there, Chief Justice Marshall added that he thought Indian tribes were better described as "domestic dependent nations."[276] The dissent relied upon concepts of international law to find that the Cherokee Nation, in agreeing to place itself

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title in the Indians.").

269. *See id.* at 574 ("Indian right of occupancy"); *id.* at 583 ("right of occupancy"); *id.* at 585 (same).

270. *See id.* at 590 ("But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.").

271. *See id.* ("What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.").

272. Worcester v. Georgia, 31 U.S. 515 (1832); Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

273. *See Worcester*, 31 U.S. at 562 ("Will these powerful considerations avail the plaintiff in error? We think they will. He was seized, and forcibly carried away, while under guardianship of treaties guarantying the country in which he resided, and taking it under the protection of the United States."); *Cherokee Nation*, 30 U.S. at 17 ("Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.").

274. *See Cherokee Nation*, 30 U.S. at 17.

275. *See id.* at 15-16.

276. *Id.* at 17.

under the "protection" of the United States in various treaties, had merely agreed to become a protectorate of the federal government, and retained all other aspects of sovereignty.[277]

Since only Justice M'Lean joined Chief Justice Marshall's opinion, it took another case for the Court to parse out the status of Indian tribes under the Constitution: *Worcester v. Georgia*,[278] decided the next year. In *Worcester*, Chief Justice Marshall held that Indian tribes were better understood to be "distinct, independent political communities,"[279] and expressly adopted the *Cherokee Nation* dissenters' theories on Indian tribes retaining significant internal sovereignty.[280] Over a solitary dissent,[281] the *Worcester* Court held that

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277. *See id.* at 52-53 (Thompson, J., dissenting) ("The terms *state and nation* are used in the law of nations, as well as in common parlance, as importing the same thing; and imply a body of men, united together, to procure their mutual safety and advantage by means of their union. Such a society has its affairs and interests to manage; it deliberates, and takes resolutions in common, and thus becomes a moral person, having an understanding and a will peculiar to itself, and is susceptible of obligations and laws. Vattel, 1. Nations being composed of men naturally free and independent, and who, before the establishment of civil societies, live together in the state of nature, nations or sovereign states; are to be considered as so many free persons, living together in a state of nature. Vattel 2, § 4. Every nation that governs itself, under what form soever, without any dependence on a foreign power, is a sovereign state. Its rights are naturally the same as those of any other state. Such are moral persons who live together in a natural society, under the law of nations. It is sufficient if it be really sovereign and independent: that is, it must govern itself by its own authority and laws. We ought, therefore, to reckon in the number of sovereigns those states that have bound themselves to another more powerful, although by an unequal alliance. The conditions of these unequal alliances may be infinitely varied; but whatever they are, provided the inferior ally reserves to itself the sovereignty or the right to govern its own body, it ought to be considered an independent state. Consequently, a weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power. Tributary and feudatory states do not thereby cease to be sovereign and independent states, so long as self government, and sovereign and independent authority is left in the administration of the state. Vattel, c. 1, pp. 16, 17.").

278. 31 U.S. 515 (1832).

279. *Id.* at 559.

280. *See id.* at 560-61 ("The actual state of things at the time, and all history since, explain these charters; and the king of Great Britain, at the treaty of peace, could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles so often repeated in Indian treaties; extending to them, first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence-its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. 'Tributary and feudatory states,' says Vattel, 'do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state.' At the present day, more than one state may be considered as holding its right of self government under the guarantee and protection of one or more

the State of Georgia's efforts to undermine Cherokee sovereignty were unenforceable, and that, as a general matter, state law had "no force" in Indian Country.[282] This watershed opinion raised the Constitution's Supremacy Clause on a pedestal, and upheld the supremacy of all federal law–even Indian treaties–over state law.[283]

Worcester is a prime example of analyzing the relationship between the federal government, the states, and Indian tribes by the utilization of simple consent theory. Chief Justice Marshall's soundest legal authority underlying the relationship between the United States and the Cherokee Nation was the Cherokee treaties themselves in which the Cherokee people agreed to place themselves under the "protection" of the federal government.[284] Marshall expressly adopted the international law definition of "protection," especially the writings of Emer De Vattel,[285] which were well known and accepted in the

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allies.").

281. *See id.* at 596 (reporting that Justice Baldwin dissented without opinion).

282. *Id.* at 561 ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.").

283. *See id.* at 559 ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties."). *See also* Comment, *Federal Plenary Power in Indian Affairs After* Weeks *and* Sioux Nation, 131 U. PA. L. REV. 235, 243 n. 49 (1982) ("*Worcester* and *Cherokee Nation* both analyzed the specific terms of treaties with the Cherokee to decide questions of federal law, and applied the supremacy clause to bind the states as well as the federal government to the terms of the treaties.").

284. *See* Worcester, 31 U.S. at 552 (1832) ("The general law of European sovereigns, respecting their claims in America, limited the intercourse of Indians, in a great degree, to the particular potentate whose ultimate right of domain was acknowledged by the others. This was the general state of things in time of peace. It was sometimes changed in war. The consequence was, that their supplies were derived chiefly from that nation, and their trade confined to it. Goods, indispensable to their comfort, in the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. *The Indians perceived in this protection only what was beneficial to themselves-an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that protection, without involving a surrender of their national character.*" (emphasis added)).

285. *See id.* at 561 (citing 1 EMER DE VATTEL, THE LAW OF NATIONS 16-17

United States.[286] Simply put, the Cherokees had consented to the delegation of their external sovereignty—that is, the right to seek alliances with any other nation besides the United States and other foreign affairs powers[287]—to the United States. This was likely subject to recapture by the Cherokee Nation at the termination of the treaties if that day ever came. The internal sovereignty of the Cherokee Nation was expressly protected.

Of course, the political reality of the day foreclosed a future in the American Southeast for the bulk of the Cherokee Nation, which the federal government, under President Jackson and others, forced to undergo the genocidal Trail of Tears.[288] Moreover, *Worcester*'s application of the "protection" principle became a dead letter within years, perhaps as a partial result of the Trail of Tears and the general degradation of Indian tribes under the pressure and "tutelage" of the federal government.[289]

Worcester established a kind of trust relationship between the United States and the Cherokee Nation, to borrow modern federal Indian law lingo.[290] Instead of Indian tribes being little brother governments to the United States, and Indian people being literal wards (and rhetorical children) to the federal agents and officials charged with supervising Indian affairs as Marshall described in *Johnson* and *Cherokee Nation*, under a treaty or similar agreement the United States would deal with Indian tribes more like partners in an international arrangement.

But that understanding died almost immediately[291] (and so did Chief Justice Marshall[292]). While the Supreme Court did not have occasion to revisit *Worcester* for decades, it became clear by the end of the 19th century that the Court had retreated to the more familiar guardian-ward dichotomy in describing

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(Northampton, Thomas M. Pomroy 1805)).

286. *See* Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N. C. L. REV. 421, 427 (1991); Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 192-94 (1984).

287. *See* PRUCHA, *supra* note 262, at 61 (noting that the 1785 Treaty of Hopewell provided that the Cherokees came under the protection of the Americans, and agreed not to align with any other sovereign).

288. *See* Rennard Strickland & William M. Strickland, *A Tale of Two Marshalls: Reflections on Indian Law and Policy, the Cherokee Cases, and the Cruel Irony of Supreme Court Victories*, 47 OKLA. L. REV. 111, 122-26 (1994); Ronald N. Satz, *The Cherokee Trail of Tears: A Sesquicentennial Perspective*, 73 GA. HIST. Q. 431 (1989); Carl J. Vipperman, *The Bungled Treaty of New Echota: The Failure of Cherokee Removal, 1836-1838*, 73 GA. HIST. Q. 540 (1989).

289. *See* Mitchel v. United States, 34 U.S. 711, 746 (1835); Fletcher, *supra* note 205, at 647-48.

290. *See* Fletcher, *supra* note 205, at 658-61.

291. *See* Mitchel, 34 U.S. 711 (1835).

292. The famed Chief Justice died in 1835. *See* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 806 (rev. ed. 1926).

Indian affairs. In *Ex parte Crow Dog*,[293] *United States v. Kagama*,[294] *Cherokee Nation v. Hitchcock*,[295] and most especially in *Lone Wolf v. Hitchcock*,[296] the Supreme Court recognized an all-but-absolute plenary power over both internal and external relations involving Indian tribes and Indian people[297]—in large part deriving from its own descriptions of the guardian-ward relationship between the United States and Indian tribes and Indian people.[298] Ironically,

293. 109 U.S. 556 (1883).

294. 118 U.S. 375 (1886).

295. 187 U.S. 294 (1902).

296. 187 U.S. 553 (1903).

297. *See generally* ECHO-HAWK, *supra* note 19, at 161-86 (describing the import of the *Lone Wolf* decision) POMMERSHEIM, BROKEN LANDSCAPE, *supra* note 53, at 125-51 (same); ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 71-87 (2005) (describing the rise of plenary power).

298. *E.g.*, *Lone Wolf*, 187 U.S. at 565 ("In one of the cited cases it was clearly pointed out that Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians."); *Cherokee Nation*, 187 U.S. at 302 ("As we have said, the title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians, and the question arises, What is the duty of the government of the United States with reference to this trust? While we have recognized these tribes as dependent nations, the government has likewise recognized its guardianship over the Indians and its obligations to protect them in their property and personal rights.") (internal quotation marks omitted); *Kagama*, 118 U.S. at 383-84 ("It will be seen at once that the nature of the offense (murder) is one which in most all cases of its commission is punishable by the laws of the states, and within the jurisdiction of their courts. The distinction is claimed to be that the offense under the statute is committed by an Indian, that it is committed on a reservation set apart within the state for residence of the tribe of Indians by the United States, and the fair inference is that the offending Indian shall belong to that or some other tribe. It does not interfere with the process of the state courts within the reservation, nor with the operation of state laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation. It seems to us that this is within the competency of congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States, dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen."); *Crow Dog*, 109 U.S. at 568-69 ("The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all,-that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs. They were nevertheless to be subject to the laws of the United States, not in the sense of citizens, but, as

there was very sparse support in either the Constitution or Indian treaties for such incredible power,[299] but that did almost nothing to dissuade the Court.[300]

During the period following *Worcester* and leading up to *Crow Dog*, the fortunes of Indian tribes nationally completely fell apart. The federal government succeeded in forcing nearly all tribal communities in the American southeast[301] and the Ohio River Valley[302] to remove to the west of the Mississippi, leaving only scattered remnants of tribal communities in the swamps[303] and the mountains,[304] as well as some Indian communities in the Old Northwest that resided in areas that could not support mass agriculture.[305] Indian people in California suffered incredible, almost unbelievable, torment following the Gold Rush of 1849, including numerous massacres and mass murders, disease, slavery, and cultural oppression.[306] The Great Sioux Nation that fought the United States military to a standstill by 1868 began almost immediately to collapse as their hunting-dependent livelihoods disappeared with the near-extinction of the buffalo herds,[307] and the federal government illegally conducted a taking of their sacred Black Hills in favor of American gold miners and land speculators.[308] Congressionally-approved "agreements" between the Sioux leaders and the United States were negotiated under a cloud of incredible duress, including threats of mass starvation, in the decades that

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they had always been, as wards, subject to a guardian; not as individuals, constituted members of the political community of the United States, with a voice in the selection of representatives and the framing of the laws, but as a dependent community who were in a state of pupilage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor, and by education, it was hoped might become a self-supporting and self-governed society.").

299. *See Kagama*, 118 U.S. at 378-79.

300. *E.g.*, United States v. Lara, 541 U.S. 193, 200 (2004) (reaffirming congressional plenary power in Indian affairs in modern cases).

301. *See generally* GRANT FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS (3rd ed. 1972).

302. *See generally* GRANT FOREMAN, THE LAST TREK OF THE INDIANS (1946).

303. *E.g.*, Alanson Skinner, *Notes on the Florida Seminole*, 15 AM. ANTHROPOLOGIST (n.s) 63 (1913).

304. *E.g.*, JOHN R. FINGER, THE EASTERN BAND OF CHEROKEES, 1819-1900 (1984). *Cf.* MALINDA MAYNOR LOWERY, LUMBEE INDIANS IN THE JIM CROW SOUTH: RACE, IDENTITY, & THE MAKING OF A NATION (2010).

305. *E.g.*, FLETCHER, *supra* note 41, at 1-55.

306. *See* EXTERMINATE THEM! WRITTEN ACCOUNTS OF THE MURDER, RAPE, AND ENSLAVEMENT OF NATIVE AMERICANS DURING THE CALIFORNIA GOLD RUSH (Clifford E. Trafzer & Joel R. Hyer, eds. 1999); C. Hart Merriam, *The Indian Population of California*, 7 AM. ANTHROPOLOGIST 594, 599-606 (1905).

307. *See* Jeffrey Ostler, *"They Regard Their Passing as* Wakan*": Interpreting Western Sioux Explanations for the Bison's Decline*, 30 W. HIST. Q. 475, 475 (1999); ROBERT M. UTLEY, THE LAST DAYS OF THE SIOUX NATION (1963). *See generally* JAMES V. FENELON, CULTURICIDE, RESISTANCE, AND SURVIVAL OF THE LAKOTA 25-252 (1998).

308. *See* United States v. Sioux Nation of Indians, 448 U.S. 371 (1980).

followed.[309]

As the affairs of Indian tribes declined, the aggressiveness of Congress and the Executive branch in undermining tribal communities increased. By the 1850s, the Executive branch had adopted as a matter of policy a method of breaking up Indian land holdings by introducing the allotment of Indian lands in various treaties involving the Anishinaabe communities of the Old Northwest.[310] In 1887, Congress adopted allotment as its official Indian affairs policy goal, with the intent of breaking up the tribal land mass.[311] Congress and the Executive branch targeted tribes that had negotiated the right *not* to be allotted or otherwise give up their land ownership in strong treaty language for allotment.[312]

The first two Supreme Court cases establishing a federal common law justification of federal plenary power over Indian affairs arose tangentially out of these disputes. *Ex parte Crow Dog* [313] arose out of the murder by Crow Dog of Spotted Tail, a competing leader of the Lower Brule Sioux community.[314] After Crow Dog's conviction in federal court, the Supreme Court granted a writ of habeas corpus, declaring that the federal government had no authority to prosecute Indian-on-Indian crime within Indian Country.[315] The *Crow Dog* Court relied upon the 1868 Treaty of Fort Laramie, which included a "bad men" clause that clearly established tribal authority to prosecute their own members, and excluded federal authority.[316] Of note, the Court added that someone of Crow Dog's barbaric and uncivilized character could not possibly hope to comprehend relatively sophisticated federal laws and political norms, and could not have participated in the political process that established such laws and norms.[317] Here, the guardian-ward dichotomy rears its visible and ugly head in the overt racism of the Supreme Court.[318]

The Bureau began a campaign promising lawlessness in Indian Country if

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309. *See* Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 821 n.411 (1992). ("The Government attached the 'sell-or-starve' rider to the treaty during the winter when the Government prevented the tribe from hunting, moved most of the members into stockades, and threatened to withhold rations if they did not agree to the treaty.").

310. *See* FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 241-42 (1994).

311. *See* General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887), *repealed in part by* Wheeler-Howard Act, ch. 576, § 1, 48 Stat. 984 (1934).

312. *E.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); ECHO-HAWK, *supra* note 19, at 161-86 (describing the import of the *Lone Wolf* decision); POMMERSHEIM, BROKEN LANDSCAPE, *supra* note 53, at 125-51 (same).

313. 109 U.S. 556 (1883).

314. *See* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 108-15 (1994).

315. *See Crow Dog*, 109 U.S. at 572.

316. *See id.* at 563.

317. *See id.* at 571-72.

318. *See* WILLIAMS, *supra* note 297, at 75-79.

no federal prosecutor had authority in Indian Country, prompting Congress to enact the Major Crimes Act in 1885.[319] The first challenge to a federal prosecution under the Major Crimes Act reached the Supreme Court the very next year in *United States v. Kagama*,[320] a case arising on the Hoopa Valley Reservation, which had been established by an Executive Order of President Grant.[321]

Defending the Major Crimes Act in *Kagama* presented the government with a slight problem—the Supreme Court had changed dramatically since the Marshall Court,[322] and was beginning to embark on a long campaign to undermine congressional authority.[323] The first holding of the *Kagama* Court was to state that the Indian Commerce Clause simply did not authorize the Major Crimes Act.[324] Despite the original understanding of the First Congress, which had established a kind of general criminal law for Indian Country as applied to Americans,[325] the Court casually held that the Commerce Clause simply had nothing in it authorizing the assertion of federal criminal jurisdiction in Indian Country.[326] Moreover, since the Senate had never ratified the 1850s treaty with the Hoopa Valley Tribe,[327] there could be no congressional authority arising from the consent of the Tribe itself.[328]

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319. *See* HARRING, *supra* note 314, at 134-40 (discussing the legislative history of the Major Crimes Act); Helen L. Peterson, *American Indian Political Participation*, 311 ANNALS AM. ACAD. POL. & SOC. SCI. 116, 118 (1957).

320. 118 U.S. 375 (1886).

321. *See* Karuk Tribe v. Ammon, 209 F.3d 1366, 1370 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); Parravano v. Babbitt, 70 F.3d 539, 542 (9th Cir. 1995).

322. *See generally* David P. Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910*, 52 U. CHI. L. REV. 324, 324-25 (1985). Professor Currie criticizes the *Kagama* Court for not relying on the Commerce Clause. *See id.* at 337-38.

323. *See* William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355, 1378-85 (1994).

324. *See Kagama*, 118 U.S. at 378-79 ("The mention of Indians in the constitution which has received most attention is that found in the clause which gives congress 'power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.").

325. *See* Act of July 22, 1790, 1 Stat. 37.

326. *See Kagama*, 118 U.S. at 378-79.

327. *See* Robert F. Heizer, *The Eighteen Unratified Treaties of 1851-1852 between the California Indians and the United States Government*, unpublished manuscript at 1 (1972); *see also id.* at 91-95 (excerpting treaty).

328. *See, e.g.*,Worcester v. Georgia, 31 U.S. 515, 549-55 (1831) (establishing history of treaties with Indian tribes prior to 1831 and links to congressional powers deriving

So what was left?

The Court upheld the Major Crimes Act not because of express authority contained in the Constitution or a treaty, but because of a combination of the geographic location of the Hoopa Valley Tribe within the territory of the United States *and* the deeply degraded condition of Indian tribes and Indian people everywhere.[329] If the Major Crimes Act came to the Supreme Court where a petitioner had challenged congressional authority to enact it in the modern era of Commerce Clause jurisprudence, as it sometimes does in the lower federal courts, it is not so clear that the Supreme Court would uphold congressional authority under the Indian Commerce Clause alone.[330] But the 1886 Court refused to do so.

The Court's reasoning, if not its conclusion,[331] if remarkable. It held that while no Constitution or treaty provision authorized the Major Crimes Act, a combination of the mere geographic placement of the Hoopa reservation within the exterior boundaries of the United States and the poor condition of Indian people generally forced the Court to recognize congressional authority to enact the statute. Now the guardian-ward served for Congress as a source legislative authority.

Congress's authority to interfere in the interior affairs of Indian Country reached its peak in a series of cases following *Kagama* that involved the authority of Congress to control tribal property.[332] The Supreme Court's review of congressional acts in this area reached a new level of deference, when it finally held in *Lone Wolf v. Hitchcock*[333] that challenges to congressional authority to regulate Indian affairs were foreclosed by what is now referred to

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therefrom); *cf.* Missouri v. Holland, 252 U.S. 416 (1920) (holding that the Treaty Power can be used to expand federal authority).

329. *See Kagama*, 118 U.S. at 383-84 ("It seems to us that this is within the competency of congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States, – dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.").

330. *Cf.* United States v. Morrison, 529 U.S. 598 (2000) (striking down aspects of the Violence Against Women Act of 1994); United States v. Lopez, 514 U.S. 549 (1996) (striking down aspects of the Gun-Free School Zones Act of 1990).

331. As Professor Currie suggested, this was probably an easy commerce clause case. *See* Currie, *supra* note 322, at 337-38.

332. *See generally* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1224-29 (1975); Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061, 1068-75 (1974); Felix S. Cohen, *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 145, 195-99 (1940).

333. 187 U.S. 553 (1903).

as the political question doctrine.[334]

Lone Wolf, a case that arose out a direct challenge to the authority of Congress to force the allotment of Indian reservations,[335] came down after a failed challenge by the Cherokee Nation to the Executive branch's administration of tribal trust property, *Cherokee Nation v. Hitchcock*.[336] In *Cherokee Nation*, the Supreme Court held that a long line of cases involving the Cherokees had established congressional and Executive branch plenary power over tribal property.[337] The Court focused on *Stephens v. Cherokee Nation*,[338] for the proposition that "the United States practically assumed the full control over the Cherokees as well as the other nations constituting the five civilized tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property."[339]

In *Lone Wolf*,[340] members of the Kiowa and Comanche communities that had executed the Medicine Lodge Treaty of 1867 challenged Congress's authority to enact legislation that would allot the tribes' reservation lands, arguing the allotment act at issue was a taking under the Fifth Amendment.[341] In *Lone Wolf*, the Court built upon cases involving the Cherokee Nation and

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334. The *Lone Wolf* Court wrote:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations ..., the legislative power might pass laws in conflict with treaties made with the Indians. ***
>
> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.

Id. at 565-66 (citations omitted).

335. *See id.* at 564-65. *See generally* Ann Laquer Estin, Lone Wolf v. Hitchcock*: The Long Shadow*, *in* THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880S at 215, 216-34 (Sandra L. Cadwalader & Vine Deloria, Jr., eds. 1984).

336. 187 U.S. 294 (1902).

337. *See id.* at 306-07.

338. 174 U.S. 445 (1899).

339. *Cherokee Nation*, 187 U.S. at 306. Ironically, the *Stephens* Court merely "assum[ed]" that Congress possessed plenary power at the time. *Stephens*, 174 U.S. at 478. Moreover, the Cherokee Nation long had succumbed to federal intervention as a result of their "adoption" of the Shawnees and the Delawares, not to mention their controversies with the Cherokee Freedmen. *See* CIRCE STURM, BLOOD POLITICS: RACE, CULTURE, AND IDENTITY IN THE CHEROKEE NATION OF OKLAHOMA (2002).

340. 187 U.S. 375 (1903).

341. *See id.* at 564.

held that Congress's power is "undoubted,"[342] and that Congress could delegate authority to administer Indian property as it saw fit. The Supreme Court's dictum in *Lone Wolf* that the sale of tribal lands was nothing more than "a mere change in the form of investment"[343] recognized incredible federal authority to control Indian property.[344]

Then, the Court also held that Congress is presumed to act in the best interests of Indian tribes (as it would in a guardian-ward relationship).[345] A challenge to a decision by Congress (and by extension the Executive branch, as the delegate of congressional power[346]) in Indian affairs was not reviewable. The *Lone Wolf* announcement that Congress possessed plenary power over Indian affairs and internal tribal relations was no announcement at all, but instead was a declaration that the relationship between Congress and Indian tribes was a political relationship within the exclusive discretion of Congress.

Congressional plenary power over Indian affairs between the federal government, states, and Indian tribes has not been seriously questioned since *Lone Wolf*, and really since *Worcester*, although the "absolute" character of plenary power is no longer recognized by the courts.[347] But the *Lone Wolf* Court brought the guardian-ward relationship to the forefront of American Indian law, and forcefully ratified congressional action in interfering with the internal affairs of Indian tribes and tribal property. However, after *Lone Wolf*, rarely would the Supreme Court so directly rely upon the common law rule that Congress and the federal government are the guardians of Indian tribes and Indian people in a warship relationship. Instead, the Court would refocus its jurisprudence on congressional Indian affairs power on the Constitution.

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342. *Cherokee Nation*, 187 U.S. at 306 (noting that "[t]he plenary power of control by Congress over the Indian tribes and its undoubted power to legislate, as it had done through the act of 1898, directly for the protection of the tribal property").

343. *Lone Wolf*, 187 U.S. at 568.

344. By the middle of the 20th century, however, federal courts began setting some limits on federal power. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 423-24 (1980); Fort Berthold Reservation v. United States, 390 F.2d 686, 691 (Ct. Cl. 1968).

345. *See Lone Wolf*, 187 U.S. at 567-68 ("In view of the legislative power possessed by Congress over treaties with the Indians and Indian tribal property, we may not specially consider the contentions pressed upon our notice that the signing by the Indians of the agreement of October 6, 1892, was obtained by fraudulent misrepresentations, and concealment, that the requisite three fourths of adult male Indians had not signed, as required by the twelfth article of the treaty of 1867, and that the treaty as signed had been amended by Congress without submitting such amendments to the action of the Indians since all these matters, in any event, were *solely within the domain of the legislative authority, and its action is conclusive upon the courts*.") (emphasis added).

346. *E.g.*, Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902).

347. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 423-24 (1980); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 83 (1977).

C. The Indian Commerce Clause and the Treaty Power—The Constitutional Authority for Congressional Plenary Power over Internal Indian Affairs

Challenges to congressional power over the internal workings of Indian affairs have been made off and on throughout the twentieth century,[348] but since Congress largely has stayed away from interfering from internal tribal affairs in recent decades,[349] there has been little to challenge. Scholars, however, have established compelling research and argumentation suggesting that no such congressional authority exists,[350] but the Supreme Court has not decided a recent case involving such a direct challenge under these theories. Instead, the Supreme Court has continued to recognize congressional plenary power in the modern era without theorizing the justifications of such authority in great detail,[351] and without delving into whether congressional authority extends into the *internal affairs* of Indian tribes.

The first significant discussion of congressional plenary power over Indian affairs came in a challenge to the so-called Duro fix,[352] in which Congress attempted to override *Duro v. Reina* [353] via statute.[354] The Supreme Court in *Duro* held that Indian tribes had been implicitly divested of their sovereign authority to prosecute all persons who were not members.[355] In the Duro fix, Congress sought to restore tribal authority to prosecute the limited class of

348. *E.g.*, Shermoen v. United States, 982 F.2d 1312 (9th Cir. 1992) (rejecting challenge to Hoopa-Yurok Settlement Act), *cert denied*, 509 U.S. 903 (1993); Crain v. First National Bank of Oregon, 324 F.2d 532 (9th Cir. 1963) (rejecting challenge to aspects of Klamath Termination Act); Duncan v. Andrus, 517 F. Supp. 1 (N.D. Cal. 1977) (voiding some aspects of implementation of California Rancheria Act of 1958); *cf.* Littlewolf v. Lujan, 877 F.2d 1058 (D.C. Cir. 1989) (rejecting challenge to White Earth Land Settlement Act), *cert. denied*, 493 U.S. 1043 (1990); Iron Crow v. Oglalla Sioux Tribe of Pine Ridge Reservation, 231 F.2d 89 (8th Cir. 1956) (rejecting challenge to tribal prosecution); Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States, 259 F. Supp. 2d 783 (W.D. Wis. 1993) (rejecting challenge to aspects of Indian Gaming Regulatory Act).

349. *See generally* GETCHES ET AL., *supra* note 20, at 216-24 (describing the era of Indian self-determination, which officially began in 1970).

350. *E.g.*, Clinton, *supra* note 53.

351. *E.g.*, Negonsott v. Samuels, 507 U.S. 99, 103 (1993); Washington v. Confederated Bands and Tribes of Yakima Nation, 439 U.S. 463, 470-471 (1979); United States v. Wheeler, 435 U.S. 313, 323 (1978); Morton v. Mancari, 417 U.S. 535, 552 (1974). *See* United States v. Lara, 541 U.S. 193, 200-07 (2004).

352. Pub. L. 101-511, Title VIII, § 8077(b), (c), Nov. 5, 1990, 104 Stat. 1892. *See* United States v. Lara, 541 U.S. 193, 216 (2004).

353. 495 U.S. 676 (1990).

354. *See generally* Robert Laurence, *Federal Court Review of Tribal Activity under the Indian Civil Rights Act*, 68 N. D. L. REV. 657 (1992); Nell Jessup Newton, *Permanent Legislation to Correct* Duro v. Reina, 17 AM. INDIAN L. REV. 109 (1992); Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts over Non-Member Indians: An Examination of the Basic Framework of Inherent Tribal Sovereignty Before and After* Duro v. Reina, 38 FED. B. NEWS & J. 70, 70-71 (Mar. 1991).

355. *See Duro*, 495 U.S. at 679.

persons known as nonmember Indians through an amendment to the Indian Civil Rights Act.[356] Congress had two options in enacting the Duro fix. It could delegate federal authority to prosecute such persons,[357] or recognize inherent tribal authority to prosecute. Congress chose the second option, and reaffirmed inherent tribal authority, something it had never done in the face of a Supreme Court holding that the inherent tribal authority had not existed for decades (or ever).[358]

The Duro fix percolated in the lower federal courts for over a decade before a circuit split arose in *United States v. Lara* over whether Congress had authority to override the Supreme Court's decision.[359] Finally, after *Lara* reached the Court, a 7-2 majority affirmed Billy Jo Lara's conviction.[360] The majority opinion, authored by Justice Breyer, reiterated the congressional plenary power doctrine,[361] but this time some Justices pressed the Court on the real sources of congressional power.[362] As noted in the previous subsection, the majority noted several possible sources of constitutional authority for the Duro fix.[363] But the real authority that supported congressional plenary power was the long line of Supreme Court cases that had assumed without significant discussion that Congress had such power, and of course Congress's assertion of that power in dozens, if not hundreds, of Acts.[364]

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356. The relevant provision is 25 U.S.C. § 1301(2), which now reads (Duro fix language in italics):

> "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; *and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians....*

357. The Supreme Court confirmed congressional authority to delegate federal power to Indian tribes in *United States v. Mazurie*, 419 U.S. 544 (1975). *See also* Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001) (en banc) (holding that Congress delegated federal power to regulate nonmembers to the tribe in the Hoopa-Yurok Settlement Act).

358. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353 (2001) (holding that tribal courts have no inherent authority to adjudicate civil rights actions against state officials); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that Indian tribes had no inherent authority to prosecute non-Indians).

359. *E.g.*, United States v. Lara, 324 F.3d 635 (8th Cir. 2003) (en banc) (striking down Duro fix); United States v. Long, 324 F.3d 475 (7th Cir.), *cert. denied*, 540 U.S. 822 (2003) (affirming Duro fix); United States v. Enas, 255 F.3d 662 (9th Cir. 2001) (en banc) (affirming Duro fix), *cert. denied*, 534 U.S. 115 (2002); United States v. Weaselhead, 156 F.3d 818 (8th Cir. 1998) (striking down Duro fix), *vacated by an equally divided court*, 165 F.3d 1209 (8th Cir. 1999) (en banc); Means v. Northern Cheyenne Tribal Court, 154 F.3d 941 (9th Cir. 1998) (interpreting the Duro fix as a delegation of congressional power); Mousseau v. U.S. Comm'r of Indian Affairs, 806 F. Supp. 1433 (D. S.D. 1992) (same).

360. *See* United States v. *Lara*, 541 U.S. 193, 196.

361. *See id.* at 200.

362. *See id.* at 211 (Kennedy, J., concurring in judgment) ("difficult question"); *id.* at 215 (Thomas, J., concurring in judgment) ("doubtful").

363. *See id.* at 200-02.

364. *See id.* at 202-07.

Justices Souter, joined by Justice Scalia, dissented through reliance on the Supreme Court's institutional authority to decide matters of inherent tribal authority[365] and Justice Kennedy concurred only in the judgment on procedural grounds.[366] But the real dissent came from Justice Thomas, who suggested that the Supreme Court review its precedents on congressional plenary power in light of recent precedents on the Interstate Commerce Clause.[367] Justice Thomas concurred for largely the same procedural reasons as Justice Kennedy,[368] but proposed that Congress had no authority whatsoever to grant Indian tribes the authority to prosecute anyone.[369] He further proposed that Indian tribal sovereignty had been effectively extinguished in 1871 when Congress (as a policy matter) chose to cease entering into treaties with Indian tribes.[370]

Regardless of the merits of the preconstitutional source of authority or Justice Thomas's disregard of a century of precedent, congressional plenary power is alive and well. Congressional plenary power over the inner workings of Indian tribes may also be alive and well, though not the subject of recent, direct challenge. We now move to an important pivot point in this Article; namely, a review of Supreme Court cases that have generated enormous consternation by federal Indian law observers,[371] first from the vantage point of

365. *See id.* at 227 (Souter, J., dissenting) ("Our precedent, then, is that any tribal exercise of criminal jurisdiction over nonmembers necessarily rests on a 'delegation' of federal power and is not akin to a State's congressionally permitted exercise of some authority that would otherwise be barred by the dormant Commerce Clause....").

366. *See id.* at 211 (Kennedy, J., concurring in judgment).

367. *See id.* at 224 (Thomas, J., concurring in judgment) (citing United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1996)).

368. *See id.* at 215 (Thomas, J., concurring in judgment).

369. *See id.* ("I cannot agree with the Court, for instance, that the Constitution grants to Congress plenary power to calibrate the 'metes and bounds of tribal sovereignty.' *Ante*, at 1635; *see also ante*, at 1639 (holding that 'the Constitution authorizes Congress' to regulate tribal sovereignty). Unlike the Court, *ante*, at 1633, I cannot locate such congressional authority in the Treaty Clause, U.S. Const., Art. II, § 2, cl. 2, or the Indian Commerce Clause, Art. I, § 8, cl. 3.").

370. *See id.* ("Additionally, I would ascribe much more significance to legislation such as the Act of Mar. 3, 1871, Rev. Stat. § 2079, 16 Stat. 566, codified at 25 U.S.C. § 71, that purports to terminate the practice of dealing with Indian tribes by treaty. The making of treaties, after all, is the one mechanism that the Constitution clearly provides for the Federal Government to interact with sovereigns other than the States. Yet, if I accept that Congress does have this authority, I believe that the result in *Wheeler* is questionable."); *see also id.* at 218 ("Further, federal policy itself could be thought to be inconsistent with this residual-sovereignty theory. In 1871, Congress enacted a statute that purported to prohibit entering into treaties with the "Indian nation[s] or tribe[s]." 16 Stat. 566, codified at 25 U.S.C. § 71. Although this Act is constitutionally suspect (the Constitution vests in the President both the power to make treaties, Art. II, § 2, cl. 2, and to recognize foreign governments, Art. II, § 3; *see, e.g., United States v. Pink*, 315 U.S. 203, 228-230, 62 S.Ct. 552, 86 L.Ed. 796 (1942)), it nevertheless reflects the view of the political branches that the tribes had become a purely domestic matter.").

371. *E.g.*, John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the*

tribal consent, and the moving in Part III to the vantage point of nonmember consent.

D. Implicit Divestiture and the Assertion of Federal Judicial Authority over Indian Affairs

The end of the political question doctrine in Indian law in *Delaware Tribal Business Committee v. Weeks* and *United States v. Sioux Nation* had an interesting and undertheorized subplot—the rise of judicial authority over Indian affairs, or what Frank Pommersheim has called "judicial plenary power."[372] Beginning in 1978, the Supreme Court began to utilize a tool now known as "implicit divesture" to manipulate the contours of tribal sovereignty absent a statement from Congress on the question.[373] The Court apparently took its authority to do so from Marshall Trilogy-era cases, which held that Indian tribes do not have authority to alienate Indian lands absent the consent of Congress, amongst other things.[374] The judicial power to craft federal Indian common law decisions in such striking ways had not been seriously considered by many observers of federal Indian law[375]—until the Court simply took action in *Oliphant*.[376] Prior to *Oliphant*, the doctrine of reserved tribal authority, or

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Cohen's Handbook *Cutting-Room Floor*, 38 CONN. L. REV. 731 (2006); Blake A. Watson, *The Thrust and Parry of Federal Indian Law*, 23 U DAYTON L. REV. 437, 472-81 (1998).; Laurie Reynolds, *"Jurisdiction" in Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent*, 27 N.M. L. REV. 359, 361-76 (1997); Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353 (1994).

372. Pommersheim, *At the Crossroads*, *supra* note 53, at 52; Pommersheim, *Tribal Courts and the Federal Judiciary*, *supra* note 53, at 328.

373. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (eliminating tribal criminal jurisdiction over non-Indians); *see also* Duro v. Reina, 495 U.S. 676 (1990) (eliminating tribal criminal jurisdiction over nonmember Indians); Montana v. United States, 450 U.S. 544, 564-65 (1981) (limiting tribal civil regulatory jurisdiction over nonmembers).

374. *See* United States v. Wheeler, 435 U.S. 313, 326 (1978) ("Moreover, the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-668, 94 S.Ct. 772, 777, 39 L.Ed.2d 73; *Johnson v. M'Intosh*, 8 Wheat. 543, 574, 5 L.Ed. 681. They cannot enter into direct commercial or governmental relations with foreign nations. *Worcester v. Georgia*, 6 Pet. 515, 559, 8 L.Ed. 483; *Cherokee Nation v. Georgia*, 5 Pet., at 17-18; *Fletcher v. Peck*, 6 Cranch 87, 147, 3 L.Ed. 162 (Johnson, J., concurring). And, as we have recently held, they cannot try nonmembers in tribal courts. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209.").

375. *E.g.*, NATIONAL AMERICAN INDIAN COURT JUDGES ASSN., *supra* note 250; Tim Vollman, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 U. KAN. L. REV. 387, 392-93 (1974).

376. 435 U.S. 191 (1978).

inherent authority, as articulated in the original *Handbook of Federal Indian Law*,[377] was the law, and only Congress or an Indian tribe via treaty or other sovereign-to-sovereign agreement could abrogate tribal governmental powers.[378]

The Supreme Court's invocation of implicit divestiture has been the most considerable source of interference in the internal workings of Indian tribes since the Termination Era in the 1950s, during which Congress unilaterally terminated the relationship between more than 100 tribes and the federal government.[379] It is noteworthy that the subject areas of tribal sovereignty with which the Court has interfered—tribal criminal jurisdiction,[380] taxation,[381] regulatory,[382] and adjudicatory[383] jurisdiction over nonmembers— are areas of sovereignty in which Congress has largely been silent or supportive of tribal governance.[384]

The best argument for an Article III court asserting jurisdiction over an internal tribal matter such as criminal jurisdiction, in my view, comes from the Marshall Trilogy[385] and *Kagama*.[386] In *Johnson* and in *Worcester* especially, Chief Justice Marshall expressed the view that Indian tribes have generally accepted federal governance over them through the notion of "protection," an accepted international law doctrine with significant limits over the

377. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1941).

378. *E.g.*, Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1440-42 (D.C. Cir. 1988) (interpreting treaties and agreements involving tribal governance authority), *cert. denied*, 488 U.S. 1010 (1989).

379. *See generally* Wilkinson & Biggs, *supra* note 50.

380. *See* Duro v. Reina, 495 U.S. 676 (1990); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

381. *E.g.*, Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

382. *E.g.*, Bourland v. South Dakota, 508 U.S. 679 (1993); Montana v. United States, 450 U.S. 544 (1981).

383. *E.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008); Strate v. A-1 Contractors, Inc., 520 U.S. 438 (1997).

384. In the area of tribal criminal authority, Congress has acted to ratchet up tribal sovereignty, most recently in the Tribal Law and Order Act of 2010. *See* 25 U.S.C. §§ 1302(7)(a)-(d). In the area of tribal regulatory jurisdiction, Congress has allowed the Environmental Protection Agency to treat tribes as states for many purposes. *See* Ann E. Tweedy, *Using Plenary Power as a Sword: Tribal Civil Regulatory Jurisdiction under the Clean Water Act after* United States v. Lara, 35 ENVTL. L. 471 (2005); Jessica Owley, *Tribal Sovereignty over Water Quality*, 20 J. LAND USE 61 (2004). In the area of tribal court civil jurisdiction, Congress has frequently supported the development of tribal courts. *See* Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 147-50 (2006). Congress largely has been silent about Indian taxation issues, but it strongly supports tribal economic development, which runs counter to the Supreme Court's views on state taxation in Indian Country. *See id.* at 144-47.

385. Worcester v. Georgia, 31 U.S. 515 (1832); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Johnson v. M'Intosh, 21 U.S. 543 (1823).

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

"protector's" authority to control the inner workings of the "protected's" governance.[387] *Kagama* expanded that dramatically by incorporating a much broader definition of "protection" based on subjective factors such as "depend[ence]" and "weakness."[388] But in either case, it is at least questionable whether an Article III court can bootstrap its authority onto the power of Congress. Moreover, the Supreme Court in cases like *Oliphant* is asserting broad authority to determine the metes and bounds of tribal power, regardless of tribal consent, and regardless of congressional direction.[389] The Court's broad pronouncements of law are lacking in humility in the Court's power,[390] sympathy for the people potentially endangered by the Court's decisions,[391] or deference to either Congress or Indian tribes.[392] These cases appear to be nothing more than lawmaking by fiat, despite their grounding in federal common law.

1. Tribal Criminal Jurisdiction

Congress had not legislated on the criminal jurisdiction of Indian tribes at all until it enacted the Indian Civil Rights Act in 1968,[393] which purported to extend major portions of the Bill of Rights into Indian Country,[394] attempting to regulate tribal prosecutions and even obliquely recognizing tribal authority to do so regardless of the membership status of the defendant. ICRA limited tribal government discretion by applying this "Indian Bill of Rights" to tribes, and did so without defining which persons could be subject to tribal governance.[395] In short, Congress left the question open by keeping silent about whether

387. *See Worcester*, 31 U.S. at 560-61; *Johnson*, 21 U.S. at 592-93.

388. *Kagama*, 118 U.S. at 383-84.

389. *See Oliphant*, 435 U.S. at 206 (articulating the "commonly shared presumption" of the federal government's three branches without reference to prior Supreme Court precedent or Act of Congress); *id.* (noting that the Treaty of Point Elliott is "silent" on the question).

390. *See* H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION (2008); Paul D. Carrington & Roger C. Crampton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 607, 624 (2009) (citing POWELL, *supra*).

391. *See* Amnesty International, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA* (2007), *available at* http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf. *Cf.* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares about Elites, Not People*, 98 GEO. L. J. 1515 (2010).

392. *See* Skibine, *supra* note 45, at 397-436.

393. Art. of 1968, Pub. L. No. 90-284, tit. 2, § 201, 82 Stat. 77 (1968) (*codified at* 25 U.S.C. § 1301 et seq.).

394. *See* 25 U.S.C. § 1302.

395. The original version of 25 U.S.C. § 1301(2) read: "'powers of self-government' means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed . . . ." Section 1302 still begins: "No Indian tribe in exercising powers of self-government shall . . . ," without reference to the persons under tribal government control.

nonmembers could be subject to tribal criminal prosecutions. Many tribes acted to modernize tribal justice systems as a result of the enactment of ICRA, and within a decade, a few dozen tribes enacted laws purporting to extend criminal jurisdiction authority over nonmembers.[396]

Throughout the history of American Indian law and policy, federal courts only rarely addressed questions of tribal criminal jurisdiction, and there are only three published federal court cases directly addressing the subject. Several other cases address the question indirectly, though in important ways. The first decision, *Ex parte Kenyon*,[397] from the latter half of the 19th century, is a federal district court case that reached federal court (apparently) on a habeas petition. It's not clear how the court could assert jurisdiction absent an act of Congress or an authorizing Constitutional provision, and so that court's decision (which went against tribal criminal jurisdiction over non-Indians) is somewhat questionable given the jurisdictional gray area in which the case rests.[398] The second case, *Oliphant*,[399] relied in part on *Kenyon*,[400] and many other legal authorities (but obviously no precedential cases), in reaching the same conclusion.[401] In that case, Congress had expressly extended the federal habeas right to criminal defendants in tribal court in 1968's Indian Civil Rights Act,[402] though even there the jurisdictional requisite—detention[403]—was not

396. *See Oliphant*, 435 U.S. at 196 ("The Suquamish Indian Tribe does not stand alone today in its assumption of criminal jurisdiction over non-Indians. Of the 127 reservation court systems that currently exercise criminal jurisdiction in the United States, 33 purport to extend that jurisdiction to non-Indians. Twelve other Indian tribes have enacted ordinances which would permit the assumption of criminal jurisdiction over non-Indians.").

397. 14 F. Cas. 353 (W.D. Ark. 1878) (No. 7720).

398. *Compare* Armistead M. Dobie, *Habeas Corpus in the Federal Courts*, 13 VA. L. REV. 433, 450, 452 (1926) (citing *Kenyon* and noting that federal judges could issue habeas writs for persons within their territorial jurisdiction), *with* Talton v. Mayes, 163 U.S. 376 (1896) (holding the United States Constitution does not apply to Indian tribes), *and* Ex parte Crow Dog, 119 U.S. 575 (1883) (holding federal prosecutors had no authority over Indian-on-Indian crime within Indian Country).

399. 435 U.S. 191.

400. *See id.* at 200.

401. For cutting reviews on then-Justice Rehnquist's majority opinion and his legal history, see WILLIAMS, *supra* note 297, at 97-114; Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979). *But see* United States v. Lara, 541 U.S. 193, 222 (2004) (Thomas, J., concurring in the judgment) (noting the *Oliphant* Court "carefully examined the views of Congress and the Executive Branch").

402. *See* 25 U.S.C. § 1303 ("The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.").

403. Neither defendant in the case had been convicted, nor was either defendant detained pending trial. *See Oliphant*, 435 U.S. at 194:

> Petitioner Mark David Oliphant was arrested by tribal authorities during the Suquamish's annual Chief Seattle Days celebration and charged with assaulting a tribal officer and resisting arrest. After arraignment before the tribal court, *Oliphant was released on his own recognizance*. Petitioner Daniel B. Belgarde was arrested by tribal authorities after an alleged

satisfied. The third case reaching the same conclusion, *Duro v. Reina*,[404] involved nonmember Indians.[405] *Duro* reached the Court in the same extra-textual manner as *Oliphant*, prior to an actual conviction and resulting detention.[406] In all three cases, the courts held that the tribal court could not exercise criminal jurisdiction over the defendants, all of whom were nonmembers. In the all three cases, federal court jurisdiction was doubtful, especially in the two modern cases;[407] again demonstrating the Court's willingness to go beyond Congress's mandate in Indian affairs. Importantly, Congress overrode the Court's judgment (as discussed above[408]) in *Duro*, but not yet in *Oliphant*.[409]

In other cases, the Supreme Court has affirmed tribal criminal jurisdiction over tribal members, most importantly in *United States v. Wheeler*,[410] which was a double jeopardy challenge to a federal prosecution following a tribal

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high-speed race along the Reservation highways that only ended when Belgarde collided with a tribal police vehicle. *Belgarde posted bail and was released.* Six days later he was arraigned and charged under the tribal Code with "recklessly endangering another person" and injuring tribal property. *Tribal court proceedings against both petitioners have been stayed pending a decision in this case.*

Id. (emphasis added).

404. 495 U.S. 676 (1990).

405. *See id.* at 679.

406. *See id.* at 682:

Petitioner then was placed in the custody of Pima-Maricopa officers, and he was taken to stand trial in the Pima-Maricopa Indian Community Court. The tribal court's powers are regulated by a federal statute, which at that time limited tribal criminal penalties to six months' imprisonment and a $500 fine. 25 U.S.C. § 1302(7) (1982 ed.). The tribal criminal code is therefore confined to misdemeanors. Petitioner was charged with the illegal firing of a weapon on the reservation. *After the tribal court denied petitioner's motion to dismiss the prosecution for lack of jurisdiction, he filed a petition for a writ of habeas corpus* in the United States District Court for the District of Arizona, naming the tribal chief judge and police chief as respondents.

Id. (emphasis added).

407. *But see* Dry v. CFR Court of Indian Offenses for Choctaw Nation, 168 F.3d 1207 (10th Cir.), *cert. denied*, 528 U.S. 815 (1999).

408. *See supra* note 352.

409. It seems like there is frequently an *Oliphant*-fix pending in Congress, but nothing has come of it, despite being a frequent note topic for law students, *e.g.*, Samuel E. Ennis, Comment, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553 (2009); Marie Quasias, Note, *Native American Rape Victims: Desperately Seeking an* Oliphant *Fix*, 93 MINN. L. REV. 1902 (2009); *cf.* Will Trachman, Comment, *Tribal Criminal Jurisdiction after U.S. v. Lara: Answering Constitutional Challenges to the Duro Fix*, 93 CAL. L. REV. 847, 852 (2005); and law professors and practitioners, *e.g.*, D. Michael McBride III, *The FBA's Indian Law Section: Vetting the Important Issues Regarding Indian Country*, FED. LAW., Mar.-Apr. 2008, at 4, 4 (2008) (describing efforts to persuade Congress to enact an "Oliphant fix"); Elizabeth Ann Kronk, *The Emerging Problem of Methamphetamine: A Threat Signaling the Need to Reform Criminal Jurisdiction in Indian Country*, 82 N. D. L. REV. 1249 (2006).

410. 435 U.S. 313 (1978).

prosecution for the same crime.[411] In the nineteenth century, the Supreme Court decided *Ex parte Crow Dog*,[412] where the Court held that the federal government had no criminal jurisdiction over Indian-on-Indian crime in Indian Country,[413] indirectly recognizing the inherent authority of Indian tribes to prosecute their own for criminal law violations. Another nineteenth century case, *Talton v. Mayes*,[414] noted that tribal criminal prosecutions are not subject to the dictates of the United States Constitution,[415] a legal fact that Congress attempted to partially remedy in enacting the Indian Civil Rights Act.[416] The most recent, *United States v. Lara*,[417] was primarily an exercise in addressing whether Congress had authority to reinstate inherent tribal powers,[418] and did not involve a habeas action arising out of tribal court.

It is important to separate out the cases that arise out of federal common law from the ones that arise out of the habeas provision of the Indian Civil Rights Act (ICRA). No case arises from ICRA, except in the extra-textual manner used in *Oliphant* and *Duro*. Because these cases arose out of pure federal common law—meaning that an Article III court created the cause of action *and* the individual right to be vindicated in the action[419]—no Indian tribe could ever be said to consent to such an outside intervention. Conversely, in cases arising from ICRA, where tribal lobbying failed to prevent its enactment, but still contributed important limitations on the reach of the statute,[420] at least some form of plausible implied tribal consent exists.

In sum, the Supreme Court directs federal policy on tribal criminal jurisdiction, with some Justices conveying open hostility to congressional preferences. The Court's exercise of jurisdiction outside of the limited scope of the Indian Civil Rights Act further undermines congressional preferences, and directly implicates the lack of tribal consent to the Court's jurisdiction. A conflict may be brewing in coming years after Congress passed the Tribal Law and Order Act and slightly expanded tribal criminal jurisdiction authority.[421] Congress may also consider revising the Supreme Court's holding in *Oliphant* to allow for tribal jurisdiction over nonmember domestic violence offenders.[422]

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411. *See id.* at 314.

412. 109 U.S. 556 (1883).

413. *See id.* at 571.

414. 163 U.S. 376 (1896).

415. *See id.* at 382-85.

416. *See* Note, *supra* note 254, at 360; *see also* Burton D. Fretz, *The Bill of Rights and American Indian Tribal Governments*, 6 NAT. RES. J. 581 (1966).

417. 541 U.S. 193 (2004).

418. *See id.* at 196.

419. *See* Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. § 1331 Jurisdiction*, 61 VAND. L. REV. 1667, 1716-26 (2008).

420. *See* Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 469-70 (1998).

421. *See* 25 U.S.C. §§ 1302(7)(a)-(d).

422. *See Violence against Native American Women Act of 2011—Draft Bill Released*,

2. Tribal Taxing, Regulatory, and Adjudicatory Authority

The Supreme Court also directs much of federal policy on tribal civil jurisdiction, starting with *Montana v. United States*,[423] decided in 1981. There, the Court articulated a common law general rule with two exceptions,[424] which on their face were broad and vague. The general rule was that Indian tribes do not possess civil regulatory jurisdiction over nonmembers on non-Indian-owned land.[425] The two exceptions, known as *Montana 1* [426] and *Montana 2*,[427] involved consensual commercial agreements and nonmember actions that had a dramatic impact on tribal governance, respectively. While the Court articulated the general rule in 1981, it wasn't until the early 1990s that it became clear that the *Montana* rule had largely won out over competing Supreme Court decisions from the 1980s.[428] And it was not clear until 1997, when Justice Ginburg's majority opinion in *Strate v. A-1 Contracting* [429] labeled *Montana* with one of her trademarks ("pathmarking") that *Montana* applied also to tribal court jurisdiction.[430]

The standard identified by the Court in *Oliphant* that would justify the judicial divestiture of tribal authority was any power "inconsistent with [the tribe's] dependent status."[431] This is hardly much of a standard at all, and

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TURTLE TALK BLOG POST (Aug. 19, 2011), *available at* http://turtletalk.wordpress.com/2011/08/19/violence-against-native-american-women-act-of-2011-draft-bill-released/.

423. 450 U.S. 544 (1981).

424. *See id.* at 565-66.

425. *See id.* at 565 ("Stressing that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns, the [*Oliphant*] Court quoted Justice Johnson's words in his concurrence in *Fletcher v. Peck*, 6 Cranch 87, 147, 3 L.Ed. 162—the first Indian case to reach this Court—that the Indian tribes have lost any 'right of governing every person within their limits except themselves.'") (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978)).

426. *See id.* ("To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.").

427. *See id.* at 566 ("A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.").

428. *See* South Dakota v. Bourland, 508 U.S. 679, 694-98 (1993).

429. 520 U.S. 438 (1997).

430. *See id.* at 445.

431. *Oliphant*, 435 U.S. at 208 (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)). At one point after *Oliphant* but before *Montana*, the Court noted in dicta that a tribe might be implicitly divested of authority if it is in conflict with some sort of "overriding interest of the National Government," *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 130, 154 (1980), a much different standard than "dependent status." The Court does not appear to have returned to this standard.

renders predictability about future cases almost impossible. And lack of predictability in federal common law cases of course generates additional need for Supreme Court review in future cases, which in turn generates additional Supreme Court discretion and power. *Oliphant* was a bright-line rule and has not generated many later cases on its contours, but *Montana*'s test and exceptions, along with *Oliphant*'s standard, have generated enormous unpredictability in the lower courts[432] and even in the Supreme Court (at least in terms of the cases it chooses to review[433]). The federal common law questions on implicit divestiture have increased the Court's importance dramatically in American Indian law and policy, so much so that even Congress depends on the Court's pronouncements,[434] a very far cry from the nearly two centuries of federal Indian law and policy that preceded the late Burger and Rehnquist Courts' decisions in which the Court adopted a virtual political question bar to tribal claims against Congress.[435]

Congress had not legislated broadly on the question of tribal civil jurisdiction over nonmembers, leaving the door open to Supreme Court interpretation via federal common law. The first tribal civil authority cases following *Montana* upheld tribal authority to tax (*Merrion v. Jicarilla Apache Tribe* [436]), to exclude undesirables from tribal lands (*Merrion* [437]), and tribal authority to regulate nonmember activity on tribal trust lands (*New Mexico v. Mescalero Apache Tribe*,[438] a decision guided in part by federal regulatory actions that supplied necessary federal Indian preemption authority to preclude state authority over nonmembers on tribal lands[439]). These cases relied on a smattering of older cases and federal government opinions that upheld tribal taxing authority in decades past, as well as treaty rights to protect reservation boundaries and lands. It is important also that all of these cases arose on tribal trust lands.

In 1985, however, the Supreme Court took an enormous step in arrogating to itself judicial review over aspects of tribal court jurisdiction over nonmembers, *even on tribal trust lands*. In *National Farmers Union v. Crow Tribe of Indians*,[440] the Court identified a federal right (for nonmembers only,

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432. *See generally* Krakoff, *supra* note 216.

433. *E.g.*, Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as a Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 947 (2009) (discussing tribal jurisdiction cases involving nonmembers).

434. *E.g.*, *Examining the Prevalence of and Solutions to Stopping Violence against Indian Women*, Hearing before the Senate Committee on Indian Affairs, 110th Cong., 1st Sess., 41-62 (2007) (Testimony and Prepared Statement of Riyaz A. Kanji).

435. *See* Baker v. Carr, 369 U.S. 186, 215-17 (1962).

436. 455 U.S. 130 (1982).

437. *See id.* at 141.

438. 462 U.S. 324 (1983).

439. *See id.* at 348-51.

440. 471 U.S. 845 (1985).

presumably) to be free of tribal court civil jurisdiction,[441] *and* a federal common law cause of action to vindicate this right.[442] *National Farmers Union* flew directly in the face of *Santa Clara Pueblo v. Martinez*,[443] the case that denied individuals a federal cause of action to sue Indian tribes under the Indian Civil Rights Act (ICRA).[444] *Martinez* held that Congress had legislated in the field of tribal civil rights completely, and Congress decided that the only federal cause of action to vindicate an ICRA right was the federal habeas provision available only to those that had been convicted of a crime in tribal court.[445] *National Farmers Union* ignored *Martinez* by identifying a federal right outside of the scope of ICRA, and further ignored *Martinez* in identifying

441. *See id.* at 852 ("This Court has frequently been required to decide questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians. . . . In this case the petitioners contend that the Tribal Court has no power to enter a judgment against them. Assuming that the power to resolve disputes arising within the territory governed by the Tribe was once an attribute of inherent tribal sovereignty, the petitioners, in essence, contend that the Tribe has to some extent been divested of this aspect of sovereignty. More particularly, when they invoke the jurisdiction of a federal court under § 1331, they must contend that federal law has curtailed the powers of the Tribe, and thus afforded them the basis for the relief they seek in a federal forum."). *Cf.* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 468 U.S. 1315, 1318 (1984) ("But if because only the National and State Governments exercise true sovereignty, and are therefore subject to the commands of the Fourteenth Amendment, I cannot believe that Indian tribal courts are nonetheless free to exercise their jurisdiction in a manner prohibited by the decisions of this Court, and that a litigant who is the subject of such an exercise of jurisdiction has nowhere at all to turn for relief from a conceded excess.").

442. *See Nat'l Farmers Unions*, 471 U.S at 852-53 ("The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331. Because petitioners contend that federal law has divested the Tribe of this aspect of sovereignty, it is federal law on which they rely as a basis for the asserted right of freedom from Tribal Court interference. They have, therefore, filed an action 'arising under' federal law within the meaning of § 1331. The District Court correctly concluded that a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction.").

443. 436 U.S. 49 (1978).

444. *See id.* at 72 ("Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of §1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.").

445. *See id.* at 70-71 ("Given this history, it is highly unlikely that Congress would have intended a private cause of action for injunctive and declaratory relief to be available in the federal courts to secure enforcement of § 1302. [The legislative history] indicates that the ICRA was generally understood to authorize federal judicial review of tribal actions only through the habeas corpus provisions of § 1303. These factors, together with Congress' rejection of proposals that clearly would have authorized causes of action other than habeas corpus, persuade us that Congress, aware of the intrusive effect of federal judicial review upon tribal self-government, intended to create only a limited mechanism for such review, namely, that provided for expressly in § 1303.").

a federal common law cause of action to vindicate that right. The Court additionally held that nonmembers must first exhaust tribal remedies before bringing the federal claim against the tribal court,[446] a holding it buttressed a few years later in *Iowa Mutual v. LaPlante*.[447] In *Iowa Mutual*, the Court suggested that tribal court jurisdiction over nonmembers for cases arising on tribal lands was "presumptive."[448] *National Farmers Union* supported this notion by limiting federal court review of tribal court decisions to the question of jurisdiction, rather than a *de novo* review.[449] Neither case ever reached the Court on the merits. And so no guidance on tribal court jurisdiction is available from them, just procedure.[450]

Tribal court jurisdiction and tribal taxing authority over nonmembers seemed to heading in a different path than that of tribal regulatory authority, which the Supreme Court held was controlled by *Montana*. In the late 1980s, the Court divided sharply in *Brendale v. Confederated Yakima Tribes* [451] over what test to apply in cases involving tribal regulation of nonmember conduct. *Brendale* was a case that frankly was a poor vehicle for deciding the question,

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446. *See Nat'l Farmers Union*, 471 U.S. at 856-57 ("We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of 'procedural nightmare' that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.").

447. 480 U.S. 9 (1987).

448. *Id.* at 18 ("Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. 'Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.'") (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149, n.14 (1982)).

449. *See Nat'l Farmers Union*, 471 U.S at 853 (holding that "a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction"); *see also id.* at 855 (suggesting that the federal court's jurisdiction is limited to "whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians").

450. The *Nat'l Farmers Union* Court importantly rejected an argument from the nonmembers that the bright-line rule against tribal criminal jurisdiction over non-Indians should be applied in the civil context as well. *See id.* at 853-57. Interestingly, part of the legal authority against such a ruling suggested that tribes generally *do* have civil jurisdiction over those within their territories. *See Nat'l Farmers Union*, 471 U.S. at 854-55 (quoting Attorney General Cushing, 7 OP. ATTY. GEN. 175, 179-81 (1855)).

451. 492 U.S. 408 (1989).

given the enormously complex landownership pattern on the highly-checkerboarded reservation.[452] In 1993, the Court (with a different fact pattern) decided *South Dakota v. Bourland*,[453] holding that the *Montana* test applied to tribal regulation of nonmember activity on nonmember land within the reservation borders.[454] The Court's analysis strongly suggested that, despite the vague wording and textual broadness of the exceptions, it would be much harder for a tribal government to meet the exceptions than previously assumed, perhaps even by the *Montana* Court.[455]

The tribal lands/nonmember lands dichotomy, which at least generated a semblance of doctrinal coherence, suffered serious blows in *Strate v. A-1 Contractors* [456] and *Nevada v. Hicks*.[457] *Strate* involved a routine car wreck on tribal trust lands and a resulting personal injury suit in tribal court.[458] Tribal courts had begin hearing more and more tort claims, likely as a result of the tribal court exhaustion doctrine.[459] The plaintiff and defendant in *Strate* were nonmembers, though the plaintiff owned property on the reservation, was married to a tribal member, and had tribal member children.[460] The highway on which the accident occurred was located on a highway upon which the State of North Dakota had an easement, and which it patrolled and maintained.[461] However, the land was still trust land, even with the easement, and the plaintiff refused to exhaust tribal court remedies in accordance with *National Farmers Union*.[462] The *Strate* Court agreed with lower courts in holding that the tribal court did not have jurisdiction,[463] that *Montana* was the correct standard to apply,[464] and then most interestingly held that the state-maintained highway on tribal trust lands was not Indian Country.[465] Moreover, the Court held that tribal

452. *See id.* at 415 (describing the land ownership pattern of what is now known as the Yakama Indian Reservation).

453. 508 U.S. 679 (1993).

454. *See id.* at 694-97.

455. *See id.* at 695-96.

456. 520 U.S. 438 (1997).

457. 533 U.S. 353 (2001).

458. *See* Strate , 520 U.S. at 442-44.

459. *See generally* Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. KAN. L. REV. 241 (1998); Blake A. Watson, *The Curious Case of Disappearing Federal Jurisdiction over Federal Enforcement of Federal Law: A Vehicle for Reassessment of the Tribal Exhaustion/Abstention Doctrine*, 80 MARQ. L. REV. 531 (1997).

460. *See Strate*, 520 U.S. at 444; Wambdi Awanwicake Wastewin, Strate v. A-1 Contractors*: Intrusion into the Sovereign Domain of Native Nations*, 74 N.D. L. REV. 711, 712 (1998).

461. *See Strate*, 520 U.S. at 455.

462. *See id.* at 444.

463. *See id.* at 442; A-1 Contractors v. Strate, 76 F.3d 930 (8th Cir. 1996) (en banc).

464. *See Strate*, 520 U.S. at 445-46 (quoting Montana v. United States, 450 U.S. 544, 565-66 (1981)); *id.* at 456.

465. *See id.* at 454-56.

court exhaustion was not required because to force exhaustion in a minor tort action involving nonmembers on non-Indian land would be futile.[466] First, the Court noted that there was no difference between tribal civil regulatory and adjudicatory authority,[467] an issue that had remained open "[f]or a long time."[468] Then, in strong language, the majority noted that it would be well-nigh impossible for a tribe to meet the *Montana* test once it applies.[469] *Strate* obfuscated what is Indian land, and what is not. *Strate* further undercut the plain language of *Montana*, which also stated, "[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."[470]

A few years later, the Court added additional confusion in *Nevada v. Hicks*,[471] where it held that an individual tribal member could not maintain a civil rights action under § 1983 against state law enforcement officers in tribal court,[472] even where the incident arose on tribal trust lands and where (arguably) the state had only been on tribal lands with the permission of the tribal court.[473] Once again, the Court applied *Montana*, but now for the first time it applied *Montana* on tribal lands.[474] On first glance, *Hicks* seems like a dramatic incursion on tribal lands through the application of the *Montana* test. Justice Ginsburg filed a short concurrence where she argued that *Strate* remains the controlling law and *Hicks* should be limited to key procedural fact, which was that the defendant was the State of Nevada.[475] Justice O'Connor wrote a

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466. *See id.* at 459 n. 14 (holding, in a footnote, that exhaustion of tribal court remedies in this case would only serve to "delay" the outcome).

467. *See id.* at 453 ("As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.").

468. *See* Katherine J. Florey, *Choosing Tribal Law: Why State Choice-of-Law Principles Should Apply to Disputes with Tribal Contacts*, 55 AM. U. L. REV. 1627, 1646 (2006).

469. *See id.* at 457 ("Although A–1 was engaged in subcontract work on the Fort Berthold Reservation, and therefore had a 'consensual relationship' with the Tribes, "Gisela Fredericks was not a party to the subcontract, and the [T]ribes were strangers to the accident.'") (quoting *A-1 Contractors*, 76 F.3d at 940); *id.* at 457-58 ("Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s second exception requires no more, the exception would severely shrink the rule.").

470. *Montana*, 450 U.S. at 565.

471. 533 U.S. 353 (2001).

472. *See id.* at 376.

473. *See id.* at 356.

474. *See id.* at 360 ("The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.' It may sometimes be a dispositive factor. Hitherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction . . . .") (quoting *Montana*, 450 U.S. at 565).

475. *See id.* at 386 (Ginsburg, J. concurring) ("As the Court plainly states, and as Justice Souter recognizes, the 'holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law.' *Ante*, at 2309, n. 2 (opinion of the

lengthy concurrence reading much like a dissent where she argued the case really was not a *Montana* case at all, but involved the question of whether Congress had waived the immunity of states in tribal courts by enacting Section 1983.[476] Even Justice Scalia's majority opinion notes that the "presumption" of tribal court jurisdiction over nonmembers noted in the dicta in *Iowa Mutual* remains, although suggested that after *Strate*, whether the presumption remains is an open question.[477]

Since *Hicks*, the Court has decided only one more tribal civil jurisdiction case, *Plains Commerce Bank v. Long Family Land and Cattle Co.*,[478] which involved nonmember actions on nonmember lands within the reservation.[479] Despite four votes[480] for the proposition that the tribe met the *Montana* test for the action complained about (which involved race discrimination by a nonmember bank against tribal member debtors[481]), the Court reaffirmed prior holdings that it is exceptionally difficult for a tribe to meet the *Montana* test on nonmember land.[482] The Court, importantly, did not go so far as to hold that a tribe could *never* meet that test.[483]

What is clear after *Strate*, *Hicks*, and *Plains Commerce* is that tribal civil jurisdiction over nonmembers on nonmember land is subject to the *Montana* general rule and exceptions, and that those exceptions are exceptionally difficult for a tribe to meet. On tribal lands, however, the "presumption" of tribal jurisdiction likely remains, with cases such as *Merrion*,[484] *Mescalero*,[485]

Court); *ante*, at 2318-2319 (Souter, J., concurring). The Court's decision explicitly "leave[s] open the question of tribal-court jurisdiction over nonmember defendants in general," *ante*, at 2309, n. 2, including state officials engaged on tribal land in a venture or frolic of their own, *see ante*, at 2317 (a state officer's conduct on tribal land "unrelated to [performance of his law-enforcement duties] is potentially subject to tribal control").").

476. *See id.* at 386-401 (O'Connor, J., concurring and dissenting).

477. *See id.* at 380 (quoting Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987)).

478. 554 U.S. 316 (2008).

479. *See id.* at 320.

480. *See id.* at 342 (Ginsburg, J., dissenting).

481. *See id.* at 342-43 (Ginsburg, J., dissenting) ("I dissent from the Court's decision, however, to the extent that it overturns the Tribal Court's principal judgment awarding the Longs damages in the amount of $750,000 plus interest. See App. 194–196. That judgment did not disturb the Bank's sale of fee land to non-Indians. It simply responded to the claim that the Bank, in its on-reservation commercial dealings with the Longs, treated them disadvantageously because of their tribal affiliation and racial identity. A claim of that genre, I would hold, is one the Tribal Court is competent to adjudicate. As the Court of Appeals correctly understood, the Longs' case, at heart, is not about 'the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals," *ante*, at 2714. "Rather, this case is about the power of the Tribe to hold nonmembers like the bank to a minimum standard of fairness when they voluntarily deal with tribal members.").

482. *See id.* at 332-42.

483. *See id.* at 329-30 (citing Montana v. United States, 450 U.S. 544, 565-66 (1981)).

484. 455 U.S. 130 (1982).

485. 462 U.S. 324 (1983).

and *Brendale* [486] supporting tribal taxing, regulatory, and adjudicatory authority over nonmembers on Indian lands. Does *Montana* apply on Indian lands? Well, *Hicks* suggests yes, but that holding was unnecessary to decide *Hicks*, and Justice Scalia's footnote on *Iowa Mutual*'s dicta conflicts with that holding. Surely, it is an open question.[487]

Lower courts, trying to predict what the Court might do in a future tribal jurisdiction case on tribal lands, have applied *Montana*, usually to dispositive effect against tribal jurisdiction.[488] However, in a few recent cases, the lower courts have been confronted with several compelling fact patterns strongly favoring tribal jurisdiction.[489] They continue to discuss *Montana*, but in a manner that suspiciously looks like what a test applying the *Iowa Mutual* "presumption" might look like. Most recently, the Ninth Circuit held that tribal civil jurisdiction over nonmembers for claims arising on tribal lands may arise from authority "independent from the power recognized in *Montana*."[490] But once such a case reaches the Court, no one can predict with any certainty what test the Court will apply.

Since Congress hasn't legislated in the area, and Indian treaties are largely silent on these questions, the Supreme Court is acting without much guidance. Various Justices over the years have acted suspicious of tribal court procedures and tribal laws in general,[491] suggesting that nonmembers would be falling into

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486. 492 U.S. 408 (1989).

487. *See* LaVelle, *supra* note 371, at 762. *See also* Grant Christensen, *Creating Bright-Line Rules for Tribal Court Jurisdiction over Non-Indians: The Case of Trespass to Real Property*, 35 AM. INDIAN L. REV. 527, 568 (2010-2011) (discussing Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 624 (2009)).

488. *E.g.*, Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc., 569 F.3d 932 (9th Cir. 2009); Nord v. Kelly, 520 F.3d 848 (8th Cir. 2008); MacAuthur v. San Juan County, 497 F.3d 1057 (10th Cir. 2007), *cert. denied*, 552 U.S. 1181 (2008); Big Horn County Elec. Co-op., Inc. v. Adams, 219 F.3d 944 (9th Cir. 2000); Burlington Northern R. Co. v. Red Wolf, 196 F.3d 1059 (9th Cir. 1999), *cert. denied*, 529 U.S. 1110 (2000); Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1998); Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

489. *E.g.*, Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802 (9th Cir. 2011) (nonmember business that refuses tribal orders to leave reservation after land lease expires); Attorney's Process and Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa, 609 F.3d 927 (8th Cir. 2010) (nonmember business that committed torts while involved in tribal government dispute), *cert. denied*, 131 S. Ct. 1003 (2011); Smith v. Salish Kootenai College, 434 F.3d 1127 (9th Cir. 2006) (en banc) (nonmember Indian involved in an automobile wreck who initially sued others for tort in tribal court, then denied tribal court jurisdiction over him in counterclaim against him), *cert. denied*, 547 U.S. 1209 (2006).

490. *Water Wheel*, 642 F.3d at 805.

491. Justice Souter's concurrence in *Nevada v. Hicks* is the most damning opinion of tribal court jurisdiction over tribal members. *See* 533 U.S. 353, 375, 383-85 (2001) (Souter, J., concurring):

> The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given "[t]he special nature of [Indian]

some form of trap by going to tribal court. The Court usually acts without knowledge about tribal governments, or on-the-ground realities.[492] In one occasion, *Strate*,[493] some Justices appeared to be concerned by the allegations of one amicus that a tribal court not a party to the underlying Supreme Court case had played dirty pool with the amicus.[494] The Court's most recent concern is a general concern that the Constitution does not apply to tribal governments, giving little weight to the presence of the Indian Civil Rights Act, and *no*

> tribunals," ... which differ from traditional American courts in a number of significant respects. To start with the most obvious one, it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes. *See Talton v. Mayes*, 163 U.S. 376, 382-385 ... (1896); F. Cohen, Handbook of Federal Indian Law 664-665 (1982 ed.) . . . . Although the Indian Civil Rights Act of 1968 (ICRA) makes a handful of analogous safeguards enforceable in tribal courts, 25 U.S.C. § 1302, "the guarantees are not identical," . . . and there is a "definite trend by tribal courts" toward the view that they "ha[ve] leeway in interpreting" the ICRA's due process and equal protection clauses and "need not follow the U.S. Supreme Court precedents 'jot-for-jot,'" Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 344, n. 238 (1998). In any event, a presumption against tribal-court civil jurisdiction squares with one of the principal policy considerations underlying *Oliphant*, namely, an overriding concern that citizens who are not tribal members be "protected . . . from unwarranted intrusions on their personal liberty," 435 U.S., at 210, 98 S.Ct. 1011.
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> Tribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges. Although some modern tribal courts "mirror American courts" and "are guided by written codes, rules, procedures, and guidelines," tribal law is still frequently unwritten, being based instead "on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices," and is often "handed down orally or by example from one generation to another." Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 130-131 (1995). The resulting law applicable in tribal courts is a complex "mix of tribal codes and federal, state, and traditional law," National American Indian Court Judges Assn., Indian Courts and the Future 43 (1978), which would be unusually difficult for an outsider to sort out.

Id.

492. *See Conference Transcript: The New Realism: The Next Generation of Scholarship in Federal Indian Law*, 32 AM. INDIAN L. REV. 1, 4 (2007-2008) ("[T]he Court has been engaging in an agonizing—I would say infuriating—case-by-case common law model of trying to micromanage doctrine in this area, based on judicial hunches about what is actually going on in Indian Country.") (Statement of Philip P. Frickey). *See also id.* at 6 ("Consider, probably not so hypothetically, Justice Souter in *Hicks*. Presumably, he asked his law clerk to research tribal courts and to give him things to read. The clerk sought help from some of the best research librarians in the world, those who work at the Supreme Court Library. They, in turn, in frustration, call upon their compatriots in the Library of Congress.") (Statement of Philip P. Frickey).

493. 520 U.S. 438 (1997).

494. *See* Brief for the American Trucking Ass'ns., Inc. *et al.* as Amici Curiae in Support of Respondents at 3, Strate v. A-1 Contractors, 520 U.S. 438 (1997) (No. 95-1872), 1996 WL 711202 (alleging that a tribal judge conspired to fix the jury in Estates of Red Wolf and Bull Tail v. Burlington N. R.R. Co., No. 94-31 (Crow Court of Appeals, Feb. 21, 1996)); Petition for a Writ of Certiorari at 6, Burlington N. R.R. Co. v. Estate of Red Wolf, 522 U.S. 80 (1997) (No. 96-1853) (repeating allegation). During oral argument in *Strate*, Justice O'Connor questioned the federal government's counsel about a hypothetical case where a tribal court jury consists of "all the friends and relatives of the victim." Oral Argument at 28, Strate v. A-1 Contractors, 520 U.S. 438 (1997) (No. 95-1872).

weight whatsoever to tribal civil rights protections.[495] Chief Justice Roberts' majority opinion explicitly tied tribal civil jurisdiction over nonmembers to consent:

> Tribal sovereignty, it should be remembered, is "a sovereignty outside the basic structure of the Constitution." . . . The Bill of Rights does not apply to Indian tribes. . . . Indian courts "differ from traditional American courts in a number of significant respects." . . . And nonmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory.[496]

Once again, the Supreme Court is the leading policymaker, making federal common law decisions, articulating vague standards requiring additional pronouncements, and increasing its political might in this field, almost always at the expense of Indian tribes, entities that attract significant skepticism from the Court, which bases its skepticism on unreliable sources. Ultimately, Indian tribes still have not consented to an Article III court's jurisdiction.

In sum, this Part is intended to demonstrate that tribal consent is, for the Supreme Court, of little import in cases involving federal and state authority in Indian affairs. Conversely, when tribal jurisdiction over nonmembers is at issue, nonmember consent becomes the most important factor. Strangely, the lack of tribal consent is consistent with a view propounded by the Supreme Court more than fifty years ago in *Tee-Hit-Ton Indians v. United States*[497]—that Indians were conquered, and so tribal consent to outside government authority is irrelevant.[498] The concluding portions of this Article will show that such a position is incorrect, and unnecessary to the adequate functioning of Indian Country governance.

III. CONSENT AND NONMEMBERS

Consent theory has a different meaning and practical application in federal Indian law when it comes to tribal assertions of governmental authority over nonmembers. When the Supreme Court speaks about consent of nonmembers to tribal governance, the Court robustly demands that the tribal government produce literal, express consent by nonmembers to tribal authority.[499] This

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495. *See* Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 337 (2008).

496. *Id.* (quoting United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in judgment); citing Talton v. Mayes, 163 U.S. 376, 382-85 (1896); and quoting Nevada v. Hicks, 533 U.S. 353, 383 (2001) (Souter, J., concurring)).

497. 348 U.S. 272 (1955).

498. *See id.* at 289 ("Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.").

499. *E.g.*, Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 337 (2008) (holding that nonmember consent over tribal court jurisdiction is paramount).

requirement stands in great contrast to the implied, often illusory, consent that the Court finds important in the context of federal assertions of authority over Indian affairs, both internal and external.[500]

This Part will not be arguing, as I have argued elsewhere,[501] that nonmember consent is irrelevant or somehow an improper means of analyzing tribal authority over nonmembers. While the previous subsection suggested there are numerous weaknesses in the Court's decisions in the various subject areas of tribal authority over nonmembers, I will not argue for an overhaul of the Court's federal Indian common law decisions. I will instead argue in the second subsection below that tribal governments have learned lessons from these cases, and slowly are adapting their laws to conform to the Supreme Court's preferred regime. I propose that the Court should borrow from the consent theory espoused in the nonmember cases and apply it elsewhere in Indian law in a consistent fashion that does not assume tribal consent.

A. Cases Involving Nonmember Consent Questions

1. Montana I Consent Theory

In *Montana v. United States*,[502] the Supreme Court held that Indian tribes do not have civil regulatory authority over nonmembers as a general rule, with two exceptions. The first exception detains us here. That exception reads: "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who *enter consensual relationships* with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[503] The Court in later cases, notably *Atkinson Trading Co., Inc. v. Shirley*,[504] narrowed the exception to mean express consent and a "nexus" between the consent arrangement and the commercial activity to be adjudicated, taxed, or regulated by the tribe.[505] We know from *Strate* cases that nonmembers are not subject to tribal court jurisdiction because they have been in an accident on nonmember land unrelated to the business purposes for being on the reservation;[506] we

500. *E.g.*, Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 852-53 (1985) (holding that federal courts have authority to review tribal court jurisdiction over nonmembers).

501. *E.g.*, Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, FED. LAW., Mar./Apr. 2006, at 38, 40.

502. 450 U.S. 544 (1981).

503. *See id.* at 565 (citations omitted) (emphasis added). Citations are omitted for a reason. In a later case, the Supreme Court rejected the notion that the citations to this language have much meaning, although the Court often will discuss these cited cases at some length.

504. 532 U.S. 645 (2001).

505. *Id.* at 656.

506. See 520 U.S. 438, 456-57 (1997).

know from *Atkinson Trading* that nonmembers on nonmember land are not subject to tribal taxation even if they accept public safety and other government services from the local tribes;[507] we know from *Plains Commerce Bank* that a nonmember is not subject to tribal court jurisdiction in a case arising on nonmember land merely because the nonmember defendant has previously filed more than twenty civil suits in the local tribe's court system.[508] All of these cases, frankly, involve nonmembers who are outliers in Indian Country, as will see in the next subpart.

First, we will discuss the so-called *Montana 1* cases. The earliest *Montana 1* case is, of course, *Montana*.[509] Prior to *Montana*, many Indian tribes operated on a theory of implied consent to tribal jurisdiction.[510] The theory seemed sound, in that anyone entering Michigan from Wisconsin impliedly consented to Michigan's authority over them, for example.[511] But the *Montana* Court rejected that claim out of hand, and imposed the general rule instead.[512] The reservation of the Crow Nation, which was the tribe involved in the *Montana* litigation, was perhaps a poor place to defend the implied consent theory in that the reservation had been allotted by Congress,[513] giving rise to a powerful argument that *Congress* had granted consent to the nonmembers living on formerly Crow lands to be there, obviating any need for tribal consent.

Montana largely involved treaty rights and federal interest claims on the Crow Reservation against the State of Montana, but the final portion of the opinion involved tribal regulatory authority over nonconsenting nonmembers on non-Indian owned land.[514] There, the State of Montana and non-Indian property owners objected to tribal authority on private property.[515] The nonmembers were not a part of the government decision-making that established the regulations, though their actions (on their own property) had wide impacts on the reservation.[516]

Montana 1 consent cases that followed have all demanded that Indian

507. See Atkinson Trading, 532 U.S. at 656-57.

508. *See Plains Commerce Bank*, 554 U.S. at 341-42; *see also* Brief for Amicus Curiae Cheyenne River Sioux Tribe in Support of Respondents 29-31 & n. 30, *Plains Commerce Bank*, 554 U.S. 316 (2008) (No. 07-411) (cataloguing tribal court cases in which the Bank appeared without questioning jurisdiction).

509. 450 U.S. 544 (1981).

510. *See* NAT'L AM. INDIAN COURT JUDGES ASS'N, *supra* note 11, at 50-56.

511. *See* Fletcher, *supra* note 501, at 40.

512. *See Montana*, 450 U.S. at 564-65 ("Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty did not authorize the Crow Tribe to adopt Resolution No. 74-05.").

513. *See id.* at 559 n. 9 (discussing Crow Nation allotment acts).

514. *See id.* at 564-66.

515. *Cf. id.* at 548-50 (noting the non-Indian activities on the river at stake).

516. *Cf. id.* at 558 & n. 6 (noting that the tribal interests had a treaty interest in fishing but did not allege as such in the complaint).

tribes produce evidence of some form of literal or express consent from nonmembers before the Court will acknowledge tribal authority. The best example is *Merrion v. Jicarilla Apache Tribe*,[517] in which a nonmember business agreed via a lease agreement to pay royalties.[518] While the majority in *Merrion* did not discuss *Montana*,[519] the express consent acquired by the tribe now takes on greater significance than it did even in the original case. The classic case on the other side is *Atkinson Trading Co. v. Shirley*,[520] where the Navajo Nation's efforts to enforce a hotel tax against a nonmember owned business on a postage stamp of non-Indian land failed for lack of express consent.[521]

2. Duro Consent Theory

The second critical case involving nonmember consent came in 1990–*Duro v. Reina*.[522] The case involved tribal criminal jurisdiction over nonmember Indians, or Indians who are not members of the tribe attempting to prosecute them.[523] Tribal members, who can chose to be tribal members of federally recognized Indian tribes, have effectively consented to tribal jurisdiction.[524] Nonmembers, who have not–and *cannot*–consent, according to *Duro*, therefore, are not subject to tribal jurisdiction.[525] The notion of consent theory propounded in *Duro* differs from the notion of consent theory propounded in the *Montana 1* exception in that Justice Kennedy appears to assume that nonmembers are not and cannot ever become members because of the race and ancestry requirements of tribal membership.[526]

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517. 455 U.S. 130 (1982).

518. *See id.* at 133 (noting the nonmember business had signed a lease, but challenged the tribal tax).

519. *See id.* at 171-72 (Stevens, J., dissenting) (discussing *Montana*).

520. 532 U.S. 645 (2001).

521. *See id.* at 647-48.

522. 495 U.S. 676 (1990).

523. *See id.* at 679.

524. *See id.* at 693 ("The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. Indians like all other citizens share allegiance to the overriding sovereign, the United States. A tribe's additional authority comes from the consent of its members, so in the criminal sphere, membership marks the bounds of tribal authority.").

525. *See id.* ("The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate. While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often 'subordinate to the political branches of tribal governments,' and their legal methods may depend on 'unspoken practices and norms.' . . . It is significant that the Bill of Rights does not apply to Indian tribal governments.") (citing Talton v. Mayes, 163 U.S. 376 (1896)).

526. *Cf. id.* at 694 ("With respect to such internal laws and usages, the tribes are left with broad freedom not enjoyed by any other governmental authority in this country. . . . This is all the more reason to reject an extension of tribal authority over those who have not

Justice Kennedy's majority opinion harkened back to his dissent as a Ninth Circuit Judge when he sat on the *Oliphant* case in the 1970s.[527] The *Duro* majority opinion evidences *Judge* Kennedy's view that tribal jurisdiction depends heavily, if not exclusively on congressional authorization, was incorrect by noting, through *Justice* Kennedy, that tribal sovereignty is retained unless abrogated.[528]

The *Duro* consent theory is both narrower and broader than the *Montana I* consent theory. The *Duro* theory allows tribal jurisdiction broadly over tribal members, with literal or express consent unnecessary.[529] The *Duro* analysis implies skepticism about whether nonmembers even have the legal capacity to consent to tribal criminal jurisdiction,[530] and perhaps even whether Congress has constitutional authority to consent on behalf of nonmembers to criminal jurisdiction over nonmembers.[531] Congress did exercise its Indian affairs authority to reverse *Duro* and recognize and reaffirm tribal criminal jurisdiction over nonmember Indians, leading to the Supreme Court's decision in *United*

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given the consent of the governed that provides a fundamental basis for power within our constitutional system."). In a critical federal Indian law decision, the Supreme Court once before held that nonmember consent is all but irrelevant. In *United States v. Rogers*, 45 U.S. 567 (1846), where a non-Indian man who had married into the Cherokee Nation and submitted to the laws of the Cherokee Nation, ostensibly becoming a citizen of the Cherokee Nation, remained subject to American criminal prosecution on grounds that his express, literal consent to Cherokee law was insufficient to break his ties to the United States. *See id.* at 573.

527. *See* Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976), *rev'd*, 435 U.S. 191 (1978). As one commentator noted about then-Circuit Judge Kennedy's *Schlie* dissent: "Judge Kennedy then reached the following conclusions about tribal sovereignty: the tribal sovereignty notion grew out of cases dealing with state encroachment and simply are not applicable to the subject of tribal jurisdiction over an individual." Carol A. Mitchell, Note, Oliphant v. Schlie*: Tribal Criminal Jurisdiction of Non-Indians*, 38 MONT. L. REV. 339, 349 (1977) (citing *Schlie*, 544 F.2d at 1015) (Kennedy, C.J., dissenting). That commentator then argued that the "dissent's position on tribal sovereignty ignores a well settled rule of Indian law which implicitly recognizes the original sovereignty of tribes, as well as the survival of the remnants of that sovereignty." *Id.* at 350.

528. *See Duro*, 495 U.S. at 684.

529. *See id.* at 694 ("Tribal authority over members, who are also citizens, is not subject to these objections. Retained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent.").

530. *See id.* at 689 ("Cases challenging the jurisdiction of modern tribal courts are few, perhaps because 'most parties acquiesce to tribal jurisdiction' where it is asserted. . . . We have no occasion in this case to address the effect of a formal acquiescence to tribal jurisdiction that might be made, for example, in return for a tribe's agreement not to exercise its power to exclude an offender from tribal lands") (quoting NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, *supra* note 250, at 48).

531. *See id.* at 693 ("It is significant that the Bill of Rights does not apply to Indian tribal governments. . . . The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts. There is, for example, no right under the Act to appointed counsel for those unable to afford a lawyer." (citing 25 U.S.C. § 1302(6))).

States v. Lara.[532]

B. Applications of Nonmember Consent

Modern and sophisticated Indian tribes are working within the Supreme Court's variations of consent theory. They seek express nonmember consent for civil jurisdiction purposes, and they exercise increasingly advanced governmental authority consistent with the implied consent over tribal members the Supreme Court recognizes.

It is likely that the Supreme Court remains unaware how often nonmembers engage in consensual arrangements with Indian tribes, but the number of nonmembers who work for Indian tribes is staggering,[533] and very well might be a large majority of all nonmembers who reside or otherwise spend significant time in Indian Country. Indian tribes with highly successful gaming enterprises such as the Mashantucket Pequot Nation, Mohegan Tribe, Pokagon Band of Potawatomi Indians, Agua Caliente Band of Mission Indians, and other tribes in the same category each employees more than a thousand nonmembers, and possibly several thousand.[534] Indian tribes with diversified and successful non-gaming business operations, such as the Southern Ute Tribe, Cherokee Nation of Oklahoma, Winnebago Tribe of Nebraska, and the Mississippi Band of Choctaw Indians likely employ thousands of members and nonmembers.[535] And dozens upon dozens of other tribes with perhaps modest economies but are located in rural areas often are the biggest (or one of the biggest) local employers in whole regions, just because of the size of their tribal government bureaucracies.[536] The Sault Ste. Marie Tribe of Chippewa Indians,

532. 541 U.S. 193 (2004).

533. *E.g.*, *Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian Country*, Hearing Before the S. Comm. on Indian Affairs, 111th Cong., 2d Sess. 67 (Jan. 10, 2010) (statement of Conrad Edwards) ("The facts are that our average tribal workforce is 50 percent to 70 percent non-Indian and our unemployment rates are still 50 percent to 80 percent, depending on what reservation you are on and what time of the year it is.").

534. *See Precious, supra* note 147. Overall, Indian gaming revenues have arisen above $25 billion a year for several years now. *See* National Indian Gaming Commission, *2010 Industry Gross Gaming Revenue* (July 18, 2011), *available at* www.nigc.gov. Indian gaming generates enormous economic activity in non-Indian communities. *See generally* Jonathan B. Taylor, Matthew B. Krepps, and Patrick Wang, *The National Evidence on the Socioeconomic Impacts of American Indian Gaming on Non-Indian Communities* (Apr. 2000), *available at* http://www.northforkrancheria.com/files/Taylor%20Kreps%2020002.pdf.

535. For example, the Umatilla Tribe and the Southern Ute Tribes are the biggest employers in their regions. *See Indian Tribal Good Governance Practices as They Relate to Economic Development*, Hearing Before the S. Comm. on Indian Affairs, 107th Cong., 1st Sess. 3 (July 18, 2011) (statement of Neal A. McCaleb) (Umatilla); *id.* at 5 (Statement of Sen. Campbell) (Southern Ute).

536. *See N. Idaho Tribe Emerges as Top Regional Employer*, NAT. AM. TIMES, Sept. 21, 2011, *available at* http://www.nativetimes.com/news/tribal/3399-n-idaho-tribe-emerges-

for example, is the single largest employer in Chippewa County in the Upper Peninsula of Michigan.[537]

Thousands upon thousands (no one knows exactly how many, or can really estimate) of nonmembers work for Indian tribes. They have all engaged in some consensual relationship with an Indian tribe, usually work on tribal lands (often for tribal businesses), and are paid for their work. Under a reasonable interpretation of *Montana 1*,[538] all of these nonmembers are subject to tribal regulation, taxation, and adjudication for events arising on tribal lands or anywhere within reservation boundaries or Indian Country.

Many more thousands of nonmembers live in tribal housing, which is usually located on tribal trust lands and land owned in fee by the tribe, because of intermarriage and other relationships. Under federal and tribal law, each of these individuals must be accounted for in a lease, rental, or ownership document and receive the consent of the tribe to live in tribal housing. All of them have signed legal documents in which they expressly consent to tribal regulation as a product of the housing agreement. Additional thousands of nonmembers are eligible to receive tribal government services because they may be the parent or guardian of tribal member children, elders, and others.

All of these thousands of nonmembers have consented in some manner expressly to tribal regulation. Maybe under the *Montana 1* line of cases a tribe could not regulate the employment of a nonmember on nonmember land who has merely signed a housing rental lease with the tribe, but there is significant overlap in employment, housing, and tribal government services in that most aspects of nonmember activity—*even on nonmember land*—meet the *Montana 1* prescription. The nonmembers to whom Indian tribes likely cannot exercise jurisdiction are *outliers*. There are fewer and fewer of them every day, and since they are not engaging in consensual relations with Indian tribes, their activities are becoming more inconsistent with tribal preferences. It bears noting that the last few Supreme Court cases regarding tribal jurisdiction over nonmembers involve nonmember tortfeasors,[539] not merely nonmembers who refuse to comply with tribal regulations or taxes. This trend is evident in lower

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as-top-regional-employer; St. Regis Mohawk Tribe, *Tribe Commissions Economic Impact Study: Tribe Contributes $119 Million to State Economy*, Press Release (Oct. 26, 2009), *available at* http://images.bimedia.net/documents/Mohawk+Economic+Impact+Study.pdf.

537. *See* N. Michigan Univ. Center for Rural Cmty. and Econ. Dev., *County Economic Profiles from Michigan's Upper Peninsula* 3 (Dec. 31, 2010), *available at* http://www.iron.org/forms/UPEconProfiles.pdf.

538. *See* Montana v. United States, 450 U.S. 544, 565 (1981).

539. *See* Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 320 (2008) ("Following the sale, an Indian couple, customers of the bank who had defaulted on their loans, claimed the bank discriminated against them by offering the land to non-Indians on terms more favorable than those the bank offered to them."); Strate v. A-1 Contractors, 520 U.S. 438, 443 (1997) ("The accident occurred when Fredericks' automobile collided with a gravel truck driven by Stockert and owned by respondent A–1 Contractors, Stockert's employer.").

courts as well.[540] Finally, all of this has begun to happen in earnest since the mid-1970s, after Congress agreed to start turning over the primary responsibility for providing government services to reservation residents to Indian tribes.[541] Likely, the number of nonmembers consenting to tribal jurisdiction in some way grows every day. We will leave for another day all those nonmembers who consent after the fact to tribal jurisdiction in civil offense and other cases, though that number grows perhaps even faster than the number of expressly consenting nonmembers.[542]

Consent theory, for all its vagaries and even confusion, has utility for Indian affairs, as I will demonstrate in the next Part. In fact, the United Nations Declaration for the Rights of Indigenous Peoples requires consent to be a critical aspect of governmental affairs involving indigenous peoples. And most importantly, it is a viable and realistic theory.

CONCLUSION: TOWARD A THEORY OF TRIBAL CONSENT IN MODERN INDIAN AFFAIRS

Indian tribes have either ownership or direct control over many millions of acres throughout the United States, though mostly in the western half of the continent.[543] Hundreds of thousands of people live and work on that territory, including tribal members, nonmember Indians, and non-Indians.[544] With the exception tribes located in the few states subject to Public Law 280,[545] an Act of Congress that extended aspects of state jurisdiction into Indian Country, Indian tribes have significant control over tribal territories and those living and working on those lands.[546] But as this Article shows, that control is subject to significant and artificial limitations and uncertainties relating to the relationship between Indian tribes and nonmembers, as well as the interests of state governments in on-reservation business activities.

Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples could force a paradigm shift if its public policy is applied as intended.

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540. *E.g.*, Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842, 844 (9th Cir. 2009) (involving a claim that nonmember defendant started on-reservation forest fire that "burned more than 400,000 acres of land and caused millions of dollars in damage"), *cert. denied*, 130 S. Ct. 624 (2009). See also cases discussed in note 489 (listing cases involving nonmember tortfeasors).

541. *See generally* WILKINS & STARK, *supra* note 147, at 131-32.

542. *See, e.g.*, Mandan, Hidatsa, & Arikara Nation, Press Release, *Tribes Pass Special Resolution Enforcing Civil Motor Vehicle Code on Reservation Roads After Family of Four Dies on Highway* (Sept. 20, 2011), *available at* http://64.38.12.138/News/2011/09/21/mha092011.pdf.

543. *See* GETCHES ET AL., *supra* note 20, at 12.

544. Interview with Wenona T. Singel, Assistant Professor of Law, Michigan State University College of Law, in East Lansing, MI (Aug. 1, 2011).

545. *See* Public Law 280, *codified in relevant part at* 18 U.S.C. § 1162.

546. *See* Montana v. United States, 450 U.S. 455, 464 (1981).

But for Indian tribes, Article 19 consent is complicated by its own terms. It reads:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their *free, prior and informed consent* before adopting and implementing *legislative or administrative measures* that may affect them.[547]

As is noted by the Supreme Court, Congress has never legislated in a comprehensive fashion on tribal authority to regulate the on-reservation activities of nonmembers.[548] As a result, the general question is one of federal common law, ultimately decided by the United States Supreme Court. The Supreme Court's jurisdiction, as a matter of federal law, is self-created under Article III of the Constitution. Of course, no American Indian tribe has effectuated "free, prior, and informed consent"[549] to Supreme Court jurisdiction over internal tribal affairs. Unfortunately, Article 19 neglects to mention judicial decisions, possibly because judicial review in most countries is less robust than it is here in the United States.[550] So is Article 19 consent even relevant to American Indian tribes in federal common law cases decided by the federal judiciary?

In my view, yes, in that the Supreme Court should defer more to Congress's silence on the question of tribal authority over nonmembers. Congress has the institutional authority and capabilities to declare national public policy in Indian affairs.[551] Congressional silence indicates at least one important factor: the lack of a pressing national interest in a question, so much so that Congress does not feel the need to act. If Congress makes no effort to comprehensively legislate in the area of tribal authority over nonmembers, then there would appear to be no national interest in the issue. Interestingly, the Court, *once* articulated a rule closely approximating this view in dicta. In *Washington v. Colville Confederated Tribes*,[552] the Court noted that tribal inherent authority is divested when the exercise of that authority is inconsistent with the "overriding interests of the National Government."[553] Congressional action to comprehensively regulate tribal authority over nonmembers, after Article 19, would require the "free, prior, and informed consent" of the American Indian nations. Supreme Court decisions in the field should defer to

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547. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1, at art. 19 (emphasis added).

548. *See* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 854-55 (1985).

549. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 1, at art. 19.

550. *See* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 18-36 (2008) (discussing "weak form" judicial review in other nations).

551. *See* Fletcher, *supra* note 384, at 130-54.

552. 447 U.S. 134 (1980).

553. *Id.* at 153.

congressional silence in this area.

Douglas Sanderson's outstanding theory on institutional corrective justice[554] provides a helpful theoretical framework for contextualizing Supreme Court deference under Article 19. Sanderson, writing about Canadian First Nations and the Canadian justice system, notes that there are three views of remedying historic wrongs against Indigenous peoples: (1) "land transfer," (2) "subsistence," (3) and "institutional."[555] In the United States, it is fair to say that "land transfer," except as provided for by Congress in a series of land claims settlements,[556] is anathema, especially to the federal judiciary.[557] "Subsistence" remedies, defined by Sanderson as a remedy that allows "Indigenous peoples to live the same kinds of lives as they once did with respect to harvesting of resources traditionally relied upon,"[558] has been welcomed several times by the federal judiciary in treaty rights cases.[559] Sanderson's recommendation, "institutional" remedies, which he defines as recognition of Indigenous "ability to develop and maintain political, social, and cultural institutions,"[560] has been roundly approved by Congress and the Executive branch.[561] But the Supreme Court, in its skepticism of tribal authority over nonmembers, repeatedly declines to defer in this area. The Court's common law decisions stunt tribal institutional development. Yet while it shouldn't take much to ask the Court to step aside, it is clear the Court will not.

Effective implementation of what I call tribal consent theory—the notion that tribal authority remains extant absent consensual abrogation of that authority—is a tough nut. The Supreme Court retains final veto over any governmental action by an Indian tribe in relation to nonmembers. But as a practical matter, the Court cannot and will not review every case, and the Court even declines to review some of the tougher cases. And that's where Indian tribes can engage in the critical act of exercising *de facto* sovereignty.[562] Tribes

554. *See* Douglas Sanderson, *Redressing the Right Wrong: The Argument from Corrective Justice*, (Oct. 8, 2011) (unpublished manuscript), *available at* http://ssrn.com/abstract=1945380.

555. *See id.* at 19-20.

556. *E.g.*, Rhode Island Indian Claims Settlement, 25 U.S.C. §§ 1701-16; Maine Indian Claims Settlement, 25 U.S.C. §§ 1721-55; Connecticut Indian Land Claims Settlement, 25 U.S.C. 1751 et seq.; Massachusetts Indian Land Claims Settlement, 125 U.S.C. § 1771-71(i); Seneca Nation (New York) Land Claims Settlement, 25 U.S.C. §§ 1774-74(a).

557. *E.g.*, City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005); Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

558. Sanderson, *supra* note 554, at 27.

559. *E.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); Washington v. Washington Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658 (1979); United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979).

560. Sanderson, *supra* note 554, at 32.

561. *See generally* Fletcher, 384, at 151-54.

562. *See* Stephen Cornell and Joseph P. Kalt, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, 22 AM. INDIAN CULTURE AND RES. J., no. 3, 1998, at 187-88.

can make their own consent regime. All it takes is one case.

Tribal consent theory, as I see it, would fundamentally—but gradually—change the framework for analyzing the scope of tribal governance on tribal lands. As noted earlier, more and more nonmembers are expressly consenting to some form of tribal authority. More and more nonmembers depend economically and politically on Indian tribes. Fewer and fewer nonmembers on tribal lands have no consensual relationship with the local tribe. Even on reservation lands owned by nonmembers, the nonmember population numbers are declining.

Critically, the "open question" identified in Justice Scalia's majority opinion—whether tribes have presumed civil jurisdiction over nonmembers on tribal lands—should be an easy one once it reaches the Supreme Court. There are two ways the Supreme Court can analyze the question when it arises. The first is to apply the presumption, a decision that could require the Supreme Court to articulate circumstances where tribal jurisdiction is unacceptable.[563] When would tribal jurisdiction be fundamentally unfair or abusive toward nonmembers, for example? Common law courts are not at their best when trying to articulate exceptions to general rules, and so the exercise might be confounding to the Court. That said, nonmembers living and doing business on tribal lands very frequently have consented to being there, and there is solid legal support dating back to the nineteenth century that nonmembers voluntarily entering Indian lands are subject to tribal law.[564]

More likely than not, the Court will apply a form of the *Montana* general rule and exceptions, even on tribal lands.[565] The Justices are already familiar with *Montana* and have labeled it "pathmarking."[566] This would be a troubling, but not unexpected, outcome. There is some very speculative evidence that the Court tends to be interested only in cases where a nonmember plausibly claims some form of abusive or irrational exercise tribal jurisdiction,[567] and as a result is extremely unlikely to ever grant certiorari in a case where a nonmember prevailed over a tribal interest below.[568] Moreover, instances involving consensual relationships between Indian tribes and nonmembers are unlikely to be litigated at all.

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563. *See* Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) ("Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.").

564. *See* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 854-55 (1985) (quoting Attorney General Cushing, 7 OP. ATTY. GEN. 175, 179-81 (1855)).

565. *Cf.* Nevada v. Hicks, 533 U.S. 353, 359-60 (2001) (arguing that land ownership is only one factor to consider).

566. Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997).

567. *Cf.* Preliminary Memorandum at 7; FMC v. Shoshone-Bannock Tribes, 499 U.S. 943 (1991) (arguing against a cert. grant on grounds that the tribes' asserted jurisdiction over a nonmember was not sufficiently "outrageous" to warrant Supreme Court review), *available at* http://epstein.usc.edu/research/blackmunMemos/1990/Denied-pdf/90-1146.pdf.

568. *See* Fletcher, *supra* note 433, at 935-36.

The Supreme Court's certiorari practices, and propensity for aligning with the *Montana* general rule, put tribal interests in a tough spot. Any Supreme Court decision involving a nonmember on tribal trust or reservation lands that applies *Montana* to the detriment of tribal interests would complicate tribal governance considerably. Nonmembers who remain outliers in reservation communities and areas would be all but free from governance, unless state governments dramatically expand their activities in Indian Country. Frankly, no state will do this,[569] even if the legal complexities of such action were removed.

While it is plausible that the Supreme Court would hold in favor of tribal interests in a case where a nonmember challenges tribal jurisdiction, the Court's historic skepticism of tribal governance,[570] coupled with its disregard of the practical consequences of its decisions,[571] is likely too heavy a mountain to move. Tribal interests might not win such a case.

In my view, however, the Supreme Court's ad hoc decision-making on tribal jurisdiction over nonmembers is increasingly irrelevant. Even the most recent case, *Plains Commerce Bank v. Long Family Land and Cattle Co.*,[572] decided almost nothing. There, the bank still had to face the rest of the jury verdict because it challenged the court's jurisdiction over only one cause of action against it.[573] The nonmembers challenging tribal jurisdiction are increasingly behaving in unusual ways, and the impacts of their actions will shrink over time as tribes acquire more and more express consents.[574] The short-term question is whether the Supreme Court will continue to side with those nonmembers in Indian Country who are increasingly becoming undesirable outliers.

Eventually, and that time may be years or decades away, Indian tribes will have solved the problem of the nonconsenting nonmember. Enterprising tribes will even find a way to incorporate non-Indians into the governance of the reservation—with their consent.

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569. The experience of Public Law 280 states and tribes is indicative of the extreme unlikelihood that states will expand their governance much into Indian Country. *See generally* Carole E. Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697 (2006).

570. *See generally* 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).

571. *E.g.*, Duro v. Reina, 495 U.S. 676, 698 (1990) ("If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs.").

572. 554 U.S. 316 (2008).

573. *See* Bank of Hoven (Plains Commerce Bank) v. Long Family Land and Cattle Co., 32 Indian L. Rev. 6001, (Cheyenne River Sioux Tribal Court of Appeals 2004) (noting that the Bank had waived its challenges to the contract claims against it).

574. *See* Matthew L.M. Fletcher, *An Immigration Policy Solution for Tribal Governments*, INDIAN COUNTRY TODAY, Sept. 14, 2007, at A3.

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More than 20 years ago, Professor Collins theorized that Indian nations would move toward independence from the federal government as perhaps the only conceivable means of achieving significant advances in strong and fair—and consensual—Indian Country governance.[575] Independence is a lofty goal, one many tribes probably don't want. But that is no reason not to pursue tribal consent theory. Indian tribes are in the best position in centuries to reestablish important governance authority over all of the people and entities within Indian Country and thoughtful tribal sovereigns have already begun to light the way.

Miigwetch.

575. *See* Collins, *supra* note 2, at 386-87.

RECONCEPTUALIZING TRIBAL RIGHTS: CAN SELF-DETERMINATION BE ACTUALIZED WITHIN THE U.S. CONSTITUTIONAL STRUCTURE?

by
Rebecca Tsosie[*]

In September 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples. Although the United States originally dissented, President Barack Obama reversed this position in 2010. The U.S. Department of State issued a formal statement of support in January 2011, maintaining that the Declaration is a non-binding statement of policy that comports with U.S. federal Indian law and policy. This Article evaluates the premise that the Declaration is consistent with U.S. law and policy by comparing the central principles of federal Indian law with the emerging norms of international human rights law that are reflected in the Declaration. The Article suggests that existing rights for Native peoples within the United States could be enhanced by applying human rights norms to the interpretation of Native rights, and posits that the Declaration also has broader implications for U.S. policy, particularly with reference to cultural rights and the rights of non-federally recognized indigenous groups. The Author concludes that there are areas of domestic law that could be reconfigured to better protect the core human rights of indigenous peoples within the borders of the United States.

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I. INTRODUCTION

In September of 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples[1] after more than 25 years of negotiations, hearings, and intensive dialogue between representatives of the nation-states and indigenous representatives.[2] The Declaration maintains that indigenous peoples have a right of self-determination as "peoples,"[3] and sets forth a series of standards that might be employed by nation-states in securing the human rights of indigenous peoples, which are largely related to their distinctive cultural and political status, and their longstanding relationship to their traditional lands.[4]

Although the United States originally joined Canada, New Zealand, and Australia in voting against the adoption of the Declaration,[5] the Obama Administration recently reversed this position, following the lead of the other dissenting governments, which also reversed their opposition.[6] President Barack Obama made the initial announcement in support of the Declaration during a White House Conference hosted for tribal leaders in December 2010, saying that "[t]he aspirations it affirms, including the respect for the institutions and rich cultures of Native peoples, are one we must always seek to fulfill," and also that his administration was committed to taking "actions to match those words."[7] The State Department then issued the official Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples, noting that the decision "to support the Declaration was the result of a thorough review of the Declaration by the relevant federal agencies," and a series of consultation sessions with tribal leaders.[8] The State Department also asserted that the Declaration was consistent with U.S. federal Indian policy, thereby justifying the Administration's decision to support the Declaration as a statement of non-binding federal policy.[9]

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[1] United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007) [hereinafter Declaration].

[2] E.S.C. Res. 1982/34, U.N. Doc. E/1982/82 (May 7, 1982).

[3] Declaration, *supra* note 1, art. 3.

[4] *Id.*

[5] U.N. GAOR, 61st Sess., 107th plen. mtg. at 18–19, U.N. Doc. A/61/PV.107 (Sept. 13, 2007).

[6] *United Nations Declaration on the Rights of Indigenous Peoples*, UN PERMANENT FORUM ON INDIGENOUS ISSUES, http://www.un.org/esa/socdev/unpfii/en/declaration.html.

[7] Remarks at the White House Tribal Nations Conference, 2010 DAILY COMP. PRES. DOC. 1076 (Dec. 16, 2010).

[8] *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. DEP'T OF STATE 1–2 (Jan. 12, 2011), http://www.state.gov/documents/organization/154782.pdf [hereinafter *Announcement of U.S. Support*].

[9] *Id.* at 1.

At some point in the future, the Declaration might become the basis for a human rights convention, and nation-states would have the option to sign onto a legally binding treaty. At the moment, however, the Declaration is purely an aspirational statement of principles for nation-states to consult as they articulate their domestic laws and policies governing indigenous peoples.[10] Although some critics might dismiss the importance of the Declaration because it is not yet an enforceable treaty, the document is of tremendous value in articulating a series of modern benchmarks for crafting more just relationships between indigenous peoples and the nation-states that now encompass them.

In that spirit, this Article evaluates the premise that the Declaration on the Rights of Indigenous Peoples is consistent with U.S. federal Indian law and policy. Part II of the Article examines the importance of international human rights law as a structure for articulating indigenous rights. Part III of the Article compares the rights framework that exists for native peoples under U.S. Constitutional law (which is the basis for federal treaties and statutory law) with the emerging norms of the human rights framework that defines the rights of indigenous peoples. In Part IV, the Article evaluates how existing rights for indigenous peoples within the United States might be enhanced by appeals to human rights norms, and suggests that this approach has broader implications for U.S. policy, for example in relation to the claims of tribal communities that currently lack federal recognition.[11] The Article concludes by arguing that there are many provisions within the Declaration that attest to the need for a more robust version of the collective rights of indigenous peoples, which may ultimately require the United States to reconfigure its domestic law to better protect the core human rights of indigenous peoples within its borders.

II. THE IMPORTANCE OF INTERNATIONAL HUMAN RIGHTS LAW FOR INDIGENOUS PEOPLES

The concept of human rights gained traction after World War II in the aftermath of the horrific torture and genocide that occurred during that war.[12] Human rights are deemed to be "universal" in the sense that they extend to every living person, and thus they do not depend upon governments for recognition through positive law.[13] Rather, human rights exist as normative precepts.[14] Those precepts may be implemented by governments through international treaties and conventions, and the standards may then become incorporated within a nation's domestic laws. However, until then, human rights are political norms that serve as

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[10] Declaration, *supra* note 1, Annex.

[11] *See infra* notes 117 and 136–42 and accompanying text.

[12] JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS 7–8 (2nd ed. 2007).

[13] *See generally id.* at 9–10 (describing the "defining features of human rights").

[14] *Id.* at 7, 10.

standards to evaluate and critique existing laws.[15] Human rights are deemed to set "minimum standards" for effective and just governance.[16] "[T]hey do not attempt to describe an ideal social and political world."[17]

In 1948, the United Nations adopted the Universal Declaration of Human Rights, which operated as an international bill of rights, proposing standards for civil and political rights, such as equal protection, nondiscrimination, due process, privacy, personal integrity and political participation.[18] The document also incorporated a limited set of standards for economic and social rights, such as an adequate standard of living, health, and education.[19] The Universal Declaration of Human Rights served as the foundation for the treaties that were promulgated by the United Nations to implement these guarantees.[20]

In 1966, the United Nations promulgated the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.[21] Both Covenants require signatory nations to adequately protect the human rights of individuals within their boundaries.[22] Article 27 of the Covenant on Civil and Political Rights affirms the rights of persons belonging to ethnic, linguistic, and religious minorities to enjoy their cultural practices in association with one another, which constitutes a marginal acknowledgment of "group rights" and "cultural rights."[23] However, there is no specific mention of the rights of indigenous peoples in either Covenant.

The notion that indigenous peoples were entitled to a distinctive set of human rights under international law first received attention from the International Labour Organization (ILO), which expressed concern about the exploitation of indigenous peoples that was associated with the rapid industrialization and development of many nation-states.[24] ILO 107, issued in 1957, represented the organization's inaugural effort to produce a convention that would trigger international consensus on the basic human rights of indigenous peoples, designated at that time as "populations."[25] ILO 107 identified the need to protect "indigenous and other tribal or semi-tribal populations" pending their full integration with their respective national communities.[26] In that sense, indigenous

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[15] *Id.* at 10.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 8–9.

[19] *Id.* at 9.

[20] *Id.*

[21] G.A. Res. 2200 (XXI) A, U.N. DOC. A/RES/2200(XXI) A (Dec. 16, 1966).

[22] *Id.*

[23] *Id.*

[24] *See History of ILO's Work*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/indigenous/Aboutus/HistoryofILOswork/lang-en/index.htm.

[25] International Labour Organisation, Indigenous and Tribal Populations Convention, June 26, 1957, No. 107, 328 U.N.T.S. 247 [hereinafter Convention 107].

[26] *Id.* pmbl., at 248–50.

peoples were protected as individuals living in distinctive cultural groups. ILO 107 posited that they should enjoy protection for their cultural distinctiveness to the extent that this was not incompatible with national goals.[27]

In 1989, the organization developed ILO 169, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, which rejected the assimilationist focus of ILO 107 and proclaimed that indigenous peoples were "peoples," though they were not entitled to the identical rights of other peoples for purposes of the Covenant on Civil and Political Rights (CCPR).[28] Under the CCPR, all peoples are entitled to a right of "self-determination" or autonomous self-government, which may, in some instances entitle the group to secede from a nation-state that suppresses this right of self-government under conditions of extreme injustice.[29] Secession is an extraordinary remedy, but is justifiable in particular cases.[30] Not surprisingly, it is that aspect of the right of self-determination that effectively blocked recognition that indigenous peoples actually constitute peoples under international human rights law.[31] ILO 169 attempted to create a middle ground, claiming that indigenous peoples were entitled to the full measure of human rights accorded to others, and that their unique social, cultural, religious and spiritual values and practices should be recognized and protected.[32] On the one hand, tribal members were persons with equal rights to enjoy the benefits of civil society, and on the other, they were entitled to practice the unique customs of their ancestral communities. They were not, however, entitled to secede as distinct national entities from the larger nation-state.[33]

The Declaration on the Rights of Indigenous Peoples is the most comprehensive and far-reaching document articulating the rights of indigenous peoples to date. For the first time, an international declaration proclaims that indigenous peoples are peoples entitled to the right of self-determination.[34] Moreover, the document outlines several

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[27] *Id.* art. 7, para. 2, at 254.

[28] International Labour Organisation, Indigenous and Tribal Peoples Convention, art. 1, para. 3, June 27, 1989, No. 169, 1650 U.N.T.S. 383, 385 [hereinafter Convention 169].

[29] G.A. Res. 2200 (XXI) A, *supra* note 21.

[30] *See* S. JAMES ANAYA, INDIGENOUS PEOPLE IN INTERNATIONAL LAW 109 (2nd ed. 2004) (observing that secession may be "an appropriate remedial option in limited contexts," but is not a "generally available 'right'").

[31] *Id.* at 110–11 (noting that it was difficult to commend a global consensus on the notion that indigenous groups were "peoples" with a right of self-determination because of the pervasive tendency to equate "self-determination" with an "absolute right to form an independent state").

[32] Convention 169, *supra* note 28, arts. 3–5, at 386.

[33] *See id.* art. 1, para. 3, at 385. *See also* Declaration, *supra* note 1, art. 46; G.A. Res. 2200 (XXI) A, *supra* note 21.

[34] Declaration, *supra* note 1, art. 3.

categories of rights, for example, to land, culture, and institutional development, which are necessary for indigenous peoples to survive and thrive within their traditional, land-based cultures.[35]

What is the ultimate importance of international human rights law to indigenous peoples? Professor Robert Williams Jr. was one of the first federal Indian law scholars to advocate for indigenous human rights as an alternate structure, observing in 1990 that the "global movement for human rights is redefining the world as we know it."[36] Primarily, he claimed, this involved a transformation in the perception of "Western settler state governments that human rights only amount to a foreign policy concern," and the ensuing recognition that they are relevant to domestic law and policy.[37] Those words proved to be prophetic. It is abundantly clear that indigenous rights are now a domestic policy concern, and the Declaration suggests that nation-states must adopt processes, procedures, and institutions that will allow for a negotiation (or renegotiation) of rights that are central to the continuing survival of indigenous peoples as separate political and cultural entities. Paramount among these rights, of course, is the right of self-determination, which is the focus of the next Part of this Article.

III. AUTONOMY RIGHTS: SELF-DETERMINATION AND THE U.S. MODEL OF TRIBAL SOVEREIGNTY

The norm of self-determination is the cornerstone of the Declaration on the Rights of Indigenous Peoples.[38] The right to self-determination expresses the collective right of a people to govern themselves autonomously and to freely consent to political arrangements with other governments. As discussed below, there are various models within which the political right of self-determination might be expressed for indigenous peoples. U.S. domestic law has maintained a formal commitment to tribal self-determination since the 1975 Indian Self-Determination and Education Assistance Act was adopted, thus raising the question of whether U.S. law already comports with the call of the Declaration.[39] This Part will explore the concept of indigenous self-determination and its status under U.S. domestic law.

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[35] *Id.* arts. 10–20.

[36] Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 660 (1990).

[37] *Id.* at 671.

[38] Declaration, *supra* note 1, art. 3.

[39] Indian Self-Determination and Education Assistance Act § 3, 25 U.S.C. § 450a (2006). President Nixon initiated the policy change to self-determination in a 1970 statement to Congress affirming his intention to adopt policies strengthening tribal sovereignty; transferring control of Indian programs from the federal to the tribal governments; restoring the tribal land base; and forever ending the termination policy, which abolished the federal trust relationship with particular tribes that were

A. The Concept of Indigenous Self-Determination

Article 3 of the Declaration states that "[i]ndigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[40] This language tracks that of Article 1 of the 1966 International Covenant on Civil and Political Rights, which identifies the right of self-determination as belonging to all peoples.[41] In hotly contested debates, representatives from many nation-states, including the United States, had rejected the notion that indigenous groups were peoples entitled to the right of self-determination, fearing that this would lead to attempts by such groups to secede from the nations.[42] However, indigenous representatives countered that it was unjust to define their rights as peoples as a subordinate class of rights, charging that this was fundamentally discriminatory.[43] The Declaration asserts the basic right to self-determination in Article 3, but also incorporates additional articles that describe this as a right to *domestic* self-determination.[44]

Article 4 of the Declaration clarifies that "[i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."[45] The upshot of this language is to present indigenous self-government as a model of domestic self-governance, rather than a model of independent nationhood. Similarly, Article 5 of the Declaration speaks to the right of indigenous peoples to "maintain and strengthen their distinct political, legal, economic, social and cultural institutions," while also retaining the "right to participate fully . . . in the political economic, social and cultural life of the State," "if they so choose."[46] The language in Article 5 clearly posits a model of indigenous self-governance that is compatible with the simultaneous status of indigenous individuals as equal citizens of the national government. Finally, Article 46 of the Declaration confirms that

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deemed ready to assimilate as equal citizens into the states. *See* Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. DOC. NO. 91-363 (1970).

[40] Declaration, *supra* note 1, art 3.

[41] G.A. Res. 2200 (XXI) A, *supra* note 21.

[42] Christopher J. Fromherz, *Indigenous Peoples' Courts: Egalitarian Juridical Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples*, 156 U. PA. L. REV. 1341, 1346 (2008).

[43] *See* SHARON HELEN VENNE, OUR ELDERS UNDERSTOOD OUR RIGHTS: EVOLVING INTERNATIONAL LAW REGARDING INDIGENOUS RIGHTS 69–106, 94 (1998) (discussing the many debates at the United Nations dealing with whether indigenous peoples were "peoples" or "minorities," and asking why "peoples" are recognized as having rights, but those rights are negated by the qualifying adjective, "indigenous").

[44] Declaration, *supra* note 1, art. 3.

[45] *Id.* art. 4.

[46] *Id.* art. 5.

nothing in the Declaration should be construed to authorize "any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[47] This effectively removes any suggestion that secession is a justifiable remedy for indigenous governments.

B. Models of Indigenous Self-Determination

Professor Shin Imai asserts that the notion of indigenous self-determination expresses "the right of a people to decide how it wants to relate to a majoritarian population."[48] He offers four possibilities for this relationship: sovereignty, self-management, co-management, and participatory governance.[49] The Declaration counsels that self-determination ought to be achieved through a political process of negotiation, in which indigenous peoples consent to the basic conditions of governance within the nation-state and in which the nation-state endorses and supports their governance.[50] This process might result in selection of one model, but it is much more likely to involve the simultaneous operation of two or more models. This, in fact, seems to be already present in the United States, as the following discussion will indicate.

First, however, it is helpful to understand the differences among the models. The first model of indigenous sovereignty supports the right of an indigenous community "to control its own social, economic and political development."[51] Under this model, the indigenous government is recognized as having the inherent authority as a separate government to make its own laws and apply them within a defined territory.[52] The institutions of indigenous self-governance are expressed through legislative, judicial, and executive action, though the indigenous government is free to constitute these functions as it desires.

The United States considers federally recognized Indian tribes to be "domestic, dependent nations," which exemplifies the first model of indigenous self-determination.[53] As discussed in the next Part of this Article, tribal governments are considered to retain their inherent sovereignty as separate nations to control their territory and their members, and also to exclude non-members from their lands or condition their entry upon tribal lands. The federal government controls the process of political recognition, as well as the question of which lands

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[47] *Id.* art. 46.

[48] Shin Imai, *Indigenous Self-Determination and the State*, *in* INDIGENOUS PEOPLES AND THE LAW: COMPARATIVE AND CRITICAL PERSPECTIVES 285, 292 (Benjamin J. Richardson et al. eds., 2009).

[49] *Id.* at 292–93.

[50] *See* Declaration, *supra* note 1, arts. 19–20.

[51] Imai, *supra* note 48, at 292.

[52] *Id.* at 293.

[53] *See infra* note 90 and accompanying text.

are to be considered tribal territory, or "Indian Country."[54] The federal government may also support tribal sovereignty through limited delegations of federal power, thus enabling tribes to exercise authority beyond the limits of their own jurisdiction.[55] The tribes' inherent sovereignty, which predates the formation of the United States, is the basis for such delegations because the U.S. Constitution precludes delegation of federal power to a non-governmental entity.[56]

The second model of "self-management" is different because it calls for the national government to authorize an indigenous community to operate a program developed and funded by the national government.[57] Under this model, the national government sets the policy objective and provides funding to the indigenous community to carry out the program.[58] In its inception, the U.S. policy of tribal self-determination reflected this model. The 1975 Indian Self-Determination and Education Assistance Act was premised on the notion that tribal self-governance would be enhanced by assuming managerial control over federal programs.[59] The so-called "638 contracts" that emerged from this legislation and similar statutes (for example, in the area of tribal healthcare), involve agreements between the tribe and federal agencies, such as the Bureau of Indian Affairs and the Indian Health Service, about the terms of the tribe's administration and control of federally funded programs.[60] Although this model supports the notion of self-government, it is also limited by the nature of the contractual arrangement. The Tribal Self-Governance Act of 1994 created a more sophisticated compact model, enabling eligible Indian nations to secure block grants from the federal government, on a level similar to state governments, to enable flexibility in the design and implementation of programs designed to secure the needs of the tribe and its members.[61] Tribes that assume this

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[54] *See* CAROLE E. GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM (6th ed. 2010) at 126–27 (describing the federal statutory definitions of "Indian tribe") and 127–32 (explaining how the federal acknowledgement process operates to formally "recognize" Indian tribes for purposes of federal law). *See also* 18 U.S.C. § 1151 (2006) (defining the various categories of "Indian Country" under federal law).

[55] For example, tribes may petition for treatment as states under the Clean Air Act and set air quality standards that limit the ability of off-reservation industries to generate pollutants. Clean Air Act § 301, 42 U.S.C. § 7601(d) (2006). This extra-territorial application of tribal law is justified as a delegation of federal power.

[56] *See* United States v. Mazurie, 419 U.S. 544, 557–58 (1975) (holding that Congress could delegate its power to regulate liquor within Indian Country to tribal governments because they possess a historical political identity as separate peoples and they regulate their lands and members).

[57] Imai, *supra* note 48, at 297.

[58] *Id.*

[59] 25 U.S.C. § 450a (2006).

[60] *See, e.g., id.* § 450f.

[61] Tribal Self-Governance Act of 1994, 25 U.S.C. §§ 450aa–450cc (2006).

relationship enjoy more autonomy in program design and more discretion in the expenditure of federal funds.

The structure of indigenous governance in Alaska, which involves regional and village corporations that have authority to manage tribal resources, is also primarily a self-management model. These corporate entities were formed pursuant to federal law, the Alaska Native Claims Settlement Act, which also revoked most reservations in Alaska, and they are generally chartered under state law.[62] These native corporations manage tribal resources under a business model; however, according to the U.S. Supreme Court, they lack the jurisdictional capacity of Indian nations in other parts of the country, which exert inherent sovereignty over their own territory.[63]

The third model of "co-management" is primarily directed toward facilitating native access and control of lands that are currently outside their jurisdiction.[64] Indigenous peoples throughout the world have been displaced from their ancestral lands pursuant to government policies enabling the settlement and development of indigenous lands by non-native citizens and corporations. This is occurring in many countries today, as national governments facilitate oil and gas exploration, hydroelectric power projects, and timber harvesting.[65] The United States is still dealing with the legacy of its own exploitation of tribal lands and resources, including the massive appropriation of tribal lands in the 19th century that was associated with westward expansion and the manifest destiny policy. Today, many native nations have ancestral connections to lands that are now designated as state or federal public lands, and they have a strong interest in protecting cultural or natural resources on those lands. In the United States, indigenous peoples may be treated as stakeholders in the management of federal public lands, or they may be treated as governments with the authority to negotiate co-management agreements with federal agencies to ensure that the administration of public lands is consistent with tribal interests in protecting cultural and

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[62] Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1606–07, 1618(a) (2006).

[63] *See* Alaska v. Native Vill. of Venetie, 522 U.S. 520, 523, 532–33 (1998).

[64] Imai, *supra* note 48, at 301.

[65] In his most recent book, Professor Anaya documents several of the petitions filed by indigenous groups in Latin America protesting human rights violations by corporations that entered indigenous territories in order to gain access to profitable resources. The *Awas Tingni* case involved a logging plan that threatened indigenous communities in Nicaragua, and *Maya Indigenous Communities v. Belize* involved logging and oil development concessions that were granted by the government of Belize over traditional Maya lands without the consent of the Maya people. Anaya documents how, in each case, the attorneys representing the indigenous groups successfully employed international human rights law to recognize the pre-existing property rights of the indigenous peoples. ANAYA, *supra* note 30, at 265–67.

natural resources.[66] This is particularly compelling when the federal public lands are adjacent to reservation lands.[67]

Another example of the co-management model exists in state-tribal cooperative agreements on issues of mutual concern, such as education, law enforcement, or environmental issues.[68] Such agreements allow the two governments, as sovereigns, to exercise joint authority within a region to alleviate or minimize common problems.[69] To some extent, the co-management model has been institutionalized into federal law. For example, the Indian Gaming Regulatory Act requires tribes to negotiate compacts with states to engage in high-stakes (Class III) gaming.[70]

The final model of participatory governance advocates the full participation of indigenous peoples within the dominant society's political system, which in the United States, entails both federal and state legislative, regulatory, and adjudicatory bodies.[71] This is an integrationist model that conjoins the indigenous communities with the larger communities that encompass them. While it may now seem unexceptional that individual Native Americans in the United States should be entitled to vote in state or federal elections, or have equal access to state educational or social services, this is largely the result of the 1924 Indian Citizenship Act, which provided federal citizenship to American Indians, as well as many lawsuits seeking to vindicate the rights of American Indians to equal citizenship within the states.[72] The battles are far from over, as illustrated by many emerging cases regarding the need for appointment of Native American representatives to state bodies that have a significant impact on tribes and their members, such as school boards or transportation commissions, as well as redistricting plans designed to ensure equal voting rights.[73]

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[66] *See* Rebecca Tsosie, *The Conflict between the "Public Trust" and the "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271, 309–10 (2003) (discussing the management plan for the Santa Rosa National Monument, in which the Agua-Caliente Band of Cahuilla Indians is identified both as a stakeholder and a government entitled to consultation, and the co-management agreement between the Bureau of Land Management, U.S. Forest Service, and the Agua-Caliente Band which covers an expanse of wilderness involving all three jurisdictions).

[67] *See id.* at 309.

[68] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.05, at 589–94 (Nell Jessup Newton et al. eds., 2005).

[69] *See id.* at 589.

[70] Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d) (2006).

[71] Imai, *supra* note 48, at 304.

[72] Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924).

[73] A prime example of this movement is currently underway in many states in redistricting cases designed to equalize the participation of Native Americans in state and federal elections by redrawing the relevant districts to afford meaningful participation. *See generally* DANIEL MCCOOL ET AL., NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 45–68 (2007) (detailing relevant cases filed under Voting Rights Act in 15 states from 1965–2006). Tribal governments have been recognized as distinct communities of interest who continue to suffer the

The call for participatory governance as a human right suggests that, as minority communities, the interests of indigenous communities are likely to be overlooked unless they have some meaningful representation within the dominant society's governmental institutions. Of course, rights to political representation may be general, meaning that individual Native Americans are free to run for public office or to vote in state or federal elections for representatives of their choosing, or they may be specific, meaning that a seat is reserved for indigenous participation within a specific body or commission.

In the United States, rights to political representation for indigenous people are largely general, rather than specific. Individual Native Americans are free to run for public office at the tribal, state, or federal levels, and they are eligible to vote in elections at all levels if they otherwise meet the stated criteria to exercise that franchise. Not surprisingly, very few Native Americans have ever served as federal or state legislators or judges.[74] Where they are elected or appointed to public office, Native Americans serve as representatives of the federal or state governments, and they are held to the same norm of impartiality that is intended to bind all public officials in the fulfillment of their duties. It is interesting to compare the systems of other countries. For example, New Zealand sets aside four seats for Maori representatives in the Parliament and allows Maori voters to elect these representatives.[75] In the United States, tribal governments may limit their own elections to tribal members, and federal agencies, such as the Bureau of Indian Affairs, may limit their services to qualified tribes and their members.[76]

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effects of historic discrimination in areas such as education, employment, and health, which hinders their ability to effectively participate in the political process. *See* Navajo Intervenors' Pre-Trial Brief for the New Mexico State House of Representatives Redistricting Trial at 5, Egolf v. Duran (D-101-CV-2011-02942) (1st Dist. N.M., Dec. 5, 2011). As demonstrated by the redistricting litigation in New Mexico, Native Americans have yet to reach proportional representation in the state House of Representatives and voting in New Mexico tends to be racially polarized. *See id.* at 5–6.

[74] The National Congress of American Indians is on the forefront of documenting the (lack of) presence on federal benches of Native American judges and tracking court cases affecting Native Americans. NCAI has a dedicated "Project on the Judiciary" which can be accessed at http://www.ncai.org/ncai/dcdata/.

[75] For a brief history of how New Zealand has set aside four seats in its Parliament since 1868, see *Maori in the House*, http://www.nzhistory.net.nz/politics/parliaments-people/maori-mps. However, Professor Andrew Sharp discusses the politics of Maori representation, noting that the Maori people are still organized into "Iwi" and "Hapu" groups, and that their representation in Parliament does not necessarily correspond to the many Maori political groups and organizations operative in New Zealand. *See generally* ANDREW SHARP, JUSTICE AND THE MAORI: THE PHILOSOPHY AND PRACTICE OF MAORI CLAIMS IN NEW ZEALAND SINCE THE 1970S (2nd ed. 1997).

[76] *See* Rice v. Cayetano, 528 U.S. 495, 520 (2000) (observing that tribal elections may be limited to tribal members because they are "the internal affair of a quasi-sovereign," and that Congress may fulfill its treaty obligations and unique responsibilities to the Indian tribes by enacting legislation directed toward their circumstances).

However, general state and federal elections must be open to all qualified citizens under the Fifteenth Amendment, and those governments may generally not limit public services or opportunities to any particular racial or ethnic group.[77] This was the basis of the U.S. Supreme Court's holding in *Rice v. Cayetano*—the state of Hawaii could not limit elections for the Office of Hawaiian Affairs trustees only to Native Hawaiians.[78]

As the discussion above demonstrates, all four models of indigenous self-determination are operative in the United States, with varying degrees of success. It should be noted that there are several indigenous groups that currently lack federal recognition.[79] Their rights to self-determination are sharply curtailed because they lack the right to negotiate the terms of their governance, as well as the right to regulate their lands and resources, or to protect the rights of their members.[80] The United States maintains that the civil liberties available to all Americans by virtue of the U.S. Constitution and the civil rights laws that have been enacted in the exercise of Congressional authority adequately protect the basic human rights of all Americans, while the unique rights that federally recognized Indian tribes enjoy are additional protections that stem from the historical relationship between the United States and the Indian nations.[81]

The next Part of this Article engages how, or if, U.S. federal Indian Law should be reshaped by application of the various norms within the Declaration that describe the inherent human rights of indigenous peoples. If indigenous human rights are universal, why can the United States—or any nation-state—limit those rights to specific groups and deny them to others? Does the United States have a good argument that the rights of federally recognized tribes are political rights accorded only to specific groups, whereas the civil rights of all peoples (indigenous or

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[77] *Id.* at 524 (holding that state elections for trustees for the Office of Hawaiian Affairs may not be restricted to Native Hawaiians, but must be opened to all qualified voters under the Fifteenth Amendment).

[78] *Id.* at 498–99.

[79] *See generally Fixing the Federal Acknowledgment Process: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. (2009).

[80] *See, e.g.*, Muwekma Ohlone Tribe v. Salazar, No. 03-1231, slip op. at 2–3 (D.D.C., Sept. 28, 2011). In that case, the court denied plaintiff tribe's challenge to Department of the Interior's denial of acknowledgement. The court then observed that federal recognition of a Native American group as a tribe "'is a prerequisite to the protection, services, and benefits' provided by the Federal government to Indian tribes, as well as the 'immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States.'" *Id.* (quoting 25 C.F.R. § 83.2 (2011)).

[81] *See, e.g., Announcement of U.S. Support*, *supra* note 8, at 2–3 (noting that the United States is committed to "promoting and protecting the collective rights of indigenous peoples as well as the human rights of all individuals," and identifying the Constitution as the basic structure for such rights, and the additional rights accorded to federally recognized tribes as rooted in the "special legal and political relationship" that exists between those groups and the United States).

not) are fully protected by the U.S. Constitution? Are civil rights coextensive with human rights? Does the federal government truly enjoy a virtually unrestrained power to limit, modify, or eliminate tribal political sovereignty, as the Supreme Court has indicated in several opinions? Or does this constitute a human rights violation?[82] These and other questions are addressed in the next Part to probe the inconsistencies between domestic law and international human rights law.

IV. RECONCILING INTERNATIONAL HUMAN RIGHTS LAW AND U.S. FEDERAL INDIAN LAW: OPPORTUNITIES AND LIMITATIONS

The State Department's endorsement of the Declaration is premised on its finding that the Declaration is consistent with the norms of U.S. federal Indian law, recognizing the right of federally recognized Indian Nations to govern their lands and their members, subject to legal constraints imposed through federal statutory law and Supreme Court decisions.[83] Under this model of "domestic self-governance," tribal governments enjoy a form of limited sovereignty, subject to the overriding supremacy of the United States. The State Department does not view this right as coextensive with the right of self-determination under international law, instead proclaiming that it supports "the Declaration's call to promote the development of a *new and distinct international concept of self-determination specific to indigenous peoples*," which would not "change or define the existing right of self-determination under international law."[84] The State Department observed that this concept of self-determination "is consistent with the United States' existing recognition of, and relationship with, federally recognized tribes," and is the basis for the unique political relationship that exists between the United States and federally recognized tribes.[85] The focus of the State Department's memorandum is on the relationship between the United States and federally recognized tribal governments, although the memorandum also mentions a willingness to work, "as appropriate, with all indigenous individuals and communities in the United States."[86] It is unclear whether this willingness stems from charity or from a sense of duty. The concluding Part of this Article examines some of the problem areas for federal Indian law, focusing on the nature of federal power with

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[82] *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance."); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.").

[83] *Announcement of U.S. Support, supra* note 8, at 3. *See generally* GOLDBERG ET AL., *supra* note 55.

[84] *Announcement of U.S. Support, supra* note 8, at 3 (emphasis added).

[85] *Id.*

[86] *Id.* at 2.

respect to native peoples, including their land and cultural rights, to see whether U.S. federal Indian law measures up to the Declaration's standards, and if not, what remedies might be pursued.

A. Federal Indian Law and Indigenous Political Rights

For purposes of U.S. law, federally recognized tribal governments are considered to be separate political sovereigns with their own territorial boundaries.[87] Non-recognized tribes do not enjoy the same recognition for their rights of self-governance, and their ancestral lands lack the federally protected trust status that is available to recognized tribes.[88] The legal history for these principles traces back to Chief Justice John Marshall's early trilogy of foundational Indian law cases, which identified a unique political status for tribal governments as "domestic dependent nations."[89] Marshall found that the Indian nations maintained a separate political identity as nations because they had entered treaties with Great Britain and the United States in that capacity and because they governed themselves within their own territories under their own laws.[90] Marshall declined to find that the Indian nations were "foreign nations," however, because they resided within the political boundaries of the United States and because their "right of occupancy" to their lands was subject to extinguishment by the United States, which, as the successor in interest to Great Britain, held the sovereign title to the land through "discovery."[91] In addition, Marshall declared that, because Indian peoples lacked the civilized status of Europeans, they were rightfully placed under the tutelage of the United States as a superior sovereign. This relationship "resemble[d] that of a ward to his guardian" and gave the United States a duty to protect the Indian nations from mistreatment by non-Indians, meaning that the power of the United States would broker any relationship between non-Indians (whether citizens, state governments, or foreign nations) and the Indian nations.[92]

This foundational trilogy of cases now manifests in two central doctrines which are pertinent to the project of this Article: the plenary power doctrine and the federal trust responsibility. Although much has been written about the nature and extent of each doctrine, the basic idea

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[87] *See* Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 192 (2001).

[88] *See supra* note 81 and accompanying text.

[89] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). The other two cases in the trilogy are *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), and *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

[90] *Cherokee Nation*, 30 U.S. (5 Pet.) at 16.

[91] *Id.* at 17. *See also Johnson*, 21 U.S. (8 Wheat.) at 584–87 (describing the title-by-discovery held by European nations and the right of occupancy held by native peoples).

[92] *Cherokee Nation*, 30 U.S. (5 Pet.) at 17–18.

is that the federal government directs the nature of the political relationship, if any, that exists between the United States and the Indian nations.[93] This authority has a protective aspect (the trust responsibility), and also a potentially destructive aspect because the federal government has the power to regulate tribal lands and tribal rights (including treaty rights and aboriginal rights), even if the Indian nations object to a particular exercise of power.[94]

The exclusive federal–tribal political relationship, as conceptualized by Chief Justice Marshall, negates the authority of state governments to interfere with tribal rights. As Marshall stated in *Worcester v. Georgia*, "[t]he whole intercourse between the United States and [the Cherokee Nation], is, by our constitution and laws, vested in the government of the United States."[95] The state of Georgia had no right to extend its laws to the Cherokee Nation, nor could non-Indian citizens enter the Cherokee Nation, "but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress."[96]

The plenary power doctrine has engendered the widespread assumption that the federal government has the exclusive authority to extend political recognition to tribal governments, and the sole and exclusive power to regulate interactions with the Indian nations.[97] To the extent that states acted to acquire tribal lands without federal consent, they violated the federal Trade and Intercourse Acts, and the transactions were voidable, even years after they were made.[98] Moreover, the documented abuses of states and their citizens toward Indian tribes resulted in the notion of "Indian Country" as a domain protected from state laws and state authority.[99]

There are several 19th century cases that build out the contours of the plenary power doctrine. For example, in *United States v. Kagama*, the Supreme Court upheld the constitutionality of the federal Major Crimes Act on the theory that the federal government has the duty to protect Indian nations, and thus enjoys the power to enact legislation in service of this goal, even if it is not directly tied to explicit constitutional authority (e.g., the commerce power).[100] Today, this means that federal

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[93] *See* Coffey & Tsosie, *supra* note 87, at 192–94.

[94] *Id.* at 194.

[95] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

[96] *Id.*

[97] *See id.* Marshall described the sole and exclusive power of the federal government to regulate transactions with the Indian nations, though he did not use the "plenary power" terminology.

[98] *E.g.*, Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 229–30 (1985).

[99] Today, the definition of Indian Country is codified at 18 U.S.C. § 1151 (2006).

[100] United States v. Kagama, 118 U.S. 375, 376–85 (1886).

law and tribal law govern criminal jurisdiction in Indian country, except when the case is purely between non-Indians.[101]

In *Lone Wolf v. Hitchcock*, the Supreme Court upheld federal power to unilaterally abrogate an Indian treaty that required the effective consent of tribal members prior to any further alienation of tribal lands on the theory that the government was merely managing tribal property interests in its capacity as trustee.[102] The Court found that the "action . . . complained of" (allotment of the reservation and sale of "surplus" lands to non-Indian settlers) was "a mere change in the form of investment of Indian tribal property, the property of those who . . . were in substantial effect the wards of the government."[103] To add insult to injury, the Court found that the tribal governments involved (the Kiowa, Comanche, and Apache Nations) had no direct right to petition the Court for the injury sustained because this was a "political question," and their recourse, if any, would consist of a petition to the very Congress that had just dispossessed them of their land rights.[104] Although this doctrine has been modified slightly in the modern era to hold Congress accountable under the Fifth Amendment for uncompensated takings of treaty-guaranteed land, the federal government still enjoys a significant amount of administrative power over tribal trust lands, and the United States still has the authority to abrogate Indian treaties, in whole or in part, through enactment of later statutes.[105]

Finally, in *United States v. Sandoval*, the Court held that Congress enjoys the right to establish a political relationship with Indian tribes, and once it does, the "guardianship" persists until Congress chooses to "release" the Indians from "such condition of tutelage."[106] The Court noted, however, that Congress could not "arbitrarily" exercise such authority, and that the political identity would be reserved to those who comprised "distinctly Indian communities," a calculus which, at that time, placed the Pueblo Indians in this category based on their perceived "Indian lineage, isolated and communal life, primitive customs and limited civilization."[107] Today, the question of which tribes are entitled to "federal acknowledgement" is governed by a byzantine federal

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[101] *See* General Crimes Act, 18 U.S.C. § 1152 (2006); Indian Major Crimes Act, 18 U.S.C. § 1153 (2006); United States v. McBratney, 104 U.S. 621, 624 (1882) (holding that state has jurisdiction over crime between non-Indians).

[102] Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

[103] *Id.* at 568.

[104] *Id.*

[105] *See, e.g.*, United States v. Sioux Nation, 448 U.S. 371, 386, 416–17 (1980) (identifying the central question as whether Congress has acted in its capacity as "trustee," converting land into money, which is an acceptable exercise of power, or whether it has exercised its sovereign power of eminent domain, in which case it may "take" tribal property for a public purpose if it pays "just compensation").

[106] United States v. Sandoval, 231 U.S. 28, 46 (1913) (quoting Marchie Tiger v. W. Inv. Co., 221 U.S. 286, 315 (1911)).

[107] *Id.* at 46–47.

administrative process which carefully sorts through the notion of "Indian identity" under a series of factors, including whether the group is recognized as an "American Indian entity" (by state or other tribal governments, by academics, or in publications), and whether the tribe has existed as a "distinct community" from historical times to the present.[108] The federal acknowledgment process has been heavily criticized for its bureaucratic inefficiency and potential unfairness to tribes whose histories are not well documented by anthropologists and historians.[109]

Thus, while the overtly racist language and assumptions of the *Sandoval* Court are no longer employed, it is still the case that federal officials decide the question of which groups are entitled to the political status of a "domestic dependent nation." Not all indigenous groups have the right to employ this administrative process. The Native Hawaiian people, for example, are specifically excluded from the capacity to petition the federal government for recognition through the administrative process available to other indigenous groups.[110] For over ten years, Senator Akaka has regularly introduced bills into Congress to authorize commencement of a process leading to some form of political recognition for Native Hawaiians, but this legislation has been very controversial among many constituencies, and to date, none of the bills has been enacted into legislation.[111] This is true even though Congress issued a joint resolution apologizing to the Native Hawaiian people for the unlawful overthrow of their internationally recognized kingdom, which operated as a constitutional monarchy, and calling for a process of reconciliation.[112] Interestingly, the net effect of the current legislative efforts (euphemistically entitled the Native Hawaiian Government Reorganization Act) will be to transform the Kingdom of Hawaii into a "domestic dependent nation," eligible to exercise "self-government" under a domestic model that is similar—but not identical—to the

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[108] 25 C.F.R. § 83.7 (2011) (detailing "mandatory criteria" for administrative recognition).

[109] *See generally Fixing the Federal Acknowledgement Process*, *supra* note 79.

[110] *See* Kahawaiolaa v. Norton, 386 F.3d 1271, 1274, 1282–83 (9th Cir. 2004) (upholding provision in federal regulations limiting recognition process to Indian tribes "indigenous to the continental United States" against an equal protection challenge filed by Native Hawaiian group); *see also* Cohen's Handbook of Federal Indian Law, *supra* note 68, § 4.07(4)(c), at 370–71 (summarizing recent litigation regarding the status of Native Hawaiians).

[111] *E.g.*, Native Hawaiian Government Reorganization Act of 2009, S. 1011, 111th Cong. (2009); S. 2899, 106th Cong. (2000). For a snapshot of the political machinations of gaining this recognition, see, for example, Herbert A. Sample, *Djou Calls for Nonbinding Plebiscite on the Akaka Bill*, HONOLULU STAR-ADVERTISER, Oct. 28, 2010, *available at* http://www.staradvertiser.com/news/breaking/106284028.html.

[112] S.J. Res. 103rd Cong., Pub. L. No. 103-150, § 1, 107 Stat. 1510, 1513 (1993).

political status of federally recognized Indian tribes.[113] Most recently, Governor Neil Abercrombie of Hawaii signed a law recognizing "Native Hawaiians as the only indigenous, aboriginal, maoli population of Hawaii" and extending the state's support for the "continuing development of a reorganized Native Hawaiian governing entity" that would ultimately lead to "federal recognition of Native Hawaiians."[114]

So what is the upshot of this federal Indian law doctrine for purposes of a comparative analysis with the tenets of the U.N. Declaration on the Rights of Indigenous Peoples? First of all, the class of "indigenous peoples" for purposes of international human rights law is clearly broader than the class of "federally recognized Indian tribes" under U.S. domestic law, indicating that the United States may be violating indigenous human rights by failing to accord political recognition to certain groups. The obvious example would be the Native Hawaiian people, who are an "indigenous people" with a right to "self-determination."[115] Their human right to self-determination is arguably being suppressed under U.S. domestic law because Congress has not explicitly extended political recognition, though it has implicitly done so through federal legislation authorizing specific programs and benefits for Native Hawaiian people.[116] The Declaration would counsel recognition on a basis of equality of status as "peoples," although it is unclear what remedies would be available under domestic law given the broad authority of Congress over "political questions."

Second, the federal plenary power doctrine may operate in violation of indigenous human rights in some cases. The Supreme Court has declared that Congress may "limit, modify or eliminate the powers of local self-government which the tribes otherwise possess,"[117] meaning that the unilateral action of the federal government may divest a tribal government of its sovereign powers without its consent, which is a fundamental violation of international human rights law. Of course, the Supreme Court also held in *United States v. Lara* that Congress may "restore" the powers that were taken at a later time, which was the effect of Congress's amendment to the Indian Civil Rights Act (the Duro fix), affirming that tribes have the inherent sovereign power to adjudicate

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[113] *See, e.g.*, Native Hawaiian Government Reorganization Act of 2009, S. 1011, 111th Cong. (2009); Native Hawaiian Government Reorganization Act of 2005, S. 147, 109th Cong. (2005).

[114] *See* S.B. 1520, 26th Leg. (Haw. 2011).

[115] *Id.* (noting that the United States' endorsement of the U.N. Declaration on the Rights of Indigenous Peoples combined with the many federal laws that selectively protect Native Hawaiian rights constitute recognition of the right of self-determination that belongs to Native Hawaiian people).

[116] *E.g.*, Hawaiian Homelands Homeownership Act of 2000, 25 U.S.C. § 4221 (2006); Native American Graves Protection and Repatriation Act, 18 U.S.C. § 1170, 25 U.S.C. §§ 3001–13 (2006); Higher Education Opportunity Act § 801, 20 U.S.C. § 1161j (Supp. II 2009).

[117] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

crimes committed by "Indians," whether or not they are members of the tribe seeking to exercise jurisdiction.[118] Justice Thomas, who concurred in the judgment in *Lara*, pointed out the inconsistency in the Supreme Court's Indian law jurisprudence, which holds both that Indian nations retain their inherent sovereignty as distinctive sovereign governments and also that the United States has the power to limit or eliminate that sovereignty at its will.[119] This paradox is likely to become a prominent feature of the dialogue on indigenous self-determination.

In fact, the Declaration posits that one aspect of the right to self-determination is the requirement that the people "consent" to the terms of their governance.[120] This norm expresses through an array of provisions, but is featured in Article 19 of the Declaration, which specifies that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."[121] Although there are federal executive orders and agency policies that call for tribal "consultation," there is a continuing question about whether the process is merely procedural or whether federal policymakers should be held to substantive requirements to ensure that they do secure the "free, prior and informed consent" of indigenous peoples affected by federal policies.[122] There are many federal policies, for example, those governing extraction of oil, gas, and uranium by companies holding mineral leases on federal public lands, which directly impact tribal governments with reservations that are adjacent to those lands, or with ancestral cultural sites on those lands.[123]

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[118] United States v. Lara, 541 U.S. 193, 197–98, 210 (2004).

[119] *Id.* at 214–15 (Thomas, J., concurring in the judgment).

[120] Declaration, *supra* note 1, art. 19.

[121] *Id.*

[122] *See Announcement of U.S. Support, supra* note 8, at 5 (citing Executive Order 13175 on "Consultation and Coordination with Indian Tribal Governments" and stating that "the United States recognizes the significance of the Declaration's provisions on free, prior and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken").

[123] Under the National Environmental Policy Act (NEPA), the federal government must engage in a scoping process whenever a proposed undertaking on federal lands would cause a significant impact on the environment. 42 U.S.C. §§ 4321–4370 (2006). This scoping process triggers statutes such as the National Historic Preservation Act and the American Indian Religious Freedom Act, which have provisions counseling the federal government to be aware of impacts to Native American cultural resources on federal lands. NEPA requires the federal agency to consider alternative courses of action in an effort to mitigate the harms, where feasible. These requirements, of course, are purely procedural and do not impose any meaningful substantive constraint on federal decision-making. *See* Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 237 (1996).

Finally, Article 37 of the Declaration states that "[i]ndigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements."[124] Many indigenous peoples within the United States, including many federally recognized tribes, Native Hawaiians, and even some non-recognized Indian tribes, descend from indigenous nations, tribes, and bands that entered treaty relationships (some never ratified) with the United States and its agents.[125] Does justice require the United States to honor those agreements because they were negotiated by indigenous peoples in good faith, even if Congress later failed to ratify the treaties or chose to abrogate them in whole or in part? The legendary and on-going battle of the Lakota and Dakota people for the Black Hills, which were guaranteed to the Sioux Nation by the 1868 Treaty of Fort Laramie and then appropriated by the United States over the fervent objection of the Sioux Nation, is an example of a human rights violation that has never been adequately resolved under domestic federal Indian law.[126] The takings claim was resolved by an award of monetary damages, which the Lakota and Dakota people have refused to accept.[127] The treaty abrogation claim was also denied, in line with *Lone Wolf*'s holding that Congress has the unilateral right to abrogate an Indian treaty.[128] However, the constitutional authority of Congress to abrogate an Indian treaty or fail to ratify it appears to be at odds with the Declaration's emphasis upon the need to negotiate a contemporary political relationship between indigenous peoples and the nation-state that is founded upon respect, trust, and political equality. Most treaties with Indian nations, in fact, dealt with indigenous lands, identifying the lands that were "ceded" to the United States, as well as those that were "reserved" to the Indian nations (purportedly, in most cases, in perpetuity), thereby raising another category of claims for evaluation.[129]

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[124] Declaration, *supra* note 1, art. 37.

[125] Many tribes in California, for example, signed treaties with the United States that were never ratified. Carole Goldberg and Gelya Frank discuss the historical background on the failed treaty process in California, including the fact that the federal treaty commissioners negotiated 18 treaties with the California tribes, but in a "closed session on July 8, 1852 . . . the United States Senate decided not to ratify any of them" and instead "voted to stash the treaties away from public view for fifty years." GELYA FRANK & CAROLE GOLDBERG, DEFYING THE ODDS: THE TULE RIVER TRIBE'S STRUGGLE FOR SOVEREIGNTY IN THREE CENTURIES 29–37, 32 (2010).

[126] *See generally* MARIO GONZALEZ & ELIZABETH COOK-LYNN, THE POLITICS OF HALLOWED GROUND: WOUNDED KNEE AND THE STRUGGLE FOR INDIAN SOVEREIGNTY (1999).

[127] *Id.* at 349.

[128] Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903).

[129] *See, e.g.*, United States v. Shoshone Tribe of Indians, 304 U.S. 111, 113 (1938) (discussing the Shoshone Treaty of 1863, which reserved to the tribe over 44 million acres of land, and the subsequent Shoshone Treaty of 1868, which required the tribe

B. Federal Indian Law and Indigenous Land and Cultural Rights

As the Black Hills case illustrates, the essence of indigenous identity is the group's longstanding connection to a particular land base and territory. The relationship of indigenous peoples and their traditional lands is a core feature of cultural survival, and a group's ancestral connections to land often manifest in cultural or religious practices tied to the land.[130] The ability of a native nation to effectively protect its land and cultural resources is directly tied to its identity as a federally recognized tribal government and also the recognition that the government has retained its territory. The latter requirement is problematic for many tribal governments, for example those in Alaska, which occupy lands that are not held in trust. As the United States Supreme Court held in the *Venetie* case, the native government could not permissibly exercise authority over non-Indian activity within the Village because the lands were not held in trust and thus lacked the legal status of "Indian Country."[131]

Of course, the United States has the ability to enact legislation specifically protecting tribal land as a trust resource, thereby protecting it from state taxation or regulation. The Supreme Court has often circumscribed tribal jurisdiction through judicial opinions designed to limit or remove tribal authority that might conflict with the perceived interests of non-Indians. For example, the Court has declared that Indian nations have been implicitly divested of their authority to prosecute non-Indians who commit crimes on tribal lands and against the tribe or tribal members, and it has selectively found that Indian nations have lost their authority to exert civil regulatory authority over non-Indians who own fee land within the reservation.[132] The Supreme Court has also limited the ability of the Department of the Interior to take land into trust for tribal governments who gained federal recognition after the effective date of the 1934 Indian Reorganization Act.[133] Thus, as a matter of federal common law, the rights of federally recognized Indian tribal governments to protect their land, resources, and members have been limited in ways that preclude their full enjoyment of their right of self-governance.

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to cede most of this territory, reserving approximately 3 million acres for its "absolute and undisturbed use and occupation" in perpetuity).

[130] *See* Tsosie, *supra* note 123, at 282–85.

[131] Alaska v. Native Vill. of Venetie, 522 U.S. 520, 523, 529–32 (1998).

[132] *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194, 208 (1978) (holding that the Suquamish Tribe lacked jurisdiction to prosecute non-Indians who assaulted a tribal officer and damaged tribal property on the reservation); Montana v. United States, 450 U.S. 544, 557 (1981) (holding that the Crow Tribe lacked authority to regulate non-Indians hunting and fishing within the reservation on fee lands).

[133] Carcieri v. Salazar, 129 S. Ct. 1058, 1065 (2009).

Non-recognized tribes, of course, have an even more difficult time protecting their rights to access their ancestral lands or protecting their cultural resources. For example, in *State v. Elliott*, the Vermont Supreme Court found that a band of Abenaki Indians, a non-recognized Indian tribe in Vermont, did not maintain the aboriginal right to fish in waters adjacent to their aboriginal lands, even though they alleged that they had done so since "time immemorial" and that no federal law or action had ever extinguished their aboriginal rights.[134] The Court found that the Tribe's aboriginal rights had been extinguished by the practical effect of a series of historical events prior to Vermont's admission into the Union in 1791.[135] Similarly, the Department of the Interior has, by regulation, interpreted the Native American Graves Protection and Repatriation Act (NAGPRA) to accord repatriation rights only to federally recognized tribes.[136] Non-recognized tribes are not legally entitled to repatriation of ancestral human remains or cultural objects that are directly culturally affiliated to them, although they may petition a recognized tribe to repatriate such remains on their behalf, or ask a museum or agency to repatriate the remains voluntarily through agreements based on moral considerations.[137] Members of non-recognized tribes often feel vulnerable to criminal prosecution for possessing sacred objects, such as eagle feathers, or for the ceremonial use of peyote within Native American Church ceremonies, because the exemptions granted under federal law for native religious use of these regulated items are generally limited to enrolled members of federally recognized tribes.[138] It is abundantly clear

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[134] State v. Elliott, 616 A.2d 210, 211–12 (1992).

[135] *Id.* at 221.

[136] *See* Rebecca Tsosie, *Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values*, 31 ARIZ. ST. L.J. 583, 601 & n.95 (1999) (noting that the statute covers "any tribe, band, nation, or other organized group or community of Indians . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians," which has been interpreted to include only those groups listed by the Secretary of the Interior as "federally recognized tribes" (quoting 25 U.S.C. § 3001(7))).

[137] The Peabody Museum at Harvard University has voluntarily repatriated items to non-recognized tribes, such as the Abenaki. *See* NAGPRA Review Committee Minutes: May 3–5, 1999, *available at* http://www.nps.gov/nagpra/REVIEW/meetings/RMS017.PDF.

[138] *See, e.g.*, United States v. Wilgus, 638 F.3d 1274, 1288, 1295–96 (10th Cir. 2011) (asserting that the government has two compelling interests at stake: "protecting bald and golden eagles, and fostering the culture and religion of federally-recognized Indian tribes," and holding that the government's compelling interests were balanced and advanced in the least restrictive manner by criminalization of possession of eagle feathers without a permit available only to members of recognized tribes); United States v. Antoine, 318 F.3d 919, 924 (9th Cir. 2003) ("The government has a compelling interest in eagle protection that justifies limiting supply to eagles that pass through the repository, even though religious demands exceed supply as a result."); and Gibson v. Babbitt, 223 F.3d 1256, 1258–59 (11th Cir. 2000) (ruling that restricting permits to possess or transport eagles or eagle parts for religious purposes to members of federally recognized tribes was the least

that the civil rights of individual Americans to "free exercise" of religion do not equally protect the rights of indigenous peoples, and federal law carefully limits the rights of federally recognized tribes to engage in practices such as the peyote sacrament.[139] Moreover, the duty of federal agencies to "consult" with indigenous peoples that might be affected by federal actions is, in most cases, limited to federally recognized tribes, meaning that non-recognized groups with ancestral cultural sites or practices on public lands will likely not be consulted about agency actions that directly jeopardize their interests.[140]

Finally, it is clear that the basic principles of federal Indian law with respect to indigenous lands may be deeply flawed under the existing principles of human rights law that protect *all* individuals. For example, two separate international tribunals, the Inter-American Commission on Human Rights and the U.N. Committee on the Elimination of Racial Discrimination, held that the Indian Claims Commission process which divested the Dann sisters and their band of Western Shoshone Indians from their aboriginal land rights in Nevada constituted a violation of the Danns' rights to equal protection under the laws protecting property interests, as well as their rights to due process and fundamental fairness.[141] In that case, a lawyer appointed by the Bureau of Indian Affairs and a lawyer representing the U.S. Department of the Interior stipulated to an arbitrary date upon which the aboriginal title of the Western Shoshone Nation was extinguished, which enabled the Claims Commission to calculate a measure of "damages" that would ultimately be paid out, per capita, to descendants of the historic Shoshone Nation.[142] The Dann sisters and their family did not participate in the Claims proceeding, did not consent to be represented, and maintained that they had been in exclusive use and occupancy of the lands since time

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restrictive means of pursuing a compelling interest in restoring Indian treaty rights, including giving tribe members alternative access to eagles). *See also* Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991) (discussing restrictions on the use of peyote).

[139] *See, e.g., Peyote Way Church of God*, 922 F.2d 1210, 1220 (upholding Texas state law exempting the ceremonial use of peyote by Native American Church members against an equal protection challenge by an individual asserting that others who wished to use peyote as a religious sacrament should be entitled to do so). *See also* 42 U.S.C. § 1996 (2006) (amending the American Indian Religious Freedom Act to accord specific protection for the right of tribal members to use peyote for religious purposes, after the Supreme Court held that such a right was not a feature of the First Amendment Free Exercise Clause in *Employment Division v. Smith*, 494 U.S. 872 (1990)).

[140] *See, e.g.*, Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000) (pertaining to groups on the Secretary of the Interior's list of federally recognized Indian tribes).

[141] Rebecca Tsosie, *Property, Power, and American "Justice": The Story of* United States v. Dann, *in* INDIAN LAW STORIES 325, 342–46 (Carole Goldberg et al. eds., 2011).

[142] *Id.* at 332–34.

immemorial.[143] Nevertheless, the domestic federal courts adjudicated the Danns to be "trespassers" on their ancestral land; their cattle and livestock were seized by government officials; and the federal agencies have since granted leases to non-Indian ranchers and mining companies to harvest the significant economic value of the land, including unextracted gold.[144]

The lawyers who represented the Dann sisters in front of the international tribunals used the existing international human rights conventions and structures within the Organization of American States and the United Nations, which are largely directed toward protecting individual human rights from abuse by State governments.[145] The international tribunals were persuaded that the fundamental human rights of the Dann sisters and their family had been violated.[146] The provisions within the Declaration are even more protective of indigenous land rights because they acknowledge the collective nature of those rights and the unique cultural relationship that exists between indigenous peoples and their ancestral lands, as well as those lands that they currently occupy. For example, Article 26 maintains that "[i]ndigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."[147] The right encompasses "the right to own, use, develop and control" these lands and territories, as well as the right to require states to give legal recognition and protection for these rights in a way that is consistent with the customary land tenure systems and customs of the indigenous community.[148] Article 27 directs the States to establish and implement, in cooperation with indigenous peoples, "a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems," and also to give indigenous peoples the right to participate in this process.[149] These provisions have already been used by courts in Latin America to vindicate the possessory rights of indigenous groups and to protect their lands from appropriation and development, pending formal recognition of indigenous land rights by the national governments.[150]

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[143] *Id.* at 333.

[144] *Id.* at 346, 350–53 (discussing the current controversy over the BLM's decision to approve the expansion plan of Barrick Gold Corporation, the company that holds the lease—a decision that endangers significant Western Shoshone).

[145] *Id.* at 342–46.

[146] *Id.*

[147] Declaration, *supra* note 1, art. 26, para. 1.

[148] *Id.* art. 26, paras. 2–3.

[149] *Id.* art. 27.

[150] *See, e.g., Supreme Court Claims Nos. 171 and 172 of 2007 (Consolidated) re Maya land rights* 64–66, S. CT. OF BELIZE (Oct. 18, 2007), http://belizelaw.org/supreme_court/judgements/2007/Claims Nos. 171 and 172 of 2007 (Consolidated) re Maya land rights.pdf.

There are, of course, many more provisions within the Declaration that illuminate the relationship between indigenous peoples and their environments and articulate standards for contemporary governments to abide by as they interact with indigenous communities. In particular, the Declaration encourages nations to act in ways that preserve the identity of indigenous peoples and their connections to their lands and resources, as well as protect those lands from development or other activities that would result in the removal of indigenous peoples from their lands without their consent, or harm the quality of their traditional lifeways upon those lands.[151]

The multiplicity of provisions (there are 46 Articles) in the Declaration, and the elaborate nature of the rights that they describe, may cause the United States to consider them to be mere "suggestions" for a better relationship, rather than a set of norms that ought to be vindicated by domestic law. In fact, the State Department qualified the United States' "support" for the Declaration by saying that it is "not legally binding or a statement of current international law," but nonetheless has "both moral and political force" because it "expresses both the aspirations of indigenous peoples" as well as those of States who seek to "improve their relations with indigenous peoples."[152] What future does this portend for indigenous peoples within the United States? The answer to that question is far from clear; however, the concluding Part of this Article offers some thoughts.

V. CONCLUSION

In charting the future of indigenous self-determination, we have a choice. We can focus on the many obstacles within United States constitutional and statutory law that would preclude the alignment of domestic federal Indian law with the standards set forth in the Declaration. In that case, domestic law becomes the outer boundary for indigenous human rights. Or we can focus precisely upon the "moral and political" force of the Declaration in moving the boundaries of federal Indian law toward a structure that is much more aligned with the "aspirations" of indigenous peoples for self-determination.

Indigenous peoples have, for many centuries, lived with the fiction of the prevailing law, while simultaneously pursuing the road to self-determination. The reality is that indigenous peoples have always transcended the limited views of the federal bureaucrats and politicians who attempt to craft the terms of their survival. For example, many native peoples in California, such as the Tule River Tribe, survived the genocidal fray of the California Gold Rush and fought for their survival as a distinctive government, ultimately prevailing, even though the current tribal government may be comprised of several different historic

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[151] Declaration, *supra* note 1, arts. 28–29, 32.

[152] *Announcement of U.S. Support*, *supra* note 8, at 1.

bands and may not have enjoyed continuous recognition by the federal government.[153] The success of these tribal governments in their fight for sovereignty is a testament to the enduring value of self-determination within tribal cultures. Similarly, Kunani Nihipali, a Native Hawaiian leader, observes that the Kanaka Maoli people have survived the overthrow of their internationally recognized kingdom, as well as the illegal annexation of Hawaiian lands into the United States, only to find themselves living "an illusion of reality, called the fiftieth state, the Aloha State of the Union, the United States of America."[154] However, as Nihipali acknowledges, the cultural sovereignty of the Hawaiian Nation is alive and well, despite the failure of the U.S. Congress to extend them political "recognition" as an indigenous nation.[155]

The legendary Native attorney, Walter Echo-Hawk, sees the United Nations' approval of the Declaration as a "watershed event" because it "sets forth standards of behavior that have immediate moral force within all countries in regard to their relations with indigenous peoples."[156] Echo-Hawk asserts that law reformers can employ the U.N. standards to provide a benchmark for evaluating the adequacy of domestic indigenous law and for setting goals for reform.[157] This process has the capacity to "reform the dark side of federal Indian law," which continues to dispossess native peoples of their full rights to self-determination.[158]

Of particular importance is the way in which the Declaration sustains the collective nature of indigenous rights, as well as the unique aspects of their cultural relationship to their lands, which cannot adequately be captured under the rubric of "religious freedom," which is the only available category under the United States Constitution. The Declaration calls for acknowledgment of the spiritual relationship that binds indigenous peoples to their land, their ancestors, and to their future generations.[159] This is an unbroken cord of light, transcendent and enduring, which ties together the constituent forces that enable the survival of native peoples throughout these lands. Article 25 of the Declaration acknowledges the right of indigenous peoples to "maintain and strengthen their distinctive spiritual relationship" with their lands, territories and waters, and "to uphold their responsibilities to future generations in this regard."[160] Article 31 protects the right of indigenous peoples to control their "cultural heritage," including their genetic

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[153] *See generally* FRANK & GOLDBERG, *supra* note 125.

[154] Kunani Nihipali, *Stone by Stone, Bone by Bone: Rebuilding the Hawaiian Nation in the Illusion of Reality*, 34 ARIZ. ST. L.J. 27, 38–44 (2002) (emphasis omitted).

[155] *Id.* at 42–43.

[156] WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE TEN WORST INDIAN LAW CASES EVER DECIDED 427 (2010).

[157] *Id.*

[158] *Id.*

[159] Declaration, *supra* note 1, arts. 25, 31, 34, 36.

[160] *Id.* art. 25.

resources, traditional knowledge, and the concrete manifestations of their cultural heritage.[161]

As the Declaration moves toward implementation at the level of law or policy, there will be countless debates about whether indigenous cultural heritage is synonymous with intellectual property, whether it would violate the Establishment Clause to recognize a spiritual right, and whether it is even permissible, as a matter of law, to accord duties to current peoples on behalf of future generations. Indigenous peoples, however, know the truth of the matter. They were placed on these lands for a purpose, with a set of cultural reference points that secure them to their ancestral past and guide them toward their collective future. Sometimes these reference points are visible only to those who participate in the cultural life of the people, but they persist. Rather than accepting the current status of domestic law, indigenous peoples must invoke the legacy of their ancestors, channeling the life force that persists, endures, and ultimately flourishes in service of indigenous self-determination.[162]

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[161] *Id.* art. 31.

[162] *See* Nihipali, *supra* note 156, at 44, and accompanying text. I am indebted to Kunani Nihipali, Dennis ("Bumpy") Kanahele, and Ho'oipo Pa for living the legacy of their ancestors and for expressing the self-determination of the Hawaiian Nation. Their comments from the ASU Symposium on Indigenous Cultural Sovereignty are published in Volume 34 of the ARIZONA STATE UNIVERSITY LAW JOURNAL, Spring 2002.

INDIAN CONSENT TO AMERICAN GOVERNMENT

Richard B. Collins*

Consent of the governed is a fundamental tenet of democratic constitutionalism. Have American Indian people consented to American government? In liberal political theory, consent is manifested through the franchise and representatives chosen by voters acting individually.[1] But Indian people could not be fitted into this constitutional scheme until relatively recently, and even now their circumstances raise unique questions about consent.

The principle of consent of the governed has an important connection to federal Indian law. Traditional Indian law theory is based upon treaties between Indian nations and the United States.[2] The treaties evidence Indian consent and proclaim promises of the United States, consent by and promises to tribes as groups rather than Indians as individuals. The commitments in Indian treaties are the claimed source of the fundamental doctrines of federal Indian law, the federal trust relationship with tribes and Indians,[3] and the Indian sovereignty doctrine that protects tribes' exclusive authority over their members in Indian country.[4]

This theory is familiar, and so are its limitations. The treaties did not provide explicitly for either retained tribal sovereignty or federal trust responsibility. While inferring retained sovereignty was a reasonable construction of some treaties, the circumstances of other treaty negotiations make it doubtful that the parties contemplated continuing tribal sovereignty.[5] Many treaty negotiations also reveal substantial coercion of the tri-

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1. *See* M. WALZER, OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP vii-xiv (1970); Whelan, *Prologue: Democratic Theory and the Boundary Problem* 24-26, in LIBERAL DEMOCRACY: NOMOS XXV (1983).

2. *See* C. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 120 (1987); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 33 (1941 ed. & 1971, 1986 reprints); MARGOLD, *Introduction*, in *id.* at VIII-XIII; Rice, *The Position of the American Indian in the Law of the United States*, 16 J. COMP. LEG. 78, 80-81 (1934).

3. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 220-28 (1982 ed.) (Trust doctrine is "one of the primary cornerstones of Indian law." *Id.* at 221.).

4. *See id.* at 229-61; F. COHEN, *supra* note 2, at 122 (sovereignty doctrine is "[p]erhaps the most basic principle of all Indian law").

5. *See infra* notes 78-97 and accompanying text. Anachronistically, one can improve the connection between treaty promises and the federal trust and tribal sovereignty doctrines by relying on modern contract theories such as adhesion, unconscionability, and implied covenants of good faith and fair dealing. *See* E. FARNSWORTH, CONTRACTS §§ 4.26-4.28, at 293-318, § 7.17, at 526-28 (1982). These doctrines were connected to federal Indian law in Wilkinson & Volkman, *Judicial*

bal party, impairing the justness of Indian consent. Further, why should treaty principles be extended to the many situations in Indian law where no treaty is involved? Why, for example, is sovereignty reserved to non-treaty tribes residing on executive order reservations? And why should federal statutes applied to Indians be construed in their favor? This Article responds to these questions and to related issues about the constitutional status of Indian nations and their members.

The claimed origin of Indian law doctrine in treaty promises is accurate, but not on the basis of the treaties alone. They do not adequately support the generality of the sovereignty doctrine applied to all tribes and reservations, nor do they sustain or define much of the federal trust responsibility. The connection between treaties and the general doctrines depends on the constitutional principle that power should be based on consent of the governed.[6]

The original understanding was that the United States would deal with Indians as national groups. Their consent to American government was sought and obtained collectively, not individually. After the Constitution was adopted, many expressions of legislative and executive policy were based on the premise that Indian consent would and should be obtained by groups rather than individually.[7]

Judicial decisions reflect this basic understanding of the original constitutional status of tribal Indians. The Supreme Court looked to the agreements reached in the early peace treaties, when the tribes had significant bargaining power, as the best measure of Indian consent. While sustaining Congress' power to override treaties and to convert Indians into citizens, the Court requires that departures from the original, collective basis for Indian consent be clearly and unambiguously adopted by the national government.[8] The government has seldom met the Court's standard to terminate tribal status. As a result, although Indians individually have the right to assume the same constitutional status as other persons, they retain the choice of separate status as tribal members as well.

The federal government continues to claim the constitutional power to eliminate the separate constitutional status of Indian nations,[9] and the Supreme Court has consistently agreed.[10] This has led some scholars to argue that the Constitution should be interpreted to protect tribes from federal power, to erect a constitutional right of tribal sovereignty, immune from congressional power, a sort of tenth amendment for tribes.[11]

It is most unlikely that the Court will declare constitutional protection

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Review of Indian Treaty Abrogations: "As Long As Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?, 63 CALIF. L. REV. 601, 617-18 (1975). However, even if these theories are properly available, they would be hard pressed to explain the generality of the trust responsibility and sovereignty doctrines. *Compare* the rules of international law on treaty interpretation, *infra* notes 106-09 and accompanying text.

6. *See infra* notes 69-120 and accompanying text.
7. *See infra* notes 51-53 and accompanying text.
8. *See infra* notes 75-120 and accompanying text.
9. *See infra* notes 23-27 and accompanying text.
10. *See infra* notes 33-34, 39-40 and accompanying text.
11. *See infra* notes 35-38 and accompanying text.

of tribal sovereignty. Moreover, the issue is less significant than many assume because the constitutional structure powerfully protects tribal status from hostile political majorities.[12] Tribal rights can be altered only by national legislation, not by the action of any state, nor by referendum. Congress has generally supported a policy of basing its actions on Indian consent, and the Supreme Court's interpretations of legislation have been grounded in the same fundamental premise. For these reasons, basic change in tribal status is unlikely without tribal consent.

When the relationship of constitutional rights to tribes is examined in its entirety, rights jurisprudence is a dubious foundation for tribal interests. Individual rights concepts have often been at war with the interests of tribes as governments, a conflict that continues.[13] Non-Indians in tribal territory raise rights-based arguments against tribes' assertions of authority over them. Federal power over tribes responds to these arguments, establishing democratic legitimacy of tribal authority.

I. INDIANS AND CONSTITUTIONAL POWER

A. *The Federal Protectorate and Plenary Power.*

The 1787 Constitution conceived of Indian tribes as outside of the body politic it established. Tribal Indians were not even to be counted in apportioning representation and taxation among the states.[14] Paramount power to regulate commerce with the Indian tribes was delegated to the new federal government, rather than to the states,[15] at a time when federal responsibilities were largely international. Treaties previously made with Indian nations were confirmed,[16] and the United States made hundreds more treaties over more than seventy years before deciding that Indian tribes were not sufficiently foreign to continue making treaties with them.[17] Thereafter, Washington continued to deal with tribes on a government-to-government basis, by means of agreements ratified by Congress.[18] During the treaty period and for some years thereafter, tribal Indians could not vote in state or federal elections.[19] As the Supreme Court described it, they were "a people distinct from others" comprising "independent political communities."[20]

12. *See infra* notes 121-28 and accompanying text.

13. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (no federal cause of action to enforce civil rights against tribe); S. 2747, 100th Cong., 2d Sess., 134 CONG. REC. 11652 (1988) (bill introduced by Senator Orrin Hatch to overturn or limit holding in *Martinez*).

14. U.S. CONST. art. I, § 2, cl. 3 (excluding "Indians not taxed"). *See also* ARTICLES OF CONFEDERATION art. IX (referring to tribal Indians as "not members of any of the States"); U.S. CONST. amend. XIV, § 2 (excluding "Indians not taxed"). The Convention labored mightily over the place of slaves in the enumeration, settling on the notorious three-fifths provision. *See* NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 103, 225, 248, 256, 259-61, 268-69, 274-76, 278, 281-82, 285-86, 309, 327, 409-13 (A. Koch ed. 1987). By contrast, excluding tribal Indians was readily accepted without debate.

15. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557-59 (1832).

16. *See* U.S. CONST. art. VI, ¶ 2 ("all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land").

17. *See* F. COHEN, *supra* note 3, at 58-107 (treaty making ended in 1871).

18. *See infra* note 54.

19. *See* F. COHEN, *supra* note 3, at 639-53.

20. *Worcester*, 31 U.S. at 559.

Although constitutionally separate, the tribes were within the boundaries of the United States and made subject to its national laws. While the federal government dealt with tribes primarily through treaties and agreements, it also imposed statutes on Indians, a practice that grew throughout the nineteenth century.[21] When challenged, federal legislative power over tribes was consistently sustained; indeed, it was characterized as plenary.[22] Challenges by Indians increased when the government began to pursue policies designed to break up tribal societies and convert Indian people into American citizens, legally like all others.[23] Extraordinary power to manipulate tribal property was exercised and sustained against Indian objections.[24]

Indian people resisted assimilation, and the federal government eventually receded from coercive policies. Indians were made citizens without requiring abandonment of tribal ties.[25] Later the government deliberately set about to support and revitalize tribal governments, and since 1960 policy has been officially premised on Indian self-determination.[26] However, the government continues to claim discretionary power to set Indian policy.[27]

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21. *See* F. COHEN, *supra* note 3, at 108-43.

22. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903). *See* United States v. Kagama, 118 U.S. 375, 384-85 (1886); *Ex parte* Crow Dog, 109 U.S. 556, 567 (1883); United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846). The Court continues use of the word plenary. *E.g.*, National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985); Antoine v. Washington, 420 U.S. 194, 203 (1975); Morton v. Mancari, 417 U.S. 535, 551 (1974).

23. *See* R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 62-63 (1980); F. COHEN, *supra* note 3, at 127-38 (describing period of federal policies of allotment and assimilation); F. COHEN, *supra* note 2, at 206-10 (describing circumstances of passage of General Allotment Act including Indian opposition).

24. *Lone Wolf*, 187 U.S. 553. *See also* Gritts v. Fisher, 224 U.S. 640, 648 (1912); Cherokee Intermarriage Cases, 203 U.S. 76, 93 (1906).

Federal plenary power has never been construed as absolute, in the sense of beyond any constitutional limits; takings of Indian property have been held to be compensable under the fifth amendment. *See infra* note 139 and accompanying text. The most extraordinary power has been that of managing and altering the form of tribal land. At various times, the federal government has leased, sold, and allotted tribal land without Indian consent. In *Lone Wolf*, it had compelled distribution of tribal land to tribal members individually, without compensation to the tribe. Whether the government could constitutionally do this to corporations or other collective entities is open to question. *Cf.* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984) (sustaining state power to force sales of trust property to individuals).

The Court's essential purpose in using the term plenary power is to distinguish enumerated federal powers over other citizens from power over Indians. In other words, federal power over Indians includes the constitutional powers that both the federal government and the states exercise over other persons. Because of the modern expansion of federal authority over all persons under the commerce and spending powers, the distinction is of reduced importance except as a reminder of federal limits on state authority over Indian country. By contrast, scholars who criticize the plenary power doctrine seek to immunize tribes against both state and federal power. *See infra* notes 35-38 and accompanying text.

25. *See* F. COHEN, *supra* note 3, at 639-46.

26. *See id.* at 180-206. Since 1960, both major political parties have pledged not to alter tribal status without tribal consent. *See* IV A. SCHLESINGER, F. ISRAEL & W. HANSEN, HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 1789-1968, at 3505-06, 3529 (1971).

27. *See* Hodel v. Irving, 481 U.S. 704, 734 (1987) (Stevens, J., concurring); Brief for the United States in *id.* at 28. *Cf.* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84 (1976) ("plenary nature of Congress' power in matters of Indian affairs 'does not mean that all federal legislation concerning Indians is . . . immune from judicial scrutiny or that claims, such as those presented by appellees, are not justiciable,' " (quoting Brief for the Department of the Interior at 19 n.19)). The Supreme Court unanimously sustained a recent exercise of federal power to override Indian treaties in United States v. Dion, 476 U.S. 734 (1986).

B. *Tribal Sovereignty at the Sufferance of Congress.*

Most Indian treaties had three explicit provisions that represented the heart of the agreement. The tribal party acknowledged the superior sovereignty of the United States, it ceded to the United States a part of its original territory, and the United States recognized the tribe's exclusive right to tribal territory not ceded.[28] Practice under the early treaties was to leave internal governance of retained tribal territory to tribal authority except for interracial trade and crimes. The Indian nations continued to exercise internal sovereignty under their own laws. When tribal sovereignty was challenged by state governments, the Supreme Court construed the treaties to guarantee internal tribal sovereignty free of interference by states.[29]

After treaty making ended, the dominant federal Indian policy became assimilation. The government took actions to undermine tribal sovereignty, by breaking up the tribal land base and by controlling tribal government through the Bureau of Indian Affairs.[30] A few tribes challenged federal power, but the courts sustained it.[31] When federal policy shifted back to Indian self-determination, the courts again protected tribal sovereignty from state governments but continued to acknowledge federal power to abolish it.[32]

In summary, while formally allowing Indians to decide about tribal sovereignty, the federal government has attempted to persuade Indians to give it up, has manipulated it in practice, and has consistently claimed the power to eliminate it. The Supreme Court has repeatedly said that tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance."[33] When Congress has explicitly exercised that power, the Court has unanimously sustained the effort.[34]

In recent years, scholars have attacked the doctrine of plenary federal power, claiming constitutional protection for tribal sovereignty against congressional interference.[35] Arguments rest on constructions of several differ-

28. *See* F. COHEN, *supra* note 3, at 232-35.

29. *E.g.*, The New York Indians, 72 U.S. (5 Wall.) 761 (1867); The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867); *Worcester*, 31 U.S. 515.

30. *See* F. COHEN, *supra* note 3, at 127-43.

31. *E.g.*, *Lone Wolf*, 187 U.S. 553.

32. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1986); United States v. Wheeler, 435 U.S. 313, 323 (1978).

33. *Wheeler*, 435 U.S. at 323.

34. *E.g.*, Rice v. Rehner, 463 U.S. 713 (1983); United States v. Kagama, 118 U.S. 375, 384-85 (1886). *Rice* had a dissent, but it was not based on lack of constitutional power; not even in dissent has any justice argued in favor of constitutional limits on congressional power. The closest the Court has come, other than in cases adjudicating takings of Indian property, was the dictum in Delaware Tribe v. Weeks, 430 U.S. 73, 84 (1976), quoted *supra* note 27. However, the point of that dictum appears to be to deny that plenary power means absolute power, a point long settled by the decisions finding constitutional protections for Indian property. *See supra* note 24.

35. The article most directly on point is Newton, *Federal Power over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195 (1984). *See also* R. BARSH & J. HENDERSON, *supra* note 23; Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 67-113; Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 996-1001 (1981). *Cf.* Brief for the United States as amicus curiae at 20-24; Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832 (1981) (U.S. advocated similar position re Indian immunity from state jurisdiction).

ent clauses of the Constitution.[36] Other scholars have questioned congressional power to override treaties.[37] Still others have articulated sovereign rights for tribes under international law.[38] However, these theories have made no headway in the Supreme Court. The Court adheres to the concept that Indian sovereignty and treaties depend on federal policy, so that the only task of the courts is to interpret what Congress and the executive branch have done.[39] The Court sustains attempts by states to govern Indians and reservation lands unless state power is preempted by federal treaties, statutes, and executive orders.[40]

Thus, prevailing constitutional theory recognizes Congress' power to govern Indian tribes any way it likes with virtually no substantive constitutional limitations. Congress can govern individual Indians under the same standards as other citizens, and on reservations or over Indian trust property, it has greater authority over Indians than over other persons.

II. INDIAN CONSENT

A. *The Consent of the Governed.*

That governments derive "their just powers from the consent of the governed" is among the Declaration's self-evident truths.[41] It is a fundamental principle of the Constitution. Original consent is manifest in the Preamble and in the Constitution's genesis in popular ratifying conventions.[42] This form of popular consent traces to Locke's vision of the original compact among free men.[43] Popular consent is further evidenced by the Constitution's principle that powers not expressly granted are retained by the

36. Professor Newton relied principally on the due process clause of the fifth amendment. Newton, *supra* note 35, at 261-67. Professors Barsh and Henderson relied principally on the ninth amendment and on article I, § 2, cl. 3. R. BARSH & J. HENDERSON, *supra* note 23, at 257-69. Professor Clinton relied on the commerce clause, Clinton, *supra* note 35, at 996-1001, as did the U.S. brief in *Ramah*, 458 U.S. 832. Professor Ball argued that plenary power is lacking because no provision in the Constitution authorizes it. Ball, *supra* note 35, at 46-55.

37. *See* Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987); Westen, *The Place of Foreign Treaties in the Courts of the United States: A Reply to Louis Henkin*, 101 HARV. L. REV. 511 (1987); Henkin, *Lexical Priority or "Political Question": A Response*, 101 HARV. L. REV. 524 (1987). Although these writings are about foreign treaties, Indian treaties are discussed, and many of the arguments apply to both.

38. *See* R. BARSH & J. HENDERSON, *supra* note 23, at 33-49; Andress & Falkowski, *Self-Determination: Indians and the United Nations—The Anomalous Status of America's "Domestic Dependent Nations"*, 8 AM. INDIAN L. REV. 97 (1980); Barsh, *Indigenous North America and Contemporary International Law*, 62 OR. L. REV. 73 (1983); Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 369 (1986); Clinebell & Thomson, *Sovereignty & Self-Determination: Rights of Native Americans Under International Law*, 27 BUFFALO L. REV. 669 (1978); Ryan, *Indian Nations Compared to Other Nations*, 3 AM. INDIAN J. 2 (1977); Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Jurisprudence*, 1986 WIS. L. REV. 219 [hereinafter *Algebra*]; Williams, *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's Learning to Live With the Plenary Power of Congress Over the Indian Nations*, 30 ARIZ L. REV. 439, 454-55 (1988).

39. *See supra* note 22.

40. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141-45 (1980); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 172 (1973).

41. The Declaration of Independence ¶ 2 (U.S. 1776).

42. U.S. CONST. preamble. *See* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 530-36 (1969).

43. *See* J. LOCKE, *An Essay Concerning the True Origin, Extent and End of Civil Government*

people, a concept so radical at the time that some were incredulous.[44] The Bill of Rights expressly withdrew powers from the government and reiterated that powers not explicitly granted were denied.[45] Continuing consent is achieved by popular election of those vested with governmental power, to serve fixed terms of moderate duration, and by the opportunity for amendment.[46] That the framers intended popular consent to be the foundation of American government is beyond cavil.[47]

Indian people did not consent to the Constitution's establishment, and the vote was denied them until this century. However, they are now citizens and entitled to vote during adulthood, which counts as the foundation of consent under the principles of liberal democracy embodied in the Constitution.[48] Are these principles properly applied to Indians?

The courts and other arms of the government must generally assume that they are. Being creatures of the Constitution, they have no license to doubt its applicability. In one of the most remarkable passages in any Supreme Court opinion, the Marshall Court expressly admitted this limit on its capacity to consider the condition of the Indians.[49] Moreover, as individuals Indians may elect to ignore or even renounce tribal ties and participate in American society on the same terms as other citizens.[50]

Yet most Indian people retain tribal ties. Many prefer to live in reservation communities despite poverty and hardship, and others would return if

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[Second Treatise of Government], in TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION, at 63-81 (C. Sherman ed. 1937, orig. publ. 1689).

Other political philosophers who influenced the framers materially differed from Locke about the concept of consent. Hobbes said that "the right of all sovereigns is derived originally from the consent of every one of those that are to be governed," but he defined consent very broadly, to include that given "to save their lives, by submission to a conquering enemy." T. HOBBES, LEVIATHAN 377 (M. Oakeshott ed. 1957). Hume ridiculed Locke, saying that the circumstances of an original compact to govern by consent had never occurred in known human history. *See* D. Hume, *Of the Original Compact*, in 3 THE PHILOSOPHICAL WORKS, at 443 (T. Green & T. Grose eds. 1964, orig. pub. 1741). But the Americans came closer to Locke's vision than Hume had thought possible. In any case, Locke's view represented the dominant social contract theory at the time of the Constitution. *See* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 161-75 (1967); P. RILEY, WILL AND LEGITIMACY 1-2 (1982). On its continuing acceptance, see Whelan, *supra* note 1.

Locke's writings several times referred to Native American societies in relation to his vision of the original compact. *See* Deloria, *Minorities and the Social Contract*, 20 GA. L. REV. 917, 921-24 (1986). But in this country, his labor theory of property was relied on to show the allegedly superior claim of agriculturists to hunters and gatherers, thus to justify displacing Indians. *See* J. LOCKE, *supra*, at 18-33; Williams, *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 SO. CAL. L. REV. 1, 2-3 (1983).

44. *See* G. WOOD, *supra* note 42, at 536-43.

45. U.S. CONST. amends. IX, X.

46. U.S. CONST. art. I, §§ 1, 3; art. II, § 1. *See also id.* at art. IV, § 4, the republican guarantee clause, which was understood to guarantee popular government. *See* THE FEDERALIST NO. 39, at 250-51 (J. Madison), NO. 43, at 291-92 (J. Madison) (J. Cooke ed. 1961). However, the framers' concept of popular government did not equate with straightforward majority rule. The constitutional scheme deliberately divided power to blunt majority oppression. *See* THE FEDERALIST NOS. 10 & 51 (J. Madison); *infra* notes 127-28 and accompanying text.

Professor Emerson has argued that the "right of consent" is protected by the free expression clauses of the first amendment. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 8 (1970).

47. *See* THE FEDERALIST NO. 39 (J. Madison).

48. *Id.*

49. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588-92 (1823).

50. *See* United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891); F. COHEN, *supra* note 2, at 177-78, 268.

economic conditions were better. As a result, the original Constitution's relationship to Indian nations remains more important than modern Indian citizenship. The original basis for Indian consent was collective, not individual. The United States addressed the tribes as national groups. The evolution of this relationship shows a continuing concern with tribal, rather than individual, consent.

B. *Political Actions Based on Indian Consent.*

Indian consent has been honored, albeit imperfectly, through policy choices of Congress and the President. Before the Constitution, the Northwest Ordinance established a compact between the federal government and new states.[51] It required that:

> The utmost good faith shall always be observed toward the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.[52]

Other statutes required federal approval to acquire land ownership from tribes, directly protecting the policy declared in the Northwest Ordinance.[53] Most importantly, in the formative years the government sought Indian consent by dealing with tribes primarily through treaties.

After treaty making ended, the government continued to deal with tribes by agreement.[54] The policy of allotment was imposed on tribes, but only after vigorous argument in Congress, in which advocates of consent lost only after years of debate.[55] The Supreme Court's 1903 decision in *Lone Wolf v. Hitchcock*[56] is the leading authority to sustain federal power to override an Indian treaty. The remarkable fact is that the decision came so late in the day, that as late as 1903 there was doubt about the question.[57]

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51. Ordinance of July 23, 1787, § 14, 32 J. CONT. CONG. 334, 340 (1787), reenacted as amended, Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

52. *Id.* § 14, art. III, 1 Stat. at 52.

53. *See* F. COHEN, *supra* note 3, at 510-22 (describing so-called "nonintercourse acts"). *See also* Wilson v. Omaha Indian Tribe, 442 U.S. 653, 658-69 (1979) (discussing statute allocating the burden of proof to whites claiming property from Indians). The "nonintercourse" statutes prohibiting direct land purchases from tribes might seem at first look to be the antithesis of Indian consent because they prohibited voluntary tribal transfers of land. However, in the context of frontier conditions, the federal protection usually operated to prevent land acquisitions from tribes that were unfair and in reality not consensual.

54. *See* F. COHEN, *supra* note 3, at 107; F. COHEN, *supra* note 2, at 67. For many years after 1871, agreements with tribes were popularly called treaties, in and out of Congress, despite technical misuse of the term. *See, e.g.*, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 596 (1977) (quoting Cong. Burke, "In 1901 a treaty was entered into with the Rosebud Indians . . . ."). In Antoine v. Washington, 420 U.S. 194 (1975), the Court compared the legal status of treaties and agreements. *See id.* at 200-04; *id.* at 213-14 (Rehnquist, J., dissenting).

55. *See* F. PRUCHA, AMERICAN INDIAN POLICY IN CRISIS 252 (1976).

56. 187 U.S. 553 (1903).

57. The Court had reached the same conclusion in The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1871), but the case was decided by six Justices, and two dissented. Apparently for this reason, it was not considered a definitive precedent. Also, the issue decided was much less important. When

In modern times, the Indian Reorganization Act[58] was made subject to Indian consent by referendum.[59] The now-discredited termination policy of the 1950s was carried out with consent of most of the affected tribes.[60] Public Law 280 was imposed on tribes in 1953, but after reconsideration in 1968, it was made subject to tribal consent by referendum.[61] Congress adopted the 1971 land settlement with Alaska Natives on the assumption that their consent should be its foundation.[62] And since 1960, both major political parties have expressly established Indian consent as the basis for federal policy.[63]

Nevertheless, the consent policies of the political branches have been uneven and imperfect. Many tribes never made treaties with the government, and the conditions under which Indian treaties and agreements were made limit their value as a just basis for Indian consent.[64] In most cases there was substantial coercion of the tribal party. The premises and terms of discourse were those of the white man's law, grounded in English history, culture, and language. The European concept of nationhood did not fit many tribal societies, so that the treating party became an artificial amalgamation of small bands of people theretofore independent.[65] In some cases the process was deliberately corrupted by federal selection of the persons to be recognized as tribal leaders.[66] At times, Indian property was seized outright with no semblance of consent, and the federal government was often unable or unwilling to control trespassing on Indian land.[67] Many statutes and bureaucratic and military rules were simply imposed on Indians.[68]

Lone Wolf was decided, the issue was considered open. *See Rosebud Sioux Tribe*, 430 U.S. at 592-94.

58. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended and supplemented at 25 U.S.C. §§ 461-467 (1982)).

59. *Id.* § 18, 25 U.S.C. § 478 (1982).

60. *See* F. COHEN, *supra* note 3, at 152-80. There can be little doubt that many Indian people who agreed to termination were either misled or came to regret their decision. But in one way or another, that is a feature of many exercises of democratic consent.

61. *See id.* at 175-77, 362-63; 25 U.S.C. § 1326 (1982).

62. *See* M. BERRY, THE ALASKA PIPELINE: THE POLITICS OF OIL AND NATIVE LAND CLAIMS 124-214 (1975) (history of ANCSA, including approval by Alaska Federation of Natives).

63. *See supra* note 26. The recent working out of competing state and tribal authority over interracial gambling in Indian country illustrates both the policy of consent and its limits. *See* Act of Oct. 17, 1988, Pub. L. No. 100-497, 102 Stat. 2467-88. The statute provides for federal regulation of gaming on Indian lands. In effect, it allows tribes to operate bingo games free of state rules and control but limits other kinds of reservation gambling enterprises to those allowed by each state. It is very much a compromise.

64. *See generally* Wilkinson & Volkman, *supra* note 5, at 608-12.

65. *See* United States v. Washington, 384 F. Supp. 312, 355 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

66. *See* United States v. Michigan, 471 F. Supp. 192, 211 (W.D. Mich. 1979), *modified*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981); G. FOREMAN, INDIAN REMOVAL 263-66 (1932).

67. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 377-78 (1980). The most important issue was the legal response the U.S. would make to white squatters who occupied Indian lands without legal right, then politicked to validate their possession. *See, e.g.*, D. FELLER, THE PUBLIC LANDS IN JACKSONIAN POLITICS 126-29, 197-98 (1984) (describing preemption laws).

68. *See, e.g.*, F. COHEN, *supra* note 2, at 174-77 (describing administrative and military policies of forcibly confining Indians to reservations without legal authority).

C. *Judicial Actions Based on Indian Consent.*

The uneven political efforts to govern with tribal consent are not the full story. When Congress has acted with doubtful Indian consent or contrary to it, the courts have adopted ameliorative policies. Whatever the abstract constitutional theory, the devastating power of a distant legislature, not beholden to Indian votes or to Indian consent in any other way, is a jarring dissonance in a democratic polity. The courts have obviously been influenced by this inharmonious chord in the constitutional symphony.

Unable to confront the constitutional issue head on, the courts evolved strategies that to some extent resemble the emergence of courts of equity. These manifest themselves in legal analogies that don't quite fit their common law clothing, such as Indian wardship and the trust responsibility of the federal government.[69] They emerge most frankly in the Supreme Court's canons of construction for Indian treaties and for federal statutes affecting Indians.[70] While stated as several distinct rules, all of them require that courts construe ambiguities in Indian treaties and in federal statutes favorably to the Indian side of a dispute.

The Court's first analogy was to common law wardship, the Marshall Court's statement that the tribes' "relation to the United States resembles that of a ward to his guardian."[71] While this description is now viewed as demeaning to Indian people and is out of favor, its purpose when made was to imply a federal duty of protection for Indians and their property against the hostility and land hunger of frontier whites. The "resembl[ance]" to wardship was legally apt on the basis of the constitutional rule that Congress has plenary power over Indians without their consent, a description that to some extent fits the relation of guardian and ward.[72] Implying that the federal government in turn has a guardian's fiduciary duties was the more daring side of the analogy, and it developed into the trust relationship of today.

1. *Consent and the Sovereignty Doctrine.*

Under the legal and social conditions of eighteenth and nineteenth century America, Indian consent cannot be found on the basis of social contract or any like theory of individual consent.[73] The treaties and agreements tribes made with the United States are a much more satisfactory source of Indian consent to the constitutional system. But as already noted, many of them were made coercively, with at best only partial Indian consent, and many tribes made no treaties or other agreements with the government.

These limitations were least important in the earliest years of dealings between the United States and the most powerful Indian nations. When the nation was founded, some frontier tribes were a significant military threat to the national security. The United States rightly feared them in their own

69. *See infra* notes 71-72 and accompanying text.

70. *See infra* notes 105-20 and accompanying text.

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

72. *See* 39 Am. Jur. 2d, *Guardianship and Ward* § 1 (1968). The Court's rule on plenary power is outlined *supra* notes 14-34 and accompanying text. For a description of various legal uses of the guardian-ward analogy, see F. COHEN, *supra* note 2, at 169-73.

73. *See* Deloria, *supra* note 43.

right and as potential allies of Britain or other European powers.[74] Treaties under these circumstances were relatively freely made by tribal parties. They were the most voluntary basis for Indian consent before the modern period of Indian citizenship. They were the best available accommodation between the condition of the Indians and the principle of consent of the governed.

The Supreme Court has implicitly chosen early treaties with powerful tribes, which I shall call the peace treaties, as the benchmark for interpreting federal Indian policy. It has been right to do so not only because of the general legislative policy of seeking Indian consent,[75] but also because consent of the governed is a fundamental principle of our constitutional order that should guide the courts' interpretations within the bounds of other constitutional and statutory limits.

The Court's derivation of policy from the peace treaties may be seen in its decisions recognizing and defining tribal sovereignty over Indian country. As is widely known, the Court first decided that treaties reserved tribal sovereignty in *Worcester v. Georgia*.[76] None of the treaties between the Cherokee Nation and the United States explicitly reserved tribal sovereignty, and the Court decided on the basis of implications. But this did not distort the treaties' terms or conditions. The words of the early treaties, read in light of extant acts of Congress, the circumstances of the Cherokees, and the actual conduct of federal, tribal, and state governments at the time of the treaties, made the Court's construction the most reasonable reading of the actual intent of the treaty parties.[77]

The *Worcester* decision was highly controversial,[78] but not because it inaccurately reflected the intent of the parties to the basic agreements between the Cherokees and the United States in 1785 and 1791.[79] Rather, social and military conditions had vastly changed between the treaty dates and 1832. Indian tribes had ceased to be a military threat to the security of the United States itself (as opposed to isolated situations on the frontier) at least by 1814, after we had settled our differences with Britain, if not somewhat earlier.[80] Treaties after that date, including several with the Cherokees, reflected the general assumption that the United States had the power to impose any terms it wished.[81] President Jackson was elected based in part on his public recognition of this new reality and his willingness to alter the

74. *See* 1 F. PRUCHA, THE GREAT WHITE FATHER 61-80 (1984).

75. *See supra* notes 51-63 and accompanying text.

76. *Worcester*, 31 U.S. 515.

77. Each of these bases for inference about treaty purposes was relied on by the Court. *See id.* at 542-50, 556-57, 560. The only Indian treaties that expressly reserved tribal sovereignty were three of the "Indian Territory" removal treaties made between 1830 and 1838. They contemplated an Indian commonwealth outside the boundaries of any state or territory, a vision that lasted until the admission of Oklahoma in 1907. *See* F. COHEN, *supra* note 3, at 261-62, 770-75.

78. *See* Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 520-31 (1969).

79. *See Worcester*, 31 U.S. at 550-56.

80. *See* 1 F. PRUCHA, *supra* note 74, at 80-88, 194. The military question in particular frontier situations remained for many decades; the text refers to the security of the nation as a whole. Prucha mentions military campaigns and some concerns with foreign alliances after 1814, but even these sporadic events had ended by 1825.

81. *See* Treaty with the Creeks (Treaty of Ft. Jackson), Aug. 9, 1814, 7 Stat. 120, which reveals

relationship with Indian tribes accordingly.[82] So the *Worcester* interpretation, while accurately reflecting conditions when the treaties were made, was out of phase with circumstances at the time the case was decided.

Because of changed circumstances, the Court could have inferred that the later Cherokee treaties implicitly yielded tribal sovereignty based on the circumstances of their making. Instead, the opinion relied almost entirely on the earliest Cherokee treaty as the foundation for its decision.[83] The Court selected the treaty most accurately reflecting Cherokee consent. The opinion noted that the United States wanted peace and that the federal negotiators sought out the Cherokees in their own country.[84] In contrast, many later treaties with tribes were made at military forts or even in Washington.[85] After 1814, treaty terms were only as fair as the Government's benevolence decided to make them. But many of the early treaties were true bargains.

If one looks in isolation to most of the post-1814 Indian treaties and to the conditions of their adoption, an inference that the treaty parties intended to reserve internal self-government to the tribal party is often doubtful.[86] That the Court has uniformly implied such intent in all Indian treaties that do not expressly state the contrary[87] can be justified only by attributing a general federal policy to underlie all the treaties and by deriving the foundations of that policy from the peace treaty period.

The Court's second examination of the question did not come until its decision in the Kansas case of 1867.[88] The right of three tribes to self-government was at issue, and the governing treaties presented a much more doubtful case for reserved sovereignty than had the Cherokee treaties in *Worcester*. Moreover, conditions for these tribes had changed more radically than they had for the Cherokees in 1832. State authorities urged the Court to recognize that the Indians had become too much integrated into local life to justify continuing tribal sovereignty.[89] But the Court refused to depart from the standard it had set in *Worcester*, requiring consent of the tribes to effect a change.[90]

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the change in relationships. Its terms scolded the Creek Nation for wrongs by Creeks, and many of the treaty terms began with the words, "The United States demand . . . ."

82. *See* Burke, *supra* note 78, at 528-29. Jackson had expressed this view publicly as early as 1817. *See* 1 F. PRUCHA, *supra* note 74, at 191-92. In 1829-30, Jackson's cabinet members argued that the Cherokee treaties gave the Cherokees neither property nor governmental rights. *Id.* at 193-94. Because the state of Georgia did not appear before the Supreme Court in *Worcester*, the pertinent parts of these claims served as a surrogate brief for the state, their arguments directly answered by the Court. Thus the *Worcester* decision was as much a rebuff to the President as to the state. However, these were highly political arguments that lacked any reasoned basis in the terms and conditions of the actual treaties.

83. *See Worcester*, 31 U.S. at 550-54.

84. *Id.* at 550.

85. *See, e.g.*, 2 C. KAPPLER, INDIAN AFFAIRS, LAWS AND TREATIES 594-600, 772-90 (1904).

86. For example, consider the 1868 treaty with the Navajos, 15 Stat. 667 (1868). It was made while the tribe was imprisoned at Fort Sumner in eastern New Mexico, far from tribal territory. The treaty terms simply set aside the reservation for the exclusive use of the Navajos and other Indians under the superintendence of the government. Yet the Court has interpreted the Navajo Treaty to apply "the basic policy of *Worcester*." Williams v. Lee, 358 U.S. 217, 219 (1959).

87. *See* F. COHEN, *supra* note 3, at 259-79; *infra* notes 105-09 and accompanying text.

88. The Kansas Indians, 72 U.S. 737.

89. *See* F. COHEN, *supra* note 3, at 262-63.

90. 72 U.S. at 757, 760-61. It is interesting that the Court did not mention the possibility of

The Court again sustained tribal sovereignty in *Ex parte Crow Dog*.[91] Although, the applicable Sioux Treaty of 1868 and agreement of 1877 included express language subjecting the Sioux "to the laws of the United States,"[92] the Court sustained tribal sovereignty in terms derived from the *Worcester* precedent.[93]

Three years later, the Court reviewed the power of Congress to punish an Indian for murder committed on a reservation under a statute passed in reaction to the *Crow Dog* decision.[94] One of the issues raised was congressional power, and concomitant immunity from state law, over the reservation in question because it had been established by executive order after statehood for tribes that had no treaty or agreement with the United States. The Court sustained the statute, and its opinion affirmed the tribes' right of self-government on the reservation based on the *Worcester* precedent.[95] Modern decisions are based on the continuing validity of these principles.[96]

One might try to explain these cases on the basis of continuity of policy, the assumption that federal policy remains constant to the extent it is not deliberately changed. But this concept alone would be greatly strained to account for the decisions. Many tribal reservations were established after the dominant policy of the federal government had clearly shifted to assimilation and break-up of the tribal land base.[97] A federal statute or executive order setting aside a reservation during the assimilation period, interpreted in light of then-current policy, could reasonably be read not to reserve tribal sovereignty; that might well be the most reasonable reading of it in isolation. Even treaties or agreements of that period can reasonably be interpreted the same way.

2. *Consent and the Limits of Tribal Power.*

The Court's reliance on the peace treaties can also be seen in its decisions finding limits to tribal sovereignty. In *Oliphant v. Suquamish Indian Tribe*,[98] the Court held that tribes retain no authority to punish non-Indians who violate tribal criminal laws. The Court's opinion relied on the understandings established in early treaties. While the Court's interpretation has been questioned,[99] its point of reference in the treaties was correct.

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unilateral abrogation of tribal sovereignty by act of Congress. *See supra* notes 56-57 and accompanying text.

91. 109 U.S. 556 (1883). *See also* United States v. Joseph, 94 U.S. 614, 617 (1877) (dictum).

92. *Crow Dog*, 109 U.S. at 568 (quoting Act of Feb. 28, 1877, ch. 72, 19 Stat. 254). *See also id.* at 563 (quoting Treaty with the Sioux, Apr. 29, 1868, art. I, 15 Stat. 635) ("subject to the authority of the United States").

93. *See id.*, 109 U.S. at 572.

94. *Kagama*, 118 U.S. 375.

95. *See id.* at 381-85.

96. *E.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S 130, 133 n.1 (1982); Williams v. Lee, 358 U.S. 217, 219 (1959).

97. *See* F. COHEN, *supra* note 3, at 98-102, 127-38.

98. 435 U.S. 191 (1978).

99. *See, e.g.*, Ball, *supra* note 35, at 36-44; Williams, *Algebra*, *supra* note 38, at 267-74; Barsh & Henderson, *The Betrayal:* Oliphant v. Suquamish Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979).

Despite criticism, there has been no questioning of the decision within the Court since it was announced. Moreover, the decision's author is now Chief Justice, and Justice Kennedy had voted

The *Oliphant* Court had to contend with the general rule of *Worcester v. Georgia*, that Indian sovereignty is the retained, original sovereignty of the Indian nations, so that tribes have whatever sovereignty has not been ceded by them or taken from them.[100] The Court also had to accommodate the rule that ambiguities in treaties should be interpreted favorably to Indian sovereignty.[101] The Court decided that tribal powers can be divested implicitly as well as explicitly.[102] That proposition is relatively uncontroversial when applied to external affairs, to implicit divestment of tribal power to make war and to deal directly with foreign nations.[103] But the *Oliphant* Court applied it to the more local power to punish non-Indians and decided that that power had been implicitly given up as well.

The Court's opinion relied on the historical understanding of the three federal branches and of tribal parties to treaties, including those at issue in *Worcester* itself.[104] One can dispute whether the Court fairly interpreted Indian consent and expectations under those treaties; this is often open to argument and leads to disagreements within the Court itself, such as the divided vote in *Oliphant*. But using the general treaty understanding as the standard for Indian consent has broad support in the Court's decisions.

One may object that each Indian treaty is a separate agreement that should be interpreted to carry out whatever its parties intended. So it should, but the words of the treaties leave many questions unanswered. Some of these answers must be derived from the general policy of the United States, the party common to all the treaties. That policy in turn has often been complex and unclear, so that more than one interpretation was reasonably open to a reviewing court. That the courts have usually chosen the constructions most consistent with Indian consent is justified both by general legislative policies favoring Indian consent, and by higher constitutional principles.

3. *Consent and Judicial Rules of Interpretation.*

How should courts apply the sovereignty and federal trust doctrines? The Supreme Court says we are to construe Indian treaties and statutes favorably to the Indians, but what outcome is favorable to them? This question has obvious answers in some situations but not in all. The rules are in fact applied to sustain tribal sovereignty, federal restraints on alienation of tribal property, and the reservation system.[105] Are these institutions beneficial to Indian people? Social conditions on many reservations lead some

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the same way in the court of appeals. *See* 544 F.2d 1007, 1014 (9th Cir. 1976) (Kennedy, J., dissenting).

100. *See Oliphant*, 435 U.S. at 196; F. COHEN, *supra* note 2, at 122; *see also Wheeler*, 435 U.S. at 322.

101. *See infra* notes 105-09 and accompanying text. The *Oliphant* opinion did not explicitly address the rule.

102. *Oliphant*, 435 U.S. at 204.

103. *But see* Ball, *supra* note 35, at 36-44; Williams, *Algebra*, *supra* note 38, at 267-74. Treaties with tribes explicitly provided for peace between the parties, and some of them specified that the tribe would not ally itself with any other nation than the United States. *See, e.g.*, Treaty with the Cherokees, July 2, 1791, art. 2, 7 Stat. 39.

104. *Oliphant*, 435 U.S. at 197-201.

105. *See* F. COHEN, *supra* note 3, at 220-25.

observers to doubt that they are. And these are profound policy questions of a sort that we generally do not expect courts to resolve.

The Court's canon for treaties is consistent with general rules of interpretation. Indian treaties are to be interpreted as the Indian parties would have understood them, in light of language and cultural barriers.[106] This principle directly honors Indian consent, but in a circumstance when traditional law would also do so. Treaty interpretation in international law seeks to give effect to the parties' intent. When the treaty memorial is in the language of one party, at best imperfectly understood by the other, it is well established that the other party's understanding should define the scope of interpretation.[107] This reading is supported by the relative power of the two parties; there is precedent for considering the circumstances of a weaker party and reading an agreement to meet its reasonable expectations.[108] Domestic contract law has similar doctrines.[109]

However, the rule that federal Indian statutes and executive orders are interpreted favorably to Indians[110] has no analogous support in international law or in the domestic law of contracts. It must rest squarely on the principle of Indian consent. While recognizing Congress' extraordinary power over Indians and tribes, unchecked by political power or other necessary consent of the Indians, the Court has ameliorated its harshness by requiring that measures imposed on Indians be clearly stated.[111] Statutes will not be read technically against Indian interests, any more than will treaties.[112] Uncertainties in statutory words will, like treaty terms, be read to accord with the Indians' reasonable expectations and with our best measure of Indian consent, the understandings in the peace treaties.

The grounding of the Court's decisions tells us how to apply the canons of construction. When lawyers first encounter the canons, they are often perplexed. As there are always ambiguities in a statute, do these rules mean that the Indians always win? They can't mean that. If they don't, how can we tell when the rules matter? Or if the rules don't matter, is the actual rule merely congressional intent and the canons just window dressing? At least one Supreme Court justice read them that way.[113]

The answers depend on the principle of consent. The canons are based on the Court's policy of tempering unchecked federal power by relying on the best available grounds to honor Indian consent. Statutes imposed on

106. *E.g.*, Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 675-76 (1978) (quoting Jones v. Meehan, 175 U.S. 1, 11 (1899)). The concept was first stated in Justice McLean's concurring opinion in *Worcester*, 31 U.S. at 582 (McLean, J., concurring). *See also* The Kansas Indians, 72 U.S. at 760; F. COHEN, *supra* note 2, at 37-38, 296.

107. *See* RESTATEMENT OF FOREIGN RELATIONS § 130 (1962).

108. *See id.*

109. *See supra* note 5.

110. *See infra* notes 111-20 and accompanying text.

111. *See* F. COHEN, *supra* note 3, at 221-25.

112. *See* Bryan v. Itasca County, 426 U.S. 373, 392-93 (1976); *Antoine*, 420 U.S. at 199-200. *Cf.* Jones v. Meehan, 175 U.S. 1, 11 (1899) ("The treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense they would naturally be understood by the Indians.").

113. *See* Northwestern Band of Shoshone Indians v. United States, 324 U.S. 335, 353 (1945) (Reed, J., writing for the Court). *See also* Squire v. Capoeman, 351 U.S. 1, 11 (1956) (Reed, J., dissenting); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281-91 (1955).

Indians are interpreted as if they were agreements, to sustain what the Indians reasonably could have expected at the time. The benchmark for interpretation is the general understanding in the early peace treaties, when the tribes did in fact consent. We begin with the set of understandings embodied in the early treaties, and we ask whether a later treaty or statute clearly departed from that set of understandings. That is why Indian reservations established under executive orders and statutes are presumed to have the same status as those established under the peace treaties. Properly understood, the implicit judicial message to Congress is, you have plenary power to dictate to the Indians, contrary to their consent, but consent is such a vital constitutional principle that we shall require you to exercise that power openly and plainly.

Some examples involving non-treaty tribes serve to illustrate this analysis. One of the most remarkable uses of the rule that federal statutes be interpreted favorably to Indians occurred in *Alaska Pacific Fisheries v. United States*.[114] In 1887, Metlakatla Indians migrated to Alaska from British Columbia. In 1891, Congress by statute set aside the Annette Islands as a "reserve" for them.[115] Later, the United States as trustee for the Metlakatlas sued non-Indian fishermen to enjoin them from fishing in the ocean waters near the Annette Islands, on the theory that the statute implicitly reserved the waters for the Indians' exclusive use. The Supreme Court unanimously agreed, despite the usually strict rule that federal reservations of navigable waters must be explicit.[116] In this case, the particular facts gave no reason to invoke policies derived from Indian consent and federal trusteeship undertaken by treaty or agreement. Yet the tradition of addressing all Indian nations as if they had agreed is so strong that it was applied even to an "immigrant" tribe.

The Jicarilla Apache Reservation in New Mexico furnishes another example. The Jicarillas have no treaty, and the reservation was set aside by executive order of President Cleveland in 1887. Nevertheless, the tribe's right of internal sovereignty is the same as that of treaty tribes. In one of the leading precedents addressing tribal jurisdiction over non-Indians on the reservation, the Supreme Court explicitly so held.[117] Other examples are the Colville Reservation in Washington, set aside by executive order of President Grant in 1872,[118] and the Hopi Reservation in Arizona, reserved by order of President Arthur in 1884.[119] Although neither tribe has a treaty, their right of self-government is consistently respected on the same basis as that of treaty tribes.[120] Even these terse executive orders are interpreted to apply

114. 248 U.S. 78 (1918).

115. *Id.* at 86.

116. On the usual rule applied to Indians who were not fishermen, see Montana v. United States, 450 U.S. 544, 550-57 (1981).

117. *Merrion*, 455 U.S. at 133 n.1. *See also Cabazon*, 480 U.S. at 204 n.1 (1986); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 326 (1983).

118. *See* Colville Confederated Tribes v. Walton, 647 F.2d 42, 44 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

119. *See* Healing v. Jones, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963).

120. Re Colville, *see* Washington v. Colville Confederated Tribes, 447 U.S. 134, 143 n.12 (1980); *Colville*, 647 F.2d at 44. *See also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 138 n.1

principles derived from the peace treaties and linked to them through the principle of consent of the governed.

III. INDIANS AND CONSTITUTIONAL RIGHTS

A. *The Protection of Constitutional Structure.*

Recent efforts to find a constitutional right to tribal sovereignty have at least two implicit premises. One is the fear that tribal sovereignty cannot withstand popular majorities in this country. For most of our history, this premise was clearly correct; a national referendum would have rejected tribal sovereignty. In modern times, Indian self-determination has had a degree of popular political approval, although even today the outcome of a national referendum would be uncertain. In frontier states, popular rejection would have been assured, and many states with reservations would vote that way today.[121] Moreover, the national political wind could shift again; tribes cannot take present tolerance for granted.

The second premise of the constitutional-right-to-sovereignty effort is the assumption that without it, there is no constitutional protection for tribal sovereignty. Modern constitutional law's domination by the jurisprudence of rights induces many to think that judicial protection of extra-majoritarian constitutional rights is the only secure way to protect basic values.

The premise is mistaken. For most of the history of this country, the structural and procedural devices of the Constitution did more to protect personal rights than did its formal personal rights guarantees.[122] The devices to spread power in a federal system with separation of powers, bicameralism, executive veto, judicial independence, and other checks and balances were the major bulwarks of liberty under the original Constitution and indeed until modern times.

The structural devices were inadequate to address some fundamental needs. The rights of black people, the principle of one person one vote, and humane adjustment of the criminal justice system to the industrial state are modern advances under the banner of personal rights. But what relation have these developments to tribal sovereignty?

Tribal sovereignty still rests on an 1832 decision written by a slave-owning judge from Virginia.[123] Modern personal rights law has not advanced the doctrine and is unlikely to do so. Moreover, the sovereignty doctrine has in fact been protected from majority will for over a century by the original constitutional structure, which effectively protects it today. It is structural protections that make the Court's statements about congressional

(1980). Re Hopi, *see* Lomayaktewa v. Hathaway, 520 F.2d 1324, 1326 (9th Cir. 1975), *cert. denied*, 425 U.S. 1118 (1976).

121. *See, e.g.*, D. GETCHES & C. WILKINSON, FEDERAL INDIAN LAW 733 (2d ed. 1986) (reference to 1984 Washington State referendum banning Indian treaty fishing for steelhead, although by a narrow margin).

122. For example, important judicial enforcement of the first amendment did not begin until 1930, but the United States has had substantial freedom of expression throughout its history. *See* Nagel, *How Useful Is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302, 314-16 (1984).

123. *See* L. BAKER, JOHN MARSHALL: A LIFE IN LAW 715 (1974).

power over tribes far less threatening in practice than they appear in the abstract.

For Indians, the most important structural protection is the federal system itself and the allocation of paramount power to the federal government rather than the states.[124] This prevents both local authority over tribes and popular referenda under state law to determine Indian rights.

During the nineteenth century, this principle was a vital protection for Indian people. As a minority race feared and hated by many white Americans and as owners of vast tracts of land coveted by settlers, Indians and tribes would have suffered much more under state and local jurisdiction than they did under federal. Recall the sorry case of Texas, which had ten years as an independent republic, during which tribes were subject to direct popular rule. Most Texas tribes were either driven out of the state or wiped out, and their lands were taken.[125] Other infamous acts toward Native Americans can be directly traced to local hostility that overcame federal authority. For example, the notorious Sand Creek Massacre was by soldiers commanded from Denver, not Washington.[126] Federal protection of tribal land was often inadequate, but considering voters' attitudes, it is remarkable that so much was protected.

The Constitution does not authorize national referenda, about tribal sovereignty or anything else. National legislation can be adopted only according to the framers' republican system of representation, by approval of three diverse organs of government,[127] a structure that substantially blunts majority oppression. In other words, the plenary power of Congress over Indians and tribes, the bugbear itself, has the important effect of preventing a popular referendum on tribal sovereignty.

The constitutional structure protects tribal sovereignty in a third, equally important, way. The federal judiciary's extraordinary immunity from popular control guards tribal rights from transient popular will, even within the federal government.[128]

In sum, the structure of the original Constitution, so inadequate to black Americans, has provided substantial protection to Native Americans. Even in the modern era of civil rights, Indian people derive more important constitutional protections from the 1787 provisions than from the fourteenth amendment and civil rights statutes. Of course, much harm was done. But given the power of the United States and the attitude of most of its citizens, any constitution that might have been adopted would have had negative impacts on Indian people. The judgments we make now must consider the

124. *Worcester*, 31 U.S. at 557-59.

125. *See* 1 F. PRUCHA, *supra* note 74, at 354-56.

126. *See* C. ABBOTT, S. LEONARD & D. MCCOMB, COLORADO 73-78 (rev. ed. 1982). California supplies numerous examples. At many times in state history, local authorities were able to weaken and even prevent federal protection of Indian rights. The most important was defeating ratification of treaties negotiated with California tribes. *See* 1 F. PRUCHA, *supra* note 74, at 384-87. *See also* California Private Land Claims Act, Mar. 3, 1851, ch. 41, 9 Stat. 631, *interpreted in* Barker v. Harvey, 181 U.S. 481 (1901).

127. *See* INS v. Chadha, 462 U.S. 919 (1983); THE FEDERALIST No. 10 (J. Madison).

128. *See supra* notes 78-84 and accompanying text.

circumstances of past events and the alternative choices that were realistically available.

B. *The Uncertain Protections of Rights.*

The protection of constitutional structure is not alone an adequate response to advocates of a constitutional right of tribal sovereignty. One can concede structural protection, point out its failures, and claim that more protection is desirable. Thus, let us consider the feasibility of a regime of judicial protection of a constitutional right of tribal sovereignty.

1. *Tribes and the Tenth Amendment.*

A basic principle of the Constitution is that the federal government exercises only enumerated powers, and all other governmental powers are allocated to the states. The tenth amendment was meant to make that principle explicit.[129]

Beginning with the celebrated case of *McCulloch v. Maryland*,[130] the Supreme Court repeatedly attempted judicial definitions of state sovereignty protected by the Constitution from federal authority. Two opposing concepts vied for ascendancy: the view that the states' principal protection is through the political process because of their powerful influence over the federal government, and the view that the judiciary should be a primary and vigorous guardian of state sovereignty.[131] While the issue is not dead, the political process rule has been predominant since 1937. Probably the main reason for the triumph of the political process rule is the perceived failure of the Court to articulate a satisfactory theory for tenth amendment adjudications.[132]

If we hypothesize a constitutional right of tribal sovereignty, we must consider how it might work in light of the history of the constitutional right of state sovereignty. Plainly, the concept of protection through political power, the modern Court's principal ground for refraining from judicial enforcement of the tenth amendment, has no application to Indian tribes. A meaningful tribal right against the power of Congress would have to depend on judicial definition and enforcement. The challenge, then, is to explain how the Supreme Court could solve the definitional problem for tribal sovereignty that it failed to solve for state sovereignty.

This is a daunting problem. The constitutional theory of the federal system is that the federal government has full authority to carry out its enumerated powers by directly governing all persons and property in the nation.[133] When it exercises its powers, conflicting state authority is displaced under the supremacy clause.[134] Under modern interpretations of the federal powers to tax, spend, and regulate interstate and foreign commerce, federal

129. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 113 (3d ed. 1986).
130. 17 U.S. (4 Wheat.) 316 (1819).
131. *See* J. NOWAK, *supra* note 129, at 160-69.
132. *See id.* at 164-67.
133. *See id.* at 115-17.
134. U.S. CONST. art. VI, cl. 2.

power can reach a myriad of local activities.[135] To be meaningful, a tribal right of sovereignty would have to carve out a much greater immunity than does existing constitutional law for state sovereignty.

One might respond that the Court has repeatedly said that the tenth amendment does protect the core, the very existence, of state government from federal power,[136] in contrast to statements that tribal power is subject to complete defeasance by act of Congress. Thus, a tribal right of sovereignty would protect the same basic existence for tribal sovereignty. This is true but not terribly significant. Most of the actual complaints that Indian people have about unconsented exercises of federal power over tribal government would require greater judicial protection than guarding bare existence. Most obviously, tribes want authority over non-Indians in tribal territory, and existing federal law severely limits that power.[137] It is hard to see how broadening of that power would follow from judicial protection of a bare right of existence. These difficulties show why some scholars who are dissatisfied with plenary federal power do not dally with reinterpretation of the Constitution and directly invoke principles of international law or propose constitutional amendments.[138]

2. *Tribes and the Bill of Rights.*

Consider also the relation of Indians and tribes to the cherished American constitutional rights protecting property, equal protection of the laws, and due process of law. Even today, these rights are more likely to be invoked against Indian interests than for their protection.

The judiciary has strongly protected property rights against popular infringements. How does that tradition affect Indians? Surely the verdict is mixed at best. It is true that both tribal and individual Indian property has been protected under the fifth amendment,[139] and Anglo-American concepts of the sanctity of property have had something to do with the general federal policy that tribal property should be bought rather than simply seized. Federal restraints on alienation prevented greater loss of Indian property than has occurred.

Yet federal purchases from tribes often were coerced, and the courts developed the evasions that aboriginal and executive order Indian titles are not constitutionally protected.[140] More directly harmful, the Anglo-American notion of individual property rights made tribal property held in common a target for abolition, an aberration that smacked of communism. The

135. *See* J. NOWAK, *supra* note 129, at 160-61.

136. *See, e.g.*, Maryland v. Wirtz, 392 U.S. 183, 196 (1968) (The Court has "ample power to prevent . . . the utter destruction of the State as a sovereign entity."). The one clear holding enforcing this vision of the tenth amendment is Coyle v. Smith, 221 U.S. 559 (1911) (voiding federal statute dictating location of state capital city).

137. *See supra* notes 98-104 and accompanying text; F. COHEN, *supra* note 3, at 252-57.

138. On international law, see, *e.g.*, *supra* note 38 (articles by Professor Williams). Professors Barsh and Henderson propose amending the U.S. Constitution and articulate the form of a proposed amendment. R. BARSH & J. HENDERSON, *supra* note 23, at 279-82.

139. Hodel v. Irving, 481 U.S. 704 (1987); United States v. Sioux Nation, 448 U.S. 371, 417-24 (1980).

140. *See* F. COHEN, *supra* note 3, at 485-99.

government avoided simply grabbing Indian property, but it was quite willing to compel the breakup of tribal common land into individual holdings.[141] And the great concern of Anglo-American law with free alienability of property has caused frequent attacks on Indian land ownership protections.[142]

Equal protection and due process have become important in modern times with the resurgence of exercised tribal sovereignty. At every turn, tribal governments have met with rights-based arguments against the legitimacy of what they do.[143] The Supreme Court had to square the separate governance of Indian country and other distinct rights of Indians with the modern notion of race as a suspect class.[144] It reached the right conclusion but awkwardly, almost apologetically.[145]

In the Indian Civil Rights Act of 1968, Congress imposed rights-based limitations on tribes.[146] While the Supreme Court blunted federal court enforcement of that act,[147] efforts to overturn the Court's holding are alive and well.[148] Undoubtedly, tribal governments have been oppressive at times; all governments are. And it is fair to say that tribal governments could not function in modern America without accommodating modern notions of personal rights in some way. The point is simply that personal rights concepts have been more at war with tribal sovereignty than helpful to it.

In modern battles over tribal sovereignty, non-Indians persistently claim that tribal authority over them is government without representation, without consent of the governed. The claim has obvious force.[149] The usual tribal response, that non-Indians elected to settle in Indian country, is unsatisfactory for two reasons. First, in many cases non-Indians were induced to settle in Indian country by federal assimilation policies that plainly gave little warning of tribal authority.[150] Circumstances gave clear notice only to settlers in Indian Territory while it existed[151] and to those arriving after the modern resurgence of exercised tribal sovereignty. Second, the principle of consent is too fundamental to rest on a permanent waiver by one's ancestors.

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141. *See Lone Wolf*, 187 U.S. 553. *See also* F. COHEN, *supra* note 2, at 208 (disputes about whether tribal ownership was "communism").

142. *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 255-73 (1985) (Stevens, J., dissenting).

143. *See, e.g.*, cases discussed in F. COHEN, *supra* note 3, at 663-72.

144. *See* United States v. Antelope, 430 U.S. 641 (1977); Fisher v. District Court, 424 U.S. 382, 390-91 (1976); *Morton*, 417 U.S. 535.

145. The Court upheld separate legal status for Indians, but it did so on the evasive basis that Indians constitute a "political" rather than a racial classification. *See* F. COHEN, *supra* note 3, at 653-60. Had these challenges succeeded, it is hard to see how tribal self-government could have survived.

Felix Cohen's 1941 treatise argued that tribes are political rather than racial groups as a basis for individual Indians to escape federal oppression. F. COHEN, *supra* note 2, at 177. *See also id.* at 268-72 (existence of tribes in a "political sense").

146. Act of Apr. 11, 1968, Pub. L. No. 90-284, tit. II, 82 Stat. 77-78 (codified at 25 U.S.C. §§ 1301-1303 (1982)).

147. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

148. *See* S. 2747, 100th Cong., 2d Sess., 134 CONG. REC. 11652-55 (1988); *Hearing Before the United States Comm'n on Civil Rights, Enforcement of the Indian Civil Rights Act*, Flagstaff, Ariz. (Aug. 13-14, 1987).

149. *See supra* notes 1, 41-47 and accompanying text.

150. *See* F. COHEN, *supra* note 3, at 128-29, 136-43, 261-66.

151. *See id.* at 770-74.

The plenary power rule, while it has sanctioned federal oppression, provides an important response to this complaint by non-Indian residents of Indian country. The federal government, a government whose political support overwhelmingly favors the values of the non-Indian residents over those of their tribal hosts, provides an avenue of relief if tribal power over non-Indians becomes truly oppressive.[152] Thus, plenary power gives democratic legitimacy to tribal jurisdiction over non-Indians.[153]

C. *Constitutional Structure Remains the Vital Protection.*

In sum, the only constitutional decision that really mattered for Indians was the *Worcester* holding that the Constitution committed overriding power to deal with tribes to the federal government and not to the states. Because of that decision, every lawsuit about tribal sovereignty is, as a constitutional matter, based on construction of federal statutes or treaties. Because of that decision and federal statutes, anyone who covets tribal land or opposes tribal sovereignty must run the gauntlet of federal legislative and administrative processes and of judicial review. And because of the Court's canons of construction, it is not even enough for coveters to get ambiguous federal approval. Structure effectively defangs the specter of plenary federal power. It also legitimizes tribal control over reservations.

CONCLUSION

The constitutional order has shown significant respect for consent of the Indian nations as a just basis for their participation in American society. In particular, the principle of consent justifies judicial rules that protect against easy invasion of tribal rights. Yet departures from the consent principle remain significant; the ultimate power to impose unconsented rules on tribes has been exercised often enough to undermine claims to have justly achieved Indian consent on any lasting and permanent basis. The oppressive conditions of some tribal societies constantly remind us that the status quo is unacceptable. The challenge to achieve a better future is as pressing now as it has ever been.

In response to this challenge, many thinkers pursue visions of greater tribal independence. However, attempting to realize these visions under the Constitution's theories of individual rights guarded by the judiciary is not a promising path. Throughout the nation's history, opponents of Indians have made claims of individual constitutional rights and of states' tenth amendment rights to try to defeat Indian interests. While it is tempting to try to fight fire with fire by erecting a tribal "tenth amendment" right, structural constitutional protections are more appropriate to the status of tribes as groups and governments. These protections require vigilance and effort,

152. *See supra* note 63 (federal regulation of gambling in Indian country); Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981) (sustaining non-Indian corporation's cause of action for damages against tribes). The *Dry Creek Lodge* decision was a very doubtful interpretation of existing law, *see* F. COHEN, *supra* note 3, at 668 n.52, but it illustrates the potential power of Congress.

153. *See Merrion*, 455 U.S. 130.

which could be dangerously relaxed if tribes came to rely on the judicial paternalism of rights-based status. Much more tribal independence can be achieved within the existing system, by doing the hard work of building up tribal governments and improving tribal economies.

Other visions go beyond the existing constitutional order and seek a more securely independent status for tribes under international law or under formal amendments to the Constitution.[154] This quest should continue to have the attention of contemporary political philosophy. It too takes the constitutional value of consent of the governed as a fundamental premise.

154. *See supra* note 138 and accompanying text.

SPECIAL REPORT

Case Study on Medicinal Plant Research in Guinea: Prior Informed Consent, Focused Benefit Sharing, and Compliance with the Convention on Biological Diversity

Medicinal plants play a very important role in the provision of primary health care in tropical countries (Farnsworth et al. 1985). Contemporary research in medical ethnobotany involves collaboration with traditional healers, local communities, scientists, scientific institutions, medical clinics, non-governmental organizations, and local and national governmental offices from the host country. Only a small number of publications in the ethnobotanical literature (Blum 1993; Carlson et al. 1997b; Chinnock et al. n.d.; King and Carlson 1995) describe real life examples of how agreements for research and benefit sharing are established and implemented between northern researchers and tropical countries. This report describes mechanisms established for reciprocity and benefit sharing throughout a four-year ethnobotanical research collaboration between Shaman Pharmaceuticals and The Republic of Guinea in West Africa (Fig. 1). Discussions led to the establishment of prior informed consent and collaborative research agreements with a variety of stakeholders in Guinea (Table 1). Since the research collaboration commenced in 1994, the company has conducted field research and collected and analyzed medicinal plants used to treat Type 2 diabetes mellitus while a spectrum of stakeholders in Guinea (Tables 2–6) have received compensation and reciprocity benefits (Tables 8–14).

Shaman's ethnobotanical field research methodology includes the use of physician and ethnobotanist teams to assure appropriate interpretation of diseases being treated and accurate identification of the medicinal plants being used (Carlson and King 1998; King and Carlson 1995). These ethnobotanical research teams have focused on plants in Guinea used to treat Type 2 diabetes mellitus. Medicinal plants collected in Guinea are analyzed for antidiabetic activity in a db/db diabetic mouse model in the Shaman laboratories in California (Luo 1998). Prior research in countries outside of Guinea by some of the authors showed that medicinal plants collected and analyzed by the above methods demonstrated antidiabetic activity in a db/db antidiabetic mouse model (Bierer et al. 1998; Luo et al. 1998a; Luo et al. 1998b; Luo et al. n.d.). Evaluation of seventy plants from around the world used to treat Type 2 diabetes mellitus showed that 57% demonstrated antidiabetic activity in a db/db diabetic mouse model (Carlson et al. 1997a). Shaman has received dried plant collections of twenty-one different plant species from Guinea used to treat Type 2 diabetes mellitus. These plant species are presently being evaluated for antidiabetic activity in a db/db diabetic mouse model. When the experimental biology evaluations have been completed, the results are reported back to the collaborating scientists and traditional healers in the country of origin (Richter and Carlson 1998).

In Guinea there are numerous different cultural groups with strong and rich traditions of botanical medicine that contribute significantly to the treatment of a variety of diseases including the treatment of Type 2 diabetes mellitus. The authors collaborate with western trained scientists, traditional healers and communities representing many different ethno-linguistic groups (Tables 5 and 6) including the Dialonke, Kpelewo (Guerze, Kpele, Konoh), Malinka (Malinke, Maninke), Mano (Manoh), Pular (Peulh, Poular, Fulani, Foulani), Susu (Soussou, Sousou, Nalou, DjaKanke-Boke dialect), and Toma. These ethno-linguistic groups live in regions that comprise several different major ecosystems: Conakry (Coastal), Kindia and Coyah (dry forest), Faranah and Kankan (woodland savannah), Labe (mountains) and Nzerekore and Lola (rainforest).

Type 2 diabetes mellitus is widely recognized by the healers with whom we collaborate. Healers

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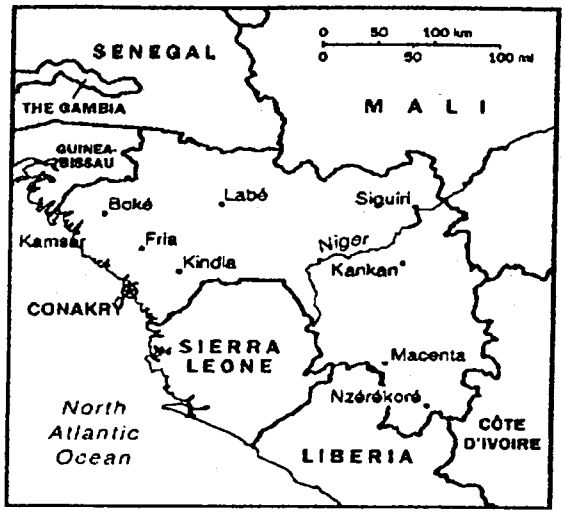

Fig. 1. Map of Guinea.

TABLE 1. HOW PRIOR INFORMED CONSENT WAS ESTABLISHED.

Step 1. 1994: Universite Gamal Abdel Nasser de Conakry scientist contacts Shaman Pharmaceuticals and proposes collaboration. Shaman provides written materials about the activities and philosophy of the company, and the NGO, The Healing Forest Conservancy.

Step 2. 1994 (October): Shaman brings Guinean scientist to its California laboratories for discussions on the proposed collaboration.

Step 3. 1994 (November)–1995 (January): Guinean scientists meet with officials from Guinea governmental agencies, Universite Gamal Abdel Nasser de Conakry, BDCP-Guinea, traditional medicine organizations, and local communities and present them with the potential for a medicinal plant research collaboration with Shaman Pharmaceuticals. Written materials translated into French were provided. Discussions were held with these different stakeholders to establish clear prior informed consent of Shaman's objectives and commitments research collaboration and focused benefit sharing. Questions and dialogue were communicated from these stakeholders to Shaman Pharmaceuticals throughout the duration of these discussions. In January of 1995, an "Agreement for Research and Collaboration" is established between Shaman and BDCP-Guinea. The person from Guinea who signed the agreement is the Director of BDCP-Guinea and the Vice Dean in Charge of Research at the national governmental university, Universite Gamal Abdel Nasser de Conakry.

Step 4. 1995 (December): The different Guinean stakeholders from Step #3 agreed to support an invitation to Shaman Pharmaceuticals to establish a formal medicinal plant research collaboration with Guinea which would include Shaman scientists' visits to conduct ethnobotanical field research.

Step 5. 1996 (January–April): Shaman obtains appropriate research and plant export permits from national government, Directeur Nationale de La Recherche Scientifique Et Technique, Ministere de L'Enseignement, Superieur de La Recherche, Scientifique Et de La Culture, Conakry, Republique de Guinee. Shaman scientists met with officials at this governmental office and renewed the research and plant export permits before the expeditions in April 1996, April 1997, and June 1998.

Step 6. 1996 (April), 1997 (April), 1998 (June): Shaman ethnobotanical research scientists working with Guinean scientists met directly with Guinean national, state, and local governmental agencies, the Universite Gamal Abdel Nasser de Conakry, BDCP-Guinea, traditional medicine organizations, and local communities and held discussions to further ensure prior informed consent of Shaman's goals and commitments for the research collaborations.

Step 7. 1996 (April), 1997 (April), 1998 (June): The ethnobotanical research collaboration commences along with focused benefits for capacity building and technology transfer.

TABLE 2. PRIOR INFORMED CONSENT FROM AND COLLABORATION WITH UNIVERSITIES, COLLEGES AND NGOs.

Universities & colleges	Non-governmental organizations
Universite Gamal Abdel Nasser De Conakry:	Bioresource Development &
Dean of Faculty of Science,	Conservation Program
Secretary General,	(BDCP)-Guinea
Maitre de Conference, Chef de la Chair	
Institute Valery Giscard d' Estaing, Faranah	Association Guineene des Diabetiques
Centre de Recherche Agronomique de Foulaya, Kindia	
Centre de Recherche Agronomique de Seredou	

from the different ethno-linguistic groups describe a variety of signs and symptoms in patients with Type 2 diabetes mellitus including fatigue, increased urination, urine that tastes sweet, and when they urinate on the ground the urine attracts ants. The afflicted people may also have foot sores that heal very slowly. The healers report that when they treat the patients with botanical medicines their foot sores heal, their urination returns to normal, and when they urinate on the ground, the ants do not go to the urine.

THE CONVENTION ON BIOLOGICAL DIVERSITY AND PHARMACEUTICAL RESEARCH

To slow the loss of the earth's biological diversity, the Earth Summit was held in 1992 in Rio de Janeiro, Brazil. At this summit, the Convention on Biological Diversity (CBD) of the United Nations Conference on Environment and Development opened for signature on June 5, 1992. Stated objectives of the Convention were (1) the conservation of biodiversity, (2) the sustainable use of its components, (3) the equitable sharing of the benefits resulting from the use of genetic resources, (4) appropriate access to genetic resources, transfer of relevant technologies, and acknowledging rights over resources and technologies (Article 1; CBD 1992). Article 10(e) of the CBD calls for the "Encouragement of cooperation between government authorities and private sector in developing methods for sustainable use of biological resources (CBD 1992)." The private sector is involved with the CBD discussions because natural products are an important source of medicinal compounds. Twenty five percent of the modern medical drug prescriptions written between 1959 and 1980 in the United States were pharmaceuticals derived from plants (Farnsworth et al. 1985).

Tropical rain forests are home to tremendous biological and cultural diversity (Durning 1992). Traditional botanical medicine systems are also widespread and diverse in these tropical regions. Medicinal plant research is commonly conducted in these regions by government, academic, or private company laboratories based in temperate countries. Numerous articles have addressed the issues of intellectual property rights (IPR) and appropriate compensation and reciprocity for local communities and scientific and conservation organizations in the host tropical countries

TABLE 3. COLLABORATING SCIENTISTS FROM GUINEA.

Four physicians from the University Medical Center in Conakry
Two nurses from the University Medical Center in Conakry
One physician from the Guinea Diabetes Association
Director of the Guinea Diabetes Association
Seven botanists from the University Gamal Abdel Nasser De Conakry
Three natural products chemists from the Universite Gamal Abdel Nasser De Conakry
Two English-French translators from the Universite Gamal Abdel Nasser De Conakry
Two botanists from the Bioresource Development & Conservation Program–Guinea
Four botanists from Institute Valery Giscard d' Estaing, Faranah
One botanist from Centre de Recherche Agronomique de Foulaya, Kindia

TABLE 4. PRIOR INFORMED CONSENT FROM AND COLLABORATION WITH TRADITIONAL HEALERS' ORGANIZATIONS, COLLECTIVES, & CLINICS.

Traditional healers' organizations	Healers' clinics & collectives
Dabola Healers' Group	Kankan Clinic
Siquiri Healers' Group	Ninge bhoye, N'zerekore Clinic
St. Alexi, Kankan Healers' Group	Gbily, Nzerekore Clinic
N'zerekore Healers' Group	Almamya Market Collective
Lola Healers' Group	Daka Market Collective
Conakry Healers' Group	Kensanbougou Market Collective

where research is conducted (Boom 1990; Carlson et al. 1997; Churcher 1996; Churcher and Nietschmann 1994; Cunningham 1991 and 1992; Elisabetsky 1991; Iwu 1996a,b; King, Carlson, and Moran 1996a; Moran 1992, 1996; Posey et al. 1995; RAFI 1996; Reid et al. 1993; Williams and Baines 1993). The CBD also addresses a wide range of ethical and political issues related to medicinal plant research and provides legal mechanisms for implementation and enforcement for the over 170 nations which have, to date, ratified it. Examples have been given that describe how to incorporate these principles and guidelines into ethnobotanical research collaborations to establish equitable collaborative agreements with tropical countries (Carlson et al. 1997; Chinnock et al. n.d.; King 1994; King and Carlson 1995; King, Carlson, and Moran 1996b). Table 14 illustrates how the company complies with the CBD in research collaboration with Guinea. This paper describes a model through which a pharmaceutical company complies with the principles set forth by the CBD and contributes a real life example to the international dialogue on what is fair and equitable benefit sharing in contemporary pharmaceutical research on tropical plants.

PRIOR INFORMED CONSENT, RELATIONSHIP BUILDING, AND COLLABORATION

It is important that host country governments, scientific institutions, and local communities understand the goals, objectives, intentions, and commitments of research projects conducted by foreign groups. Before the research commences, the goals and objectives of involved parties should be discussed and established. When the different host country stakeholders are satisfied that a mutually beneficial plan has been established, consent can then be granted to the foreign researchers. The development and evolution of establishing prior informed consent and research collaboration agreements with Guinea is described in Table 1. In 1994 the Bioresource Development & Conservation Programme (BDCP), an African non-governmental organization (Iwu 1996b), sponsored a conference at the national government Universite Gamal Abdel Nasser de Conakry (UGANC) in Guinea. At this conference, discussions proceeded on the need for sustainable use and development of biological resources, pharmaceutical development from plants, and the importance of prior in-

TABLE 5. ECOSYSTEMS AND ETHNOLINGUISTICAL COLLABORATIONS.

Ecosystem	Province	Ethnolinguistic groups
Coastal	Conakry	Susu, Maninka, Pular (Peulh, Fulani)
Rainforest	N'zerekore, Lola	Kpelewo (Guerze), Maninka, Toma, Mano
Wet forest	Macenta	Maninka
Woodland savannah	Kankan	Kpelewo (Guerze), Maninka, Dialonke, Toma
Woodland savannah dry forest	Faranah	Maninka
Upland savannah, dry forest	Coyah	Maninka
Upland savannah, dry forest	Kindia	Susu
Mountain savannah, dry forest	Labe	Pular (Peulh, Fulani)

TABLE 6. COLLABORATING TRADITIONAL HEALERS, COMMUNITIES, & ETHNOLINGUISTIC GROUPS.

Traditional healers	Communities	Ethnolinguistic groups
58 traditional healers: 43 males 15 females	42 communities in 7 provinces	7 ethnolinguistic groups: Maninka, Susu, Kpelewo (Guerze), Pular (Peulh, Fulani), Toma, Mano, Dialonke,

formed consent and equitable benefit sharing for the tropical country scientific institutions and local communities. The Vice Dean in charge of research from UGANC attended this conference and then contacted Shaman Pharmaceuticals to propose discussions for potential research collaboration. Literature on the company's activities was provided to the Vice Dean of Research and in September 1994, and he was invited to and funded by the company to visit its laboratories in California. He toured the laboratory facilities and held discussions with numerous people from different departments about research approach, philosophy, and the company's "Agreement of Principles" (Shaman 1997). Discussions included how Guinean scientific institutions and local communities could benefit from medicinal plant research collaboration.

The Vice Dean returned to Guinea and initiated meetings with Guinea governmental agencies, UGANC, BDCP-Guinea, traditional medicine organizations, and local communities. Literature translated into French that describes Shaman's activities and philosophy was provided to these stakeholders. Discussions were conducted that included detailed descriptions of how the medicinal plants would be analyzed, potential for commercialization, and issues of equitable compensation and benefit sharing. Questions, concerns, or requests expressed by any of these entities were communicated to the company to facilitate dialogue and communication with different Guinean stakeholders. The Directeur Nationale de la Recherche Scientifique Et Technique, the National Government of the Republique de Guinea in Conakry was also involved with these discussions. University scientists, government officials, and numerous communities representing a variety of different ethnolinguistic groups expressed interest in collaborating with the company. By January 1995, an "Agreement for Research and Collaboration" between BDCP-Guinea and the company was established. The agreement was signed by the Vice Dean in charge of research at the national government university in Conakry (UGANC), who is also the director of the non-governmental organization, BDCP-Guinea. Later that year, the company was formally invited in writing to collaborate with the country of Guinea in medicinal plant research. In the early months of 1996, appropriate research and plant export permits were obtained from the Directeur Nationale de la Recherche Scientifique Et Technique of the National Government of the Republique de Guinea in Conakry. Before each of the ethnobotanical research expeditions in 1996, 1997, and 1998 Shaman scientists visited this governmental department and renewed our research and plant export permits.

EDUCATIONAL WORKSHOPS

In April 1996 Shaman scientists (physician and ethnobotanist) participated in an all-day educational and informational meeting at UGANC. This day consisted of presentation and discus-

TABLE 7. BOTANICAL SPECIMENS COLLECTED IN GUINEA.

Botanical voucher specimens and ethnomedical data	Dried plant material for analysis
During ethnobotanical field research expeditions in 1996, 1997, and 1998, voucher specimens and ethnomedical information were collected on 145 different plant species in 118 genera used to treat symptoms related to Type 2 diabetes mellitus. Copies of the ethnomedical and botanical information and voucher specimens were deposited in herbaria in Guinea and at Shaman Pharmaceuticals.	Forty kilograms of dried plant material was collected for 21 of the 145 different plant species by Guinea scientists and traditional healers. This plant material was sent to Shaman's California laboratory for analysis of antidiabetic activity.

ETHNOLINGUISTIC GROUPS.

nolinguistic groups

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ulani), Toma, Mano, Dialonke,

nerche Scientifique Et Tech-
l Government of the Repub-
Conakry was also involved
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variety of different ethnolin-
essed interest in collaborating
By January 1995, an "Agree-
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ent was signed by the Vice
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in Conakry (UGANC), who
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TABLE 8. FOCUSED BENEFITS 1994–1998. THE OPERATING COSTS TO MAINTAIN THE COLLABORATION WITH GUINEA DURING AND IN BETWEEN EXPEDITIONS SUCH AS LODGING, FOOD, TRANSPORTATION, AND COMMUNICATION COSTS BOTH FOR THE GUINEA CONSULTANTS AND SHAMAN SCIENTISTS ARE NOT CONSIDERED AS PART OF THE COMPENSATION AND RECIPROCITY FOCUSED BENEFITS FOR GUINEA.

Immediate-term reciprocity	Immediate-term compensation	Medium-term compensation	Total benefits 1994–1998
$28 150	$34 770	$82 000	$144 920

sion of Shaman's activities and philosophy to 150 attendees including the following: national government ministers; national religious leaders; representatives from the Guinea Diabetes Association; traditional healers; an NGO, the Bioresource Development & Conservation Programme-Guinea (BDCP-Guinea); students and faculty from the Universite Gamal Abdel Nasser De Conakry departments of botany, chemistry, forestry, pharmacology, and medicine; and newspaper journalists and a television crew. Parts of the event were televised on the evening news in Conakry. Discussions included the importance of Guinean scientists and traditional healers receiving appropriate intellectual credit and benefits from the collaboration with Shaman or any other collaborating northern research group. There were also presentations on the technical aspects of Type 2 diabetes mellitus, ethnobotany, botany, and conservation. The Guinean participants were enthusiastic about the topic because Type 2 diabetes mellitus is a growing problem in Guinea. The participants were eager to establish a research program to better understand how botanical medicines from Guinea are used to treat this disease. Literature in both English and French about Type 2 diabetes mellitus, ethnobotany, botany, conservation, and intellectual property rights was provided to the people that attended. There were opportunities for questions and discussion on a variety of issues throughout the day. All presentations and discussions were translated into French. In April 1996 and April 1997 Shaman scientists conducted four day intensive ethnobotany field research training sessions in Conakry with twenty seven Guinea scientists (Table 3) and six Conakry traditional healers. Plant presses, books, written materials, and ethnomedical and botanical field research methodology were provided by Shaman to all the participants of both these training sessions.

TABLE 9. IMMEDIATE TERM FOCUSED BENEFITS FOR CAPACITY BUILDING & SUPPORT FOR EDUCATION, WORKSHOPS AND CONFERENCES.

1996 and 1997 four day workshops conducted in Conakry, Guinea and attended by 30 Guinea scientists on research methods in ethnobotany, conservation, public health, and mechanisms for benefit sharing. Written materials in French were provided.
1996, 1997, 1998 eight weeks of ethnobotanical research expeditions throughout Guinea involved and trained twelve different Guinea scientists in detailed field research methods. Over 50 different traditional healers also learned about our field research methods.
1994, October, one Guinea scientist to a International Bioresources Development & Conservation Program meeting, Washington, D.C. USA
1995, October, two Guinea scientists, Second Congress on the "Utilization of Tropical Plants and Conservation of Biodiversity," Cameroon, Douala
1997, September, one guinea scientist, Conference title: "Commercial Production of Indigenous Plants as Phytomedicines and Cosmetics," Nigeria, Enugu
1998, February, one Guinea scientist, Drug Information Association Conference: "Phytomedicines Development: Botanicals for the 21st Century," South Africa, Cape Town
1997, April, desks and supplies for schools in the communities of Pellel-Malal Labe, Bhawo Taghe Labe, and N'zerekore.
1997, April, Contribution to construction of schools in the communities of Damakhanya Kindia, Faranah, Macenta, Gah Lola, Bounouma N'zerkore, and N'zerekore.
1998, June, Contributed books to school in Abattoin Secteur 1 community near Faranah.

TABLE 10. IMMEDIATE TERM FOCUSED BENEFITS FOR CAPACITY BUILDING AND SUPPORT FOR SCIENTIFIC RESEARCH.

Resources were provided for infrastructure development for a Guinea NGO, BDCP-Guinea that has members that are scientists and traditional healers. This organization works to facilitate ethnobotanical research collaborations between scientists and traditional healers.
Members of the BDCP-Guinea and the Department of Botany at UGANDC received literature in botany, plant presses, and a GPS (geographical positioning system) to facilitate their botanical research.
Resources for herbarium maintenance at the Institute Valery Giscard d' Estaing in Faranah.
Resources for herbarium maintenance at the Centre de Recherche Agronomique de Foulaya in Kindia.
Voucher specimens of all plants collected for ethnobotanical research are deposited both in the herbarium at BDCP-Guinea and at the Department of Botany at UGANDC. All voucher specimens collected in Guinea are determined at the Missouri Botanical Gardens. These determinations are communicated to the botanists at BDCP-Guinea, Department of Botany at UGANDC, Institute Valery Giscard d' Estaing in Faranah, and Centre de Recherche Agronomique de Foulaya in Kindia.
Resources for herbalist and botanist from Centre de Recherche Agronomique de Foulaya in Kindia to conduct research on efficacy of plants used to treat Type 2 diabetes mellitus.
Five physicians from the University Medical Center in Conakry were trained in ethnomedical research methods to learn about medicinal plants used to treat Type 2 diabetes mellitus.
Physicians from the University Medical Center in Conakry were trained in methods and study design to conduct small human studies on the therapeutic efficacy of medicinal plants used to treat Type 2 diabetes mellitus.
Support for a new program through the University Medical Center in Conakry called, "Phytomedicines for Diabetic Patients."
Antidiabetic activity evaluation of Guinea plants are conducted by Shaman Pharmaceuticals and the results are returned to the physicians, botanists, and traditional healers in Guinea.
Publications on Guinea medicinal plants will include authors from Guinea.

In April 1996, April 1997, and June 1998 Shaman scientists visited and discussed the research collaboration with several top officials at the Universite Gamal Abdel Nasser de Conakry (including the Dean of Faculty of Science and the Secretary General of the University), the Directeur of National de la Recherche for Republique de Guinee, Director of the Guinea Diabetes Association, local governemental officials, traditional medicine healers, and local community members. All these stakeholders were provided written materials in French describing the company's research activities. In these meetings, the philosophy, and objectives of the company were discussed and prior informed consent was established with a spectrum of people and institutions in Guinea (Tables 2–6).

ETHNOBOTANICAL FIELD RESEARCH EXPEDITIONS

In April 1996, April 1997, and June 1998 Shaman scientists conducted ethnobotanical field research with Guinea scientists (botanists, physicians, and a natural products chemist) who

TABLE 11. IMMEDIATE TERM FOCUSED BENEFITS FOR CAPACITY BUILDING AND SUPPORT FOR PUBLIC HEALTH AND MEDICAL ORGANIZATIONS.

1996, 1997, 1998 = $3400 given Guinea Diabetes Association, a non-governmental organization, for medicines and medical supplies to provide health care for low income diabetic patients. A physician and Medical Director of the Guinea Diabetes Association were trained in ethnomedical research methods to study plants used to treat type 2 diabetes mellitus.
Five glucometers, supplies of blood glucose test strips, and diabetes literature were provided to the Diabetes Division at the University Medical Center in Conakry for provision of patient care.
Physicians, ethnobotanists, and traditional healers in Guinea have received workshop training in field research methods in medical ethnobotany. These skills will help them better understand how the traditional botanical medicine systems can contribute to provision of primary care in Guinea.

TABLE 12. IMMEDIATE TERM FOCUSED BENEFITS FOR CAPACITY BUILDING TRADITIONAL HEALERS ORGANIZATIONS AND CLINICS.

Money for infrastructure development of traditional healers organizations on a national level based in Conakry.
Support for Traditional Medicine Hospitals, in Gbily, N'zerekore, Loule Nord, N'zerkore, St. Alexi, Kankan, and in Kankan, Kankan.
Support for Traditional Healer's Association, Siguiri, Kankan, Lola Healers' Association in Lola, and the N'Zerekore Traditional Healers' Association.
Support for traditional medicine clinic & garden, in Ninge bhoye, Nzerekore, and Lola Healers' Association traditional medicine garden in Lola.
Maintenance of urban medicinal plant dispensaries in Almamya, Labe, Kensanbougou, Labe, Daka, Labe, and Dabola, Kankan.
Plant grinder to prepare their medicinal plants provided to traditional herbalists organization in the Abattoin Secteur 1 community near Faranah.

were associated with the Universite Gamal Abdel Nasser de Conakry and members of BDCP-Guinea. The focus of the research was on plants used to treat Type 2 diabetes mellitus and symptoms caused by this disease (Fig. 2–4). Prior to research expeditions in 1996, 1997, and 1998 Guinean scientists traveled to different regions of Guinea and discussed the research collaboration with the communities and healers. The binational team was invited by these communities to collaborate on ethnobotanical research. On each expedition, before the research commenced, the team had direct discussions with the communities and healers about the goals and objectives of the collaboration including benefit sharing. The decision-making bodies in these villages were typically groups of male and female elders, some of who were traditional healers. These communities did not want to sign written agreements. They preferred verbal commitments for collaboration and benefit sharing and gave their verbal consent for research to commence. Ethnobotanical field research expeditions were conducted in Guinea at the following times and places: April 1996 in the regions of Conakry, Kindia, Faranah, and Nzerekore; April 1997 in the regions of Labe, Kankan, Conakry, and Lola; June 1998 in the regions of Faranah, Kindia, and Coyah. Copies of all ethnomedical and botanical data collection forms and plant vouchers were left in Guinea at the end of each expedition.

BOTANICAL SPECIMENS COLLECTED IN GUINEA

Table 7 describes the number of botanical specimens collected from research in Guinea. During ethnobotanical field research expeditions in 1996, 1997, and 1998, voucher specimens and ethnomedical information was collected on 145 different plant species in 118 different genera used to treat symptoms related to Type 2 diabetes mellitus. Copies of the ethnomedical and botanical information and voucher specimens were deposited in herbaria in Guinea and at Shaman Pharmaceuticals. Forty kilograms of dried plant material was collected by Guinea scientists and traditional healers for 21 of the 145 different plant species. This plant material was sent to Shaman's California laboratory facility for analysis of antidiabetic activity.

TABLE 13. IMMEDIATE TERM FOCUSED BENEFITS FOR CAPACITY BUILDING COMMUNITY PUBLIC HEALTH PROJECTS.

Contribution to construction of a clean water well in Dubreka Kindia, and Sasrakoleah Kindia.
Contribution to construction of Health Center in Ghein N'zerekore, and Kouroussa, Kankan.
Support for maintenance of Health Center in Coyah Dialloya Kindia, and Maferinya Kindia.
Money to pay for hospitalization and medicines for seriously ill patients in Bheion Boo-Huona N'zerekore, Loule Nord N'zerekore, and Lola.

TABLE 14. MEDIUM TERM FOCUSED BENEFITS FROM PLANT COLLECTIONS.

Dried bulk plant collections of the most compelling Guinean medicinal plants used to treat Type 2 diabetes mellitus are ordered by the company. The Conakry based botanists work with the traditional healers and local community members to collect bulk materials of specific medicinal plant species. Collections are done only on plant species that are not rare or endangered. The local communities, traditional healers, and BDCP-Guinea all benefit financially from these bulk plant collections. The total amount money that has been paid to these Guinea stakeholders for these collections is $82 000 for the bulk collection of 21 species.

IMMEDIATE-TERM, MEDIUM-TERM, AND LONG-TERM FOCUSED BENEFITS

The focused benefits described in this section represent the compensation and reciprocity that has been provided to Guinea. The operating costs of conducting the research expeditions such as lodging, food, transportation, and communication costs for the Guinea consultants are not considered as part of the compensation or reciprocity focused benefits in Table 8–13. Also the operating costs of the company to maintain the collaboration with Guinea during and in between expeditions is not included as part of the focused benefits received by Guinea.

IMMEDIATE-TERM FOCUSED BENEFITS

Immediate-term focused benefits in the form of both compensation and reciprocity (Table 8) have been provided since the beginning of the relationship with Guinea and will continue throughout the duration of the collaboration. **Compensation** is the daily wage paid to consultants such as the scientists, traditional healers, and local community members that collaborate on the ethnobotanical research. The daily compensation of the traditional healers is equivalent to what the scientists receive. In addition to compensation to consultants, resources are also provided as reciprocity. **Reciprocity** is provided to benefit communities, organizations, and institutions rather than individuals. This form of benefit sharing involves the provision of resources that contribute to capacity building and technology transfer for scientific institutions, public health programs, traditional healers organizations, and local communities (Tables 8–13).

MEDIUM-TERM FOCUSED BENEFITS

Medium-term focused benefits come in the form of financial compensation for dried plant collections for chemical and pharmacological analysis (Table 14). The local communities, traditional healers, and BDCP-Guinea all participate in the collections and benefit financially from providing dried plant materials. The ecology and abundance of each plant species is evaluated and no rare or endangered plants are collected.

LONG-TERM FOCUSED BENEFITS

In addition to short and medium-term focused benefits, long-term focused benefits may also be provided. If a marketable product is developed from research on plants collected from Guinea or any other collaborating country, a mechanism has been established to distribute long-term focused benefits to all the collaborating countries. Half of these benefits will go to the government for support of conservation programs and half will be distributed amongst the different ethnolinguistic groups with whom we have collaborated in each country. The Healing Forest Conservancy (Moran 1996), an NGO established by Shaman Pharmaceuticals, will work with the BDCP-Guinea to maintain communication and distribute long-term benefits to these ethnolinguistic groups to contribute to the conservation of cultural and biological diversity.

DISCUSSION/CONCLUSION

The Shaman ethnobotanical field research methodology in Guinea is a focused strategy to learn about antidiabetic plants. The research involves collaborating with traditional healers who are familiar with Type 2 diabetes mellitus and only collecting those medicinal plants used to treat this disease. We did not collect ethnobotanical information or plants used to treat other diseases. Shaman also has an approach of focused immediate and medium-term benefit sharing. The distribution of these benefits is focused on our research collaborators in Guinea including local communities, traditional healers, medical clinics, medical organizations, scientific institu-

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Fig. 2. Physician Amadou Bah and botanist Gandeka Abdourahmane conduct ethnomedical and botanical interviews with Elhadj Nausira Fode, a Maninke traditional healer from Faranah (June 1998; photo by T. Carlson).

Fig. 3. Traditional healer Mohamed 54 Camara and botanist Bah Mamadou Sannoussy collect *Ravenala madagascariensis* Sonn. to treat Type 2 diabetes mellitus (June 1998; photo by T. Carlson).

Fig. 4. Sekou Ahmed Cisse, a Maninke traditional healer from Faranah is preparing botanical medicine t treat Type 2 diabetes mellitus (June 1998; photo by T. Carlson).

tions, and scientists (Tables 8–14). During field expeditions in 1996, 1997, and 1998, the ethnobotanical research teams collaborated with 58 traditional healers from seven provinces, 42 communities, and seven ethnolinguistic groups including the Maninka, Susu, Kpelewo (Guerze), Pular (Peulh, Fulani), Toma, Mano, and Dialonke. This research generated 145 different plant species representing 118 genera that are used to treat Type 2 diabetes mellitus. The study of traditional botanical medical systems involves the collaboration of traditional healers, people from rural communities, scientists, scientific institutions, medical clinics, and appropriate governmental and non-governmental organizations from the host country. Establishment of collegial relationships between the western scientists and the local healers is essential for developing trust and fluent communication. In compliance with the Convention on Biological Diversity (CBD), prior informed consent with appropriate discussions, agreements, and permission took place with these parties before initiating a research project. This included discussions on the following issues: How medicinal plants would be an alyzed and their potential for commercialization How host country collaborating scientists an traditional healers would be compensated for th time they contribute to the research; and, Hov equitable focused benefit sharing would be dis tributed as reciprocity through support of locall initiated projects that benefit institutions, orga nizations, and communities rather than individ uals. It is the right of host country governmen scientists, traditional healers, and communit members to decide whether or not they will col laborate and provide information on medicina plants. Discussions with the different stakehol ers in Guinea led to the establishment of mutu ally beneficial agreements for collaborative re search. As mandated by the CBD, the host cour try should receive appropriate technology trans fer and benefit sharing from the researc collaboration (Tables 8–14). Provision of ben fits started when the collaboration commence and will continue throughout the duration of th collaboration. Since ethnobotanical field re search began in 1995, the Company has starte

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preliminary evaluations on a variety of medicinal plants from Guinea. There is, however, no guarantee that a marketable product will ever be developed from the collaboration with Guinea. The provision of immediate and medium-term focused benefits has guaranteed that technology transfer and resources for capacity building, have been received by scientific institutions, medical clinics, and communities, even though a commercialized product has not yet been developed. If research on plants collected from Guinea or any other collaborating country results in a marketable product, long-term benefits will be distributed equally among all the countries that collaborate with Shaman. Half of the benefits that Guinea receives go to the seven different collaborating ethnolinguistic groups and half to the Guinean government to support programs in conservation. The Healing Forest Conservancy (Moran 1996), an NGO established by the company, will facilitate the distribution of these long-term benefits.

From 1994 to 1998 benefits totaling over $144 000 US dollars (Table 8) have been provided by the company to scientists, scientific institutions, health care clinics, local communities, traditional healers, and traditional healers organizations. This does not include the overhead costs of communications, transportation, food, research supplies, and lodging for the ethnobotanical field research team and the Guinean collaborators. The provision of these benefits along with educational workshops conducted by company scientists has had some of the following effects: Improve ability of departments at the Universite Gamal Abdel Nasser de Conakry and the Bioresources Development and Conservation Programme-Guinea (an NGO) to collaborate with traditional healers and conduct medicinal plant research; Enhance the understanding and appreciation within the scientific, medical, and governmental communities in Guinea of the importance of medicinal plants and the interconnections between conservation of biological and cultural diversity and human health; Improve infrastructure development for traditional healers' organizations and clinics; and, Support protection of community medicinal plant forests and gardens. The resources that helped support these projects represent immediate and medium-term focused benefits provided long before any drug has been developed from this research. This approach has ensured that whether or not a marketable product results from collaboration, the Guinean scientific institutions, medical organizations, traditional healers organizations, and rural communities are guaranteed focused benefits for capacity building.

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We would like to express our appreciation to the people and traditional healers of Guinea especially from the following ethnolinguistic groups: Dialonke, Kpelewo (Guerze), Malinka (Maninke), Mano, Pular (Peuhl, Fulani), Susu, and Toma. We thank the following institutions for their contributions: Universite Gamal Abdel Nasser de Conakry (UGANC) in Guinea; Bioresource Development & Conservation Program of Guinea; the Direcleur Nationale de la Recherche Scientifique Et Technique, the National Government of the Republique de Guinea in Conakry; the Guinea Diabetes Association (Association Guineene des Diabetiques); Institute Valery Giscard d' Estaing in Faranah; Centre de Recherche Agronomique de Foulaya in Kindia; and, the Centre de Recherche Agronomique de Seredou. We also want to thank Michael Balick and Lyle Glowka for reviewing the manuscript and giving very valuable suggestions. Tegan Churcher contributed valuable expertise on the Convention on Biological Diversity. Lisa Conte, Maurice Iwu, Katy Moran, Susan Nelson, Beto Borges, and Carina Romero all provided valuable comments on this manuscript.

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DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS
Division for Social Policy and Development
Secretariat of the Permanent Forum on Indigenous Issues

WORKSHOP ON FREE, PRIOR AND INFORMED CONSENT
(New York, 17-19 January 2005)

CONTRIBUTION OF THE INDIAN LAW RESOURCE CENTER

CENTRO DE RECURSOS JURIDÍCOS PARA LOS PUEBLOS INDÍGENAS

Indigenous Peoples' Right Of Free Prior Informed Consent With Respect To Indigenous Lands, Territories and Resources

The purpose of this paper is to clarify what we mean and what we understand to be the law in regard to the indigenous demand for "free prior informed consent" as it relates to indigenous lands, territories and resources. It is particularly important that the right of free prior informed consent not be misunderstood and that it not be used as a substitute for indigenous peoples' rights to property, self-determination and other human rights. In all of our human rights work, whenever we focus our attention on one right or one subset of rights, we must keep in mind that our ultimate objective is full respect and protection for all of the rights of indigenous peoples. A cardinal principle of all human rights work is that one human right must never be abandoned or compromised to advance another human right**.**

Indigenous peoples have the right to collective ownership and use of their lands, territories and resources based on their longstanding use and occupancy of these lands and territories. These indigenous rights are recognized in international human rights law, and they arise independently of domestic laws of states.

Indigenous peoples also have the right of self-determination, which includes the right of self-governance. The right of indigenous peoples to self-governance includes the collective right to exercise full authority, free from outside interference or manipulation, over their lands**,** territories and resources.

As a part of their collective rights to ownership of their property and self-determination, indigenous peoples have the right to protect and to determine the use and disposition of

their lands, territories and resources. Indigenous peoples' right of free prior informed consent is one of the particularly important incidents of their collective rights to property and self-determination. The right of free prior informed consent refers to two things: 1) the right of indigenous peoples to forbid, control or authorize activities that are on their lands and territories or that involve their resources, and 2) the right of indigenous peoples to forbid, control or authorize activities not on their lands, but which may substantially affect their lands, territories and resources or may affect their human rights.

The right of indigenous peoples to self-governance, including the right to make all decisions with respect to their lands**,** territories and resources**,** is a collective right exercised through their governments and representatives in accordance with their own laws and customs. Indigenous individuals do not have a right when acting as individuals to authorize or veto any activity affecting the collective rights of indigenous peoples.

Indigenous peoples' right of free prior informed consent includes both the right to make all decisions related to development and other activities affecting their lands or resources and their right to make decisions about activities taking place outside of their lands that may significantly affect them, especially when those activities may affect their human rights. Full respect for indigenous peoples' human rights requires that such activities not proceed without the free prior informed consent of the people or peoples concerned.

For consent to be "free," it must be given without coercion, duress, fraud, bribery, or any threat or external manipulation.

For consent to be "prior," it must be given before any significant planning for the proposed activity has been completed, and before each decision-making stage in the proposed activity's planning and implementation at which additional relevant information is available or revised plans are proposed.

For consent to be "informed," it must be given only after the affected indigenous people is provided with all relevant information related to proposed activities in appropriate languages and formats, including information regarding indigenous rights under domestic and international law, the likely and possible consequences of the proposed activities, and alternatives to the proposed activities. All information must be provided free from external manipulation and with sufficient time for review and decision-making in accordance with the laws and customs of the affected indigenous people.

International law requires that international financial institutions respect all rights of indigenous peoples, including the right of free prior informed consent. These institutions should adopt and implement binding policies and procedures to fulfill their international human rights obligations. Other reasons such as the concepts of social license and development effectiveness, which are not necessarily based in international law, also support the adoption of binding policies and procedures requiring free prior informed consent for both indigenous peoples and non-indigenous communities

There is typically unequal bargaining power as between indigenous peoples and states, international financial institutions, and private development interests. This

requires particular care in ensuring that there is full and fair compliance with each element of free prior informed consent, and that the required indigenous consent is obtained in each phase of the planning, development and implementation of development and other activities affecting indigenous lands, territories and resources. There must also be full respect and protection for all of the other human rights of indigenous peoples. Special measures may be needed in some situations – for example, where development activities affect indigenous peoples living in voluntary isolation – to determine whether indigenous consent may be properly obtained.

Indigenous rights to lands, territories and resources are very often denied recognition or protection under domestic laws. In these situations the right of free prior informed consent is especially important. Large scale development or other activities can permanently remove resources, make land uninhabitable, and effectively destroy indigenous communities that have rightful claims to own the land and resources at issue. As a result, the right of free prior informed consent must be respected in all situations where indigenous rights and interests are claimed, even if the full range of indigenous ownership and governance rights is in dispute or may not be entirely clear or settled.

Fair and effective laws and legal procedures must be made available to resolve disputes about indigenous rights to lands, territories and resources and to help assure that indigenous consent is truly "free", "prior" and "informed." There is an urgent need to strengthen the rule of law at both the domestic and international levels in order to protect all of the human rights of indigenous peoples. Establishing and strengthening appropriate mechanisms of accountability to protect indigenous rights should be a priority concern for all states and for international institutions engaged in development and other activities on or affecting indigenous lands, territories and resources.

CHAPTER 8

Traditional Knowledge, Biological Resources and Drug Development: Building Equitable Partnerships to Conserve, Develop and Respect Biocultural Diversity[1]

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8.1 INTRODUCTION

The protection, utilisation and conservation of Traditional Knowledge (TK) have become an important global issue for many countries, cultures, organisations and peoples. The current international debates and negotiations taking place within many international fora such as the Convention On Biological Diversity, (CBD), the World Intellectual Property organisation (WIPO) and the World Trade Organization (WTO) are focusing on reconciling many fundamental ethical, legal and moral issues. One of the most frequently discussed issues is the potential conflict between the mandates of the CBD and the Trade Related Aspects of Intellectual Property Rights (TRIPS).

WIPO is actively working to understand, define and moderate the complex evolution of the global community's attempts to respect both the IPR system and the holders of TK and biological resources.[2] (WIPO, 2001, 2002a, b, c, d, e, f). Two recent papers by the Head of the Genetic Resources, Biotechnology and Associated Traditional Knowledge section of WIPO have summarised the ethical, moral and legal issues with great depth, clarity and compassion.[3] There are many extremely capable legal experts, diplomats, scholars, social scientists and fortunately increasing numbers of Traditional Knowledge holders (earthcall.org) guiding this debate. The United States Patent and Trademark Office (USPTO) is also trying address the issues associated with patents and the protection of Traditional Knowledge.[4]

In the meantime, local communities and cultures continue to live and seek protection from inappropriate exploitation as well as opportunities to improve, enhance and advance their lives, communities, cultures and ecosystems. This chapter presents two examples of the process of actual direct collaboration with the holders of Traditional Knowledge and the countries in which they live. This discussion provides one other critical dimension to the discussion and debate. In Article 1 of the CBD, there are three well known objectives: the conservation of biological diversity; the sustainable use of biological diversity's components; and the fair and equitable sharing of benefits arising out of the utilisation of genetic resources. There are, however, very few specific discussions of how individuals, organisations, or corporations have worked to address and accomplish these three mandates and objectives. We hope that this chapter contribution will be of use to any groups or organisations seeking to collaborate directly with the holders of traditional knowledge.

After introducing the key issues and themes of this chapter, we will present details of two specific partnerships with the cultures and countries of Belize and Tanzania. Shaman Pharmaceuticals Inc. worked to address the complex issues mentioned above in the course of multiple years of collaboration with local cultures, national scientists and government

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agencies. With this account of two distinct collaborations, we hope to stimulate analysis, dialogue, and discussion on Traditional Knowledge, biological resources, intellectual property rights, and the equitable sharing of benefits. In following sections of this chapter, we present several examples of organisations conducting ethnobotanical research and development activities around the world.

8.2 BIOCULTURAL DIVERSITY AND INDIGENOUS PEOPLES

It is well known that tropical ecosystems are being destroyed at a rapid pace.[5] In addition to the diminishing flora and fauna, human cultures living in the forest are dwindling in numbers as well. As the ecosystems are destroyed, the cultures that depend on it are destroyed as well. The conservation of both biological and cultural diversity, or "biocultural diversity", is essential in conserving both the ecological systems and the human cultures nurturing these systems.[6] Tropical ecosystems have long been a location for both industrial and scientific research. Great discoveries and achievements, as well as financial benefits, have often been accompanied by the exploitation and destruction of genetic resources.

There is no longer any doubt, however, that indigenous peoples must share in the benefits derived from products developed based on their knowledge, technology, and forest management. One of the key question is how these benefits can be distributed in the most fair and effective manner.[7] Obviously, each country and relationship will be different, and ensuring equitable sharing usually involves a complex series of steps. Fair and equitable benefit-sharing is often complex, but not impossible, and efforts should continue to be made.[8] Intellectual property rights (IPRs) are a Western concept originally established to protect commercial inventions.[9] Many feel that *sui generis* legislation may be needed to protect the rights of indigenous peoples.[10] Posey and Dutfield proposed the concept of Traditional Resource Rights (TRR), which are "equitable integrated Rights, including IPR".[11] The concept of TRR may more appropriately reflect the concerns of indigenous people than IPR.[12] These are based on fundamental human rights and include both tangible and intangible resources. They are actually not one set, but a bundle of rights, combining various international

agreements "in an effort to build a solid foundation for more equitable systems of protection and benefit sharing".[13]

8.3 INDIGENOUS PEOPLES' ORGANISATIONS AND MANDATES

Indigenous Peoples are directly challenging the global IPR system. Indigenous Peoples are now leading many of the efforts in IPR, Biological Diversity, and cultural conservation.[14] They have set up organisations such as the Indigenous Peoples' Biodiversity Network (IPBN), the World Council of Indigenous Peoples (WCIP), and the Coordinating Body of Indigenous Organizations of the Amazon Basin (COICA).[15] These are people who constitute less than 4 per cent of the world's population, but make up 95 per cent of the world's cultural diversity[16], and are using the issued mandates and alliances to initiate steps towards positive interpretation and implementation.

The International Alliance of Indigenous-Tribal Peoples of the Tropical Rainforest (IAIP) has released a document, titled "The Biodiversity Convention—the concerns of Indigenous Peoples", which address the objectives of the Convention on Biological Diversity (CBD) and Article 8(j) in particular, calling for support to "help indigenous peoples carry out our own process of mutual consultation on our rights, our knowledge, our biodiversity".[17]

Therefore, in addition to, and possibly more important than, the many international agreements and declarations, there are existing indigenous mandates and charters, often directly stating demands on these issues. These include the aforementioned IAIP's mandate, which explicitly condemns "those who use our biological diversity for commercial and other purposes without our full knowledge and consent".[18]

Quite obviously, there are many methods of collaboration and each case is very different and holds a unique set of circumstances. In addition, each community has its own set of individual needs. Relationships and transactions will always be dynamic and case-specific.[19] As Clay argues in *Generating Income and Conserving Resources: 20 Lessons From the Field*[20], "There is no single blueprint for success." It is up to the individual, company, or institution to initiate these reciprocal partnerships and to follow cultural and national laws. Positive and negative examples should be documented and published so that monitoring, dialoguing, digesting, and assessing these methods are feasible exercises.

TABLE 8.1

Indigenous Mandates and Charters in 1990s

UN Declaration on the Rights of Indigenous Peoples, 1993
Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, 1993
The COICA/UNDP Statement, 1994
Charter of Indigenous Tribal Peoples of the Tropical Forests, 1992
Recommendations from the Voices of the Earth Congress, 1993
Kari-oca Declaration and Indigenous Peoples' Earth Charter, 1992
Consultation on Indigenous Peoples' Knowledge and Intellectual Property Rights, 1995
UNDP Consultation on Indigenous Peoples' Knowledge and Intellectual Property Rights, 1995
World Council of Indigenous Peoples: Declaration of Principles, 1984
UNDP Consultation on the Protection and Conservation of Indigenous Knowledge, 1995

One of the most important aspects in these collaborations at all levels is the role of the indigenous groups, who must become full partners in the negotiations, and be supplied with complete information about the intended research. Highest priority should be given to their ability to accept or reject offers of research collaboration or to negotiate agreements with legal counsel on their teams. Communities will often partake in an equitable collaboration, if the researchers are open and honest about their goals and methods, as well as their commitments to the community, and can guarantee them fairly negotiated contracts and agreements. They may also rely on the reputation of other projects that groups have been involved with and what has been said about them, true or not. Because of both past and ongoing wrongs in research methods, some communities are, for good reason, hesitant to collaborate. There exists, for many, a positive view of the renewed interests in traditional knowledge and natural resources combined with fair compensation. Many

tribal and indigenous communities however, choose not to "share" their healing systems, made up of plant medicines, local ecology, spiritual care, and more.[21] But if equitable sharing and positive biocultural benefits can be attained, partnerships can be amicably made. As one member of Costa Rica's *Kéköl.di* indigenous group has stated: "We are happy to assist scientists who want to analyse the medicinal properties of the plants in our forests. We only ask them to assist us too, in our efforts to protect our forests."[22]

8.4 SHAMAN PHARMACEUTICALS INC.

Shaman Pharmaceuticals was a mid-stage pharmaceutical company in the process of developing traditional pharmaceuticals identified through a multi-disciplinary process of ethnomedicine and ethnobotany, biology, and natural products chemistry. In the Senate Foreign Relations Committee Hearing on the US ratification of the Convention of Biological Diversity, Shaman's CEO and founder, Lisa Conte, testified as to the significance of the Convention for the recognition of both biological diversity and cultural rights. She stressed the Convention's importance, "... because it defines not only biodiversity conservation, but also the sustainable use of biodiversity and of the equitable sharing of benefits that arise out of that use".[23] She also explained Shaman's philosophy and procedures "to equitably compensate indigenous societies for their intellectual contributions to the identification of useful products in the drug discovery process".[24] This was the foundation for Shaman's commitment to several layers of reciprocity, directly related to ethnomedical collaborations with communities, which are discussed below.

8.4.1 Shaman's focused benefit sharing and reciprocity

From the start of the company, and before the Convention on Biological Diversity (CBD) was opened for signature in 1992, Shaman Pharmaceuticals has focused on reciprocity issues through balanced collaborations between the company and the communities with which it works.[25] It has addressed biodiversity and conservation, as well communal compensation and reciprocity at all stages of the relationship. Because traditional knowledge is an irreplaceable cultural resource and direct acknowledgment is inherent, Shaman has set up three time frames for

reciprocity: the short, medium, and long terms. These were developed to provide benefits to communities throughout the drug discovery process. Because of the nature of the pharmaceutical industry, there is a long lead time before a drug is actually on the market, and the company thought it inappropriate to delay reciprocity until this happened. Short and medium term methods address this time issue. Short term reciprocity, which we will focus on in this chapter, devotes 10–15 per cent of the field research funds to immediate community needs, as defined directly by the community. Reciprocity can be in the form of services, or of supplies which are lacking in the community, but this is decided on by the community itself and not by Shaman.

Medium term reciprocity involves projects that transpire in several months or years, and include major parts of the CBD, technology transfer and sustainable development goals. This involves working with local universities, governments, Traditional Healers Associations, Federations, and other groups to benefit the community. These intentions are stated in Article 10(e) of the CBD, which calls for the encouragement of cooperation between government authorities and the private sector in developing methods for sustainable use of biological resources.

Long term benefits are those that are distributed after a product reaches the market. Compensation is carried out by The Healing Forest Conservancy (HFC), a non-profit organisation founded by Shaman Pharmaceuticals, to develop and implement methods to deliver long-term compensation back to the communities with which the company has worked.[26] The overall philosophy is that a portion of company profits will be returned to *all* communities and countries in which Shaman has worked, regardless of where the plant or information that led to its discovery was encountered.[27] This method was designed to provide benefits to a large number of groups, reducing the risk that exists in drug discovery for each individual group. Only a small, unpredictable percentage of products will ever reach the market, so the benefit as well as the risk is spread out among all groups to increase opportunities for compensation and speed up the return time. All of these stages have been discussed in much more detail in previous publications.[28]

Shaman has worked to comply with the CBD and extended the methods of reciprocity and collaboration to include opportunities that were not included in the Convention. Case studies of how Shaman worked to implement CBD policies, principles, and guidelines into applicable research practices are included in publications which provide the details

of collaborations in Nigeria[29], Cameroon[30], Guinea[31], and Uganda.[32] We now add to these case studies a description in the next two sections of how partnerships were created in Belize and Tanzania.

8.4.2 Belize: Ethnobotanical research collaboration

Belize is a small country about the size of the state of Massachusetts. It was previously known as British Honduras until 1973 and gained independence from Britain in 1981. It lies on the East coast of Central America in the heart of the Caribbean Basin, with Mexico bordering to the North, Guatemala to the West and South, and flanked by the Caribbean Sea on the East. On the Caribbean side lies the longest barrier reef (185 miles) in the Western Hemisphere, and the second longest in the world. Approximately 30–50 per cent of the forest is still intact—depending on whose estimates you use—and another 20 per cent is being selectively logged. Although, in some areas, like the South, contracts are being given to foreign logging companies, who control up to 200,000 acres of forest in that region.[33]

The *Maya* were the first known inhabitants of Belize, beginning as early as 1500 B.C. There still exists a significant proportion of *Maya* (*Yucatec*, *Mopan*, and *Kekchi*), making up 7–10 per cent of the population throughout the entire country. In the 17th century, the British arrived to cut mahogany for export. They eventually brought African slaves who now represent the 8 per cent Garifuna (Carib) population. There are actually six distinct cultural groups in Belize in addition to *Maya* (7–10 per cent), including Creole (mixed European and African) (40 per cent), Mestizo (mixed *Maya* and Spanish) (33 per cent), Garifuna (8 per cent), East Indian (3 per cent), and Mennonite (3 per cent) populations.[34]

Like traditional cultural practices everywhere, traditional medicine in Belize is in danger of extinction. Many of the codices (books) that were the written teachings of *Maya* medicine and its practice were burned by the Spanish Conquistadors. The practice or teaching of traditional medicine, along with other traditional practices of the *Maya*, were banned and then declined. Changing from written to oral, this continued for generations until the last few decades, when traditional teachings were felt to be irrelevant to life in the modern world. Healers, ethnobotanists, and interested younger Belizeans have made it their work to chronicle the remnants of Belizean traditional medicine before it is all lost.[35] Many

of the healers who still retain this knowledge are old and work is being done to capture their vast "oral libraries" of healing knowledge. One of the greatest and most well-known *Maya* doctor-priests of Belize, Don Eligio Panti, died in February of 1996. Much of his experience and knowledge died with him.[36] Fortunately, he had worked for years with Dr. Rosita Arvigo and Michael Balick, who recorded many of his uses of Belizean plants. Dr. Arvigo, who was his apprentice, continues to see many of Don Eligio's patients. Don Eligio will not be forgotten, and now, neither will much of his valuable healing pharmacopoeia.

Dr. Arvigo, with Gregory Shropshire and Michael Balick set up the Ix Chel Tropical Research Foundation (IXTRF) in the Cayo District of Belize. IXTRF is a Belizean NGO dedicated to traditional medicine, ethnobotany, Belizean culture, and rainforest conservation. It is home to *The Belize Ethnobotany Project*, a joint project with the New York Botanical Garden to record traditional uses of plants and carry out cooperative studies, such as with the National Cancer Institute, to test rainforest plants for AIDS and cancer fighting substances.[37] It also assisted in the formation of the Belize Association of Traditional Healers (BATH) and the acquisition of Terra Nova, an extractive reserve for medicinal plants.[38] Through the project, a reference collection of plants has been built at the Belize College of Agriculture and the Belize Forestry Department. Creative approaches to reciprocity in exchange for information have been developed. A significant portion of the profits made from *Rainforest Remedies*, a medicinal plant book which Arvigo and Balick compiled and wrote on the healing plants of Belize, have gone to individual collaborating healers to help construct clinics, support apprentices, and to achieve other personal goals further enhancing traditional healing.[39] Conferences, classes, and lectures on ethnobotany and healing have taken place and have helped rekindle the interest of the younger generations, as well as respect for the traditional healer's knowledge. An employee profit-sharing herbal extract industry has also been started, and is run as a cooperative venture with local farmers.

The Healing Forest Conservancy (HFC) has successfully completed several pilot projects to contribute to the discussion of long term compensation. One of these occurred in Belize in conjunction with IXTRF and BATH. Results of all pilot projects are shared with other cultural groups and countries to give them concrete examples for analysis. Because land demarcation is an important aspect and the first step towards sustainable management, it is often one of the highest priorities for

indigenous groups. When BATH sought a way to protect Terra Nova from approaching poachers and loggers, they decided that demarcating the 6,000-acre tract would help and requested assistance. The HFC and the Rex Foundation funded the surveying and demarcation of this area. This successful cooperation between a government, a traditional healers association, and outside groups is a useful example for other groups who desire to demarcate their land. This was the first major collaboration between Shaman, through the HFC, and indigenous groups and other organisations in Belize.[40]

8.4.2.1 Prior informed consent and relationship building

Shaman Pharmaceuticals initiated interest in Belize due to its existing indigenous populations, rainforest and the continued use of traditional medicine by its people. It is one of the over 25 countries, in Latin America, Africa, and Asia that have collaborated with Shaman scientific teams. Michael Balick, an ethnobotanist with extensive field research in Belize was involved in the planning process, as was Julie Anne Chinnock, a natural products ethnobotanist at Shaman, who had lived and worked in Belize previously.[41] A cultural background report on Belize was prepared by Shaman's in-house medical anthropologist as part of the pre-fieldwork preparation, a practice which has been suggested by several authors.[42] The Southwest part of the country was chosen due to the existing *Mopan* and *Kekchi Maya* communities there. An NGO, the Toledo Eco-Tourism Association (TEA), who had expressed interest in working with Shaman, was contacted to seek a possible collaboration with people in the community. This was a NGO set up by, and a representative of, the people in several communities of the Toledo District. It was decided after reviewing their objectives as an organisation and receiving their permission, that they would be an appropriate liaison in order to conduct an ethnomedical field research collaboration. It is important to highlight that other NGO's and groups do exist in the region, but this one appeared to have commendable objectives, was proactive in inviting us to collaborate, had one of the largest representations of the people in the communities, and was accepted by many people in the 14 village areas. Sometimes individuals, groups, or communities can represent themselves in collaborations, but sometimes they do not "have the legal, technical, social, or political expertise or power to effectively structure an exchange in their own interests and may require the assistance of other organisations such as activist NGOs."[43] This is partially the case in Southern Belize,

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although many self-representative groups do exist and are currently forming and reinforcing their presence and objectives in the country.

The self-defined purposes of the TEA were to provide alternatives to ecological destruction, to set up manageable and controlled income-generating activities (including eco-tourism) as the name suggests, to improve public health and education in the district, to protect the environment, and to preserve the culture and the values of the indigenous communities. They are also actively involved in current projects to prevent illegal and destructive logging in the Toledo District.[44]

The Toledo *Maya* still maintain slash and burn farming (milpa) methods. In recent times, their environment is being sacrificed for short term economic gain. Timber concessions are being granted and misguided development schemes are utilising non-sustainable harvest methods.[45] Tourism had become an economic alternative, but was developing into another means of forest and cultural demise. There was, and remains, the immediate need for protection of the indigenous groups residing in this natural area. There are still many traditional uses of the forest in this area, with much knowledge held by the local people. This adds greater strength to the demand that these natural areas be protected from over-development.[46] The TEA was formed to help keep this area from biological and cultural destruction, while producing income for the communities as well. As Jason Clay has argued, "success [in resource use] will only be achieved if very specific local conditions are taken into account in the design and implementation of conservation and development strategies for each community".[47] This is exactly what the TEA attempted to do by concentrating its efforts on a small number of communities and using non-timber forest products and ecotourism in an ecological and productive manner. They received commendations and recommendations from the Rain Forest Action Network and other groups for their efforts in conservation and sustainable development.[48]

8.4.2.2 The prior informed consent process

Contact regarding this research project was established with the TEA in June 1994, in the form of a introductory letter of interest, a proposal to visit and do research, articles describing past collaborations, commitments and research methods, as well as an open invitation for questions and concerns. Prior Informed Consent (PIC) was requested from the healers and the communities. Although Spanish, Creole, Garifuna, and several forms of *Maya* are all spoken in Belize, English is the central language

and is spoken by most people, and therefore the most appropriate language to be used for all written correspondence. PIC is one of the most important aspects of the CBD, and in the context of TRRs and IPRs. It is an authorisation from the communities within the research jurisdiction, based on the description (in the local language) of the intended work, the possible implications, the intended benefits, and among other things, how and by whom the genetic resources will be used. This information gives the communities the ability to negotiate, comply or deny access.[49] The Convention on Biological Diversity addresses PIC in Article 15(5), stating that:

> Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by the Party.

In accordance with the CBD and the important need for PIC, all parties and communities involved in the collaboration with Shaman were fully informed of the company's objectives and goals and the potential for commercialisation prior to the collaborative research being conducted. This is a vital aspect in any research program and needs to be initiated at the beginning of any program and openly maintained throughout the relationship, in order to have enough time to discuss problems, goals, and aspirations before the research begins. There will always be changes and questions and the discussions should be ongoing.[50]

A meeting was held to discuss Shaman's request and to come to a decision on their proposal to begin collaborating. The company's objectives and methods were described to the group and the potential advantages and disadvantages discussed and debated between them. The TEA then decided that they would approve and help facilitate the research, including interviews and plant collections, and that a committee be formed to observe and monitor Shaman's work. Two interested villages extended an invitation. Permission was then granted, in writing, by the TEA Executive Committee.

Planning activities began, such as setting and verifying dates, confirming existing government permits, and picking a convenient date for a follow-up public meeting to discuss details of reciprocity. Discussions of objectives continued via phone and fax, and additional materials were sent upon request. Joint goals were expressed by both parties to be considered and discussed further at the follow-up meeting. Discussions

took place on the appropriate amount of daily salaries each healer and other workers would receive for their work on the project. Specific suggestions on salaries were given by the members of TEA and other Belizean organisations and individuals. Medium and long term benefit information was also relayed both in writing and verbally.

8.4.2.3 Discussions and ethnobotanical research

The field expedition began several weeks later, with the team consisting of Balick and Chinnock, a Belizean herbal healer from the western part of the country, Polo Romero, and a Mexican medical doctor, Silviano Camberos Sanchez, trained in both medicine and ecology. Mr. Romero learned his healing methods while working in rubber, mahogany, and chicle camps. He is now a well-known healer who specialises in treating snake bites. Dr. Sanchez had extensive training in ethnobotany and had worked for 10 years with the Huichol Indians in Western Mexico.

Shaman's ethnomedical/botanical approach to drug discovery was largely based on, and begins with, the work of the field research teams. The representatives from Shaman always included an ethnobotanist and a physician. Both of these team members play key roles in the interviewing and plant collecting process. Most of the healers are experts in various disciplines, including the flora of the region that comprises their botanical pharmacopoeia and the diseases that are present in the geographic area. Having both an ethnobotanist and a physician on the research team enhanced its ability to understand the healers' botanical medicine knowledge.[51]

Upon Shaman's arrival in Belize and before the actual research work began, immediate informal discussions about the collaboration occurred. Individuals spoke with the ethnobiomedical team about the objectives of the research and Shaman's work with indigenous people from other countries. Healers were previously identified by members of the two communities and had accepted the invitation to collaborate. Over a 10-day period, ethnomedical interviews and research activities were carried out, while botanical voucher and bulk collections were made. The team interviewed, in total, four *Maya* healers and one village health care worker/herbalist who provided descriptions of Type II diabetes patients and the local plants used to treat them. Translators were hired in some cases to translate both *Kekchi* and *Mopan Maya*. Collectors were also hired to accompany the team when plant collections were made.

Through direct interviews, conversations, and case presentations of Type II diabetes, the team worked with the healers and discussed signs and symptoms, age groups, and disease identification. They talked about the names given to both the disease and the medicines used. In several field walks of the surrounding forest, the team located and collected botanical voucher specimens for taxonomical identification and plant collections for analysis.

8.4.2.4 Focused benefit-sharing and reciprocity

The community meeting took place on a set date and at least one representative from each village attended. The meeting was composed of mostly TEA members, although several other individuals came. The meeting began with a declaration by the TEA president, that reciprocity should be distributed at the community level and that related decisions should be directed through local cultural councils: Alcalde's Association and the Toledo *Maya* Cultural Council (TMCC) representing all the indigenous people of the local communities. During our time in the field, there was one suggested healer who requested a large personal monetary payment (US$20,000) in exchange for meeting with him. The Shaman team politely declined to accept his offer as Shaman was able to comply financially or according to our previous discussions and guidelines of compensation. These guidelines were based on Shaman's codes of reciprocity and were approved earlier and by this declaration of the Southern group in Belize. The "community benefit" approach to reciprocity is used by other groups as well. This declaration coincides with a vote taken in 1993 by BATH. They decided that reciprocity and profits in ventures with pharmaceutical companies for access to their plants should be returned to the community and not to individuals.[52]

The group then presented a statement of thanks for Shaman's acknowledgment of *Maya* culture and the healers' knowledge. This *acknowledgment* was and is *extremely important* to all the culture groups that we have collaborated with. It is an issue of *fundamental dignity* and *respect* which is outside the realm of money and contracts. They also expressed concerns about the false promises they were given by researchers in the past, citing specific examples of graduate students and anthropologists who had lived in their communities for lengths of time and had failed to send "even a photo or a copy of their theses or books."

The Shaman team then thoroughly explained the company's purpose and objectives, and reciprocity was discussed in great detail. Everyone in attendance introduced themselves and each individual stated their thoughts and opinions and asked questions. Ideas of short-term reciprocity were offered by the community members and one idea was formally presented to build several village nurseries to promote reforestation and the growth of non-timber crops. This project was to be part of a larger project that was then being proposed to the Belizean government. Three nurseries were to be built to initiate re-forestation, research, and employment for the members of the community. The intention was to eventually grow medicinal plants, fruit trees, and other economically viable crops to help support these communities. It also included training and workshops on sustainable crops and development. This was an opportunity which could, eventually, be open to all villagers, for education and income generating purposes.

There was another extensive long-term project suggested which was deemed unfeasible and beyond the available budget. After some discussion, a vote was taken and a majority decision was reached to proceed with the nursery project. Informational packets about the company, papers detailing past projects and collaborations, and 60 copies of *Rainforest Remedies*[53], a book on Belizean Medicinal Plants, were distributed to all the attendees and for reference at the community health centres in each village.

In accordance with our standard procedures, during the course of our research we adhered to things that all responsible field research teams do. We provided emergency medical care and transport. We held a supplemental one day health clinic at the community's request, treating over 60 people with minor ailments. The clinic was held with Dr. Camberos Sanchez and the village health worker/herbalist working together. The traditional healer and Dr. Camberos Sanchez made joint evaluations of most of the patients. Some of the patients were prescribed or treated with botanical medicines from the herbalist. The Western medicines were provided by the medical physician, when needed, and were regarded as a complement to their own therapeutics.

Compensation for daily wages was given for translators, healers, collectors, and other local participants. Payment was given for food and lodging, through the TEA's existing Homestay program. As part of medium term reciprocity, a commitment was given to return and to hire people in the same communities for potential recollections. This was done nine months later, when a plant that a local healer suggested was collected in a greater quantity for testing. The Shaman team also sent photographs and written material from their trip back to the villages. Voucher specimens of each plant collected, with collection data, were identified and mounted on archival paper and sent to the Belize College of Agriculture and the Belize Forestry Department. Test data from all analyses carried out on Belizean plants was sent to several organisations in Belize, including Ix Chel and the TEA.

8.4.2.5 Observations from Belize

Here are some observations highlighting both the advancements and limitations that the team experienced. The biggest challenge that may be encountered in any work with communities is finding a group that is representative of the whole community. Although the TEA is a progressive, productive group, not all of the members of the community were fully represented by them or by any organisation that we found in the country. There were some other more encompassing groups, such as the Toledo *Maya* Cultural Council, suggested by members of the community while we were there, and these groups will most likely be facilitators for extended medium and long term reciprocity arrangements. Along these same lines is deciding on a project for reciprocity that would affect the community as a whole. The project that was chosen does have a direct impact on many people and an indirect one on even more, yet it is not something that all community members chose to participate in. There are existing factions in these communities which can make these and other decisions even more difficult.

This research did stimulate much discussion in the community, and created links where they did not exist before. People met to discuss the threat of losing their important traditional knowledge and culture. The research, as well as the discussions, reinforced the interest in traditional knowledge. The Belizean herbal medicine book, *Rainforest Remedies*[54], was widely valued and more copies were requested by and sent to schools and community organisations. Many children participated, watched the research and collection activity and expressed a new interest in the healers. This project also helped to generate discussions for future research and benefit sharing projects with Shaman and others. It also eased some of their doubts about working with researchers and helped prepare them for negotiations regarding the sharing of future equitable benefits.

During the course of our work, a US researcher, Jeffrey Augello, a student at the School for International Training, requested to accompany us in the field. He had previously studied Shaman's objectives and observed and documented our work. He had discussions with numerous people in the communities before, during, and after the team was there. He then compiled a report entitled *Bridging the Gap: An Analysis of the Pharmaceutical Industry and Their Emerging Role in the Conservation Movement* which was distributed later in the US and Belize. Mr. Augello's unbiased observations were very much an asset to our research. As part of his assessment, he came to four main conclusions about the community's opinion of our methods and research:

1. The majority of villagers showed support and participated in the project;
2. Those who knew Shaman's purpose, but chose not to participate, still supported the research;
3. Those who knew little about the company or project, showed little reaction or interest;
4. Those who knew even less or were unaware of the company or project, were interested in participating in the future and learning more about the project.

For the purposes of self-assessment, there were additional lessons which we collectively learned overall through our own observations and all channels of feedback:

1. It is important to continue to attempt to *identify* an organisation that *represents all or the majority of the communities' interests*, or to personally contact all representative parties and groups in the communities in which we work.
2. It is essential to keep *prior informed consent* as an integral part of the conception and planning of a project. This should be done well *in advance of the research* taking place to accommodate communication limitations, and so that the largest number of people have the opportunity to participate in the collaboration and decision making discussions.
3. *Feedback*, in the form of relevant publications and results, should be provided to the communities, especially schools, clinics, and health care centres to further their knowledge and interest in traditional healing and medicine.

4. *Reciprocity* should be initiated from the community and be focused on strengthening the majority of the community directly or indirectly. Reciprocity should be an issue discussed before, during, and after the entire research process, so as to allow time and thought for a realistic assessment of the risks and options, and the value of intellectual and natural resources.

8.4.2.6 Follow-up and conclusion

For several years after the field research occurred, there was frequent multi-lateral communication between Shaman, the TEA, the individuals who assisted in the research, the Belizean government, and others. A Biodiversity Task Force Working Group was formed by the Belizean Department of Forestry in order to discuss the key issues unfolding related to research and natural resource collections. The TEA has proceeded with the nursery project using the funds supplied by Shaman. They have built three nurseries in separate villages and are planning to expand the projects to more villages and incorporate them with their Community Conservation Areas for further research, education, and income-generating projects. They have held several workshops on botany, nursery and agroforestry practices in these communities and are currently growing a variety of species in the nurseries. The test results of the plants collected in Belize that Shaman sent back are being shared with the local traditional healers and health workers. The TEA was awarded the world prize for socially responsible tourism in Berlin in 1996.

By utilising a combination of the various laws, declarations, and mandates that now exist, and striving to comply with the CBD, stressing factors such as PIC and focused benefit sharing at various stages, effective research combined with fair and equitable benefit-sharing and reciprocity can be a foundation for equitable partnerships.

8.4.3 Tanzania: Ethnobotanical research collaboration

Tanzania has a population of 30 million and over 100 cultural groups. Traditional medicine is thriving in Tanzania as it is throughout the rest of Africa.[55] Many African nations, such as Nigeria, have officially incorporated traditional medicine practitioners into their national public health care programs.

In 1991 Shaman was contacted by Mr. David Scheinman of the Tanga AIDS Working Group (TAWG) and Rural Development Associates (RDA). The TAWG is an interdisciplinary group that links physicians, health workers, traditional healers, people living with AIDS (PLWAs) and social scientists. TAWG focuses on increasing research on medicinal plants that show promising results in the treatment of HIV/AIDS patients in Pangani, Tanzania.[56] The core focus of TAWG is to treat people living with AIDS (TAWG has treated 4,000 people as of 2004) with traditional medicines, provide compassionate care and conducts applied ethnomedical research. The efforts of TAWG was sought to bridge the gap between traditional and hospital medicine, and to provide much needed integrated health care to PLWAs.

The initial collaboration involved Shaman providing literature searches on the biology, chemistry and efficacy of many of the plants utilised to treat people living with AIDS. The literature data provided by Shaman indicated that there was data which supported the use of several of the treatments used by the traditional healers, including a treatment for oral thrush, a major opportunistic infection caused by AIDS. This type of data was important and well received by the TAWG.

In 1992 one of the authors, Steven King, visited the Tanga region, met with healers, patients, and nurses from the hospital and other biomedical staff. As part of this initial process, Shaman provided a US$2,000 contribution to support the collection, preparation and delivery of traditional plant medicines to patients in the Tanga area.

Through discussions and correspondence, Shaman and TAWG agreed to proceed with an exploratory visit by a Shaman-trained physician who was also a skilled ethnobotanist. In 1993, Dr. Charles Limbach worked for one month in the Tanga region and trained local healers, physicians and technicians in Shaman's ethnobotanical field research methods. The skills learned in this exploratory collaboration were utilised by the TAWG group to further their own primary objectives and to collaborate with Shaman and with other international and national organisations.

8.4.3.1 Relationship and capacity building

In 1994 scientists from the Institute of Traditional Medicine (ITM) at the Muhimbili University College of Health Sciences in Dar es Salaam contacted Shaman about a potential collaboration. One of the ITM's mandates is to research and provide recommendations on the safety and efficacy of traditional plant medicines of importance to public health in Tanzania. The ITM had been collaborating with the United States National Cancer Institute (NCI) as well. In this relationship, medium term focused benefit sharing was initiated first, followed by a workshop exchange as a form of capacity building and technology transfer.

In September 1994, Shaman sponsored the Director of the ITM, Dr. Rogasian Mahunnah, to attend a meeting on intellectual property rights held in Costa Rica by the American Society of Pharmacognosy. Dr. Mahunnah then visited Shaman's facilities in California to review our facility and operations. Shaman then began financially supporting the research programs of the ITM, including US$11,274 for an ITM diabetes research project. The ITM also requested literature searches and equipment for their laboratory facility.

8.4.3.2 National level prior informed consent and agreements

Shaman submitted an Agreement of Principles to the ITM and Muhimbili. This contractual agreement had been utilised by Shaman in multiple countries. In each previous case, collaborating countries, NGOs and culture groups modified and negotiated a variety of aspects of the agreement. In Tanzania, the Board of the Muhimbili University reviewed the draft agreement and began a process of negotiation. While the agreement was being negotiated Shaman was invited to Tanzania to conduct a capacity-building workshop and to initiate collaborative field research. Shaman sent an ethnobotanist and physician team, comprising of Ms. Rowena Richter and Dr. Kariem Ali, to conduct the workshop and field research.

The ITM had expressed interest in evaluating Shaman's ethnomedical field interview methodology. The ITM scientist planned to combine our methods with their own expertise to enhance their capacity to engage in plant medicine research for public health issues in Tanzania. Once the Shaman team had obtained the required research permits they conducted a four-day workshop. The workshop was held in Tanga, Tanzania in collaboration with the previously described TAWG. With their previous success in integrating traditional medicine, healers, health care workers and the local hospital, TAWG provided expertise for the workshop. The workshop involved 14 participants, representing five Tanzanian community health and conservation organisations. The four days involved lectures, interview techniques, and all technical aspects of documenting the preparation of phyto-medicines.

8.4.3.3 Prior informed consent and focused benefit-sharing in Mwanga and Moshi districts

Two weeks before the workshop and the field research, a scientist from the ITM visited the villages that the Shaman team hoped to work with. Those communities that wished to potentially collaborate gave their prior informed consent to meet with the field teams.

Before the research teams visited any villages in Mwanga, traditional healers and traditional birth attendants representing each village met with the research teams in a central location. A total of 44 men and women attended the meeting, including the chairman and secretary of the Mwanga Association of Healers, and district medical officer. Speaking in Swahili, Tanzania's national language, Shaman's research and development focus was described and explained to them. The meeting lasted for several hours and the representatives of the villages related their past negative experiences with researchers who had not provided compensation or reciprocity and who never returned to share their results. The Shaman team described its multiple levels of focused benefit-sharing, and informed them that each healer would be paid for their time, knowledge and expertise. After a dialogue between the parties, the representatives gave their prior informed consent for the teams to conduct the interviews. It was also requested that the same group meet again a second time after the interviews in the villages had been conducted. The research team conducted the research over the next five days. The second meeting began with the Shaman research team inviting comments on their work. The healers mentioned that it would have been better if more time had been allowed to discuss the plant medicines during the interviews.

The discussion then moved on to the immediate focused benefit-sharing arrangements. In every Shaman research collaboration, 10–15 per cent of the overall budget is designated for immediate focused benefit-sharing with the communities. The funds in this case, a sum of US$6,750, was divided equally between the Mwanga and Moshi districts. The people of each district determined how they wished to allocate the funds for the benefit of their respective communities. The Shaman team learned that the timing of the benefit-sharing discussion was important. The team had followed the advice of the chairman of the Mwanga Association of Healers, Mr. Milkiel Msemo, and had not brought up the topic of focused community benefit-sharing at the first meeting. Several healers at the meeting informed the Shaman team that they had demonstrated proper respect by discussing focused community benefits at the second meeting after the work was done. The Shaman team was told that if they had brought this topic up at the initial meeting, it would have easily been misinterpreted as insulting behaviour.

At the time of this research project, the Mwanga Association of Healers had been experiencing internal strife, and the meeting and the research team's visit helped re-invigorate the organisation. One of their revised goals was to work more closely with the physicians in the government hospitals for the benefit of their patients. The group agreed that the establishment of a central office would help their organisation gain strength, as well as credibility, and help them towards their goal of increased integrated collaboration. The association was not ready to build this facility at that time and they asked us to hold the funds that we had committed until they were ready to begin construction. The Shaman team agreed and the director of the ITM later facilitated the transaction. The association built what they had visualised, which comprised offices, wards and a laboratory. The Government of Tanzania gave them 15 acres of land on which these structures were built. A medicinal plant garden was planned for another plot of land.

In the Moshi district, prior informed consent was discussed and granted in each of the five villages. After the discussions, one individual healer chose to not participate. When the interviews were completed, each village determined how they wished to utilise the resources made available to them under the focused benefit-sharing arrangements. They requested that the Shaman team purchase and deliver building materials to them rather then giving them the actual funds. This request was honoured by the Shaman team. The Village of *Uchira* decided to purchase the materials necessary to install electricity and lights in the local health clinic so that women delivering babies at night would be able to do so with adequate light. The *Mayuyuni* village had a partially constructed health clinic made from local bricks and they elected to purchase 45 bags of cement to complete its construction. Women in the village of *Mayuyuni* had been travelling to the nearest clinic to deliver babies, often having to pay as much as a year's wages for transportation. The community was therefore eager to complete their clinic. Two other villages elected to buy mattresses, sheets and blanket for their clinics. The women participated actively in the decisions made on the type of focused benefits that each village chose to receive. It appeared that they influenced the

choices made in the five communities and steered the discussions towards issues that affected women, children and childbirth in the community.

8.4.3.4 Follow-up, data return and conclusions

After the field research described above, the Shaman/ITM team returned to Dar es Salaam and presented a summary of its work to the physicians and officials at Muhimbili. Copies of the data forms and duplicates of the plant herbarium specimens were deposited at the ITM, Tanzania Forestry Research Institute and the National Herbarium. There was also continued focused benefit-sharing in the medium term. After this the Shaman team returned to the United States, and a taxonomist at the Missouri Botanical Garden identified the plants. These determinations, along with newly published scientific names and supporting literature, were sent to the botanists at the ITM for them to review. Shaman also provided an additional US$11,274 for a second phase of research support for ITM's research programs. Shaman also continued to return data from the biological assays on Tanzanian plants, as part of its agreement with Tanzania.[57] This data return has proved beneficial to the treatment of patients in Tanzania.

One specific plant, called *Zingiri*, demonstrated activity in an in-vitro cell-based assay of herpes simplex, a viral infection that is often pronounced in people with weak immune systems. Prior to learning of the Shaman anti-viral data, Mr. Kassomo, a regional traditional healer had been utilising *Zingiri* to treat mouth sores. After learning of this lab data, Kassomo began treating patients suffering from herpes zoster and other herpes viral infections. The results were promising. As a result, this well-known local plant medicine has become widely utilised in the Tanga Aids Working Group treatment programs. Mr. Kassomo began to deliver the plant medicine to the Bombo Hospital and it is also being utilised to treat fungal infections.[58] Mr. Kassomo has become well-known for his herpes treatments and patients come to him from Kenya and Tanzania to receive treatment. Shaman did not pursue any research or development on this plant or any compounds from it. This is an example of an important local public health benefit.

In September 1996 an ethnobotanist, a physician from the ITM and four *Masaai* were sponsored by Shaman to attend a meeting of the International Society of Ethnobiology in Nairobi and a public health workshop was conducted by Dr. Thomas Carlson, the head of Shaman ethnomedical field research.

The relationship between Shaman and Tanzania was initiated as a long term partnership. Between the years of 1992–1997 a total of US$226,577 was invested in a combination of research support, focused benefits, purchases of research materials and reciprocity. The numerous partners in Tanzania continue to collaborate with a diverse set of national and international partners to research, develop, utilise and conserve the rich biocultural diversity of this country.

8.5 ORGANISATIONS UTILISING TRADITIONAL ETHNOBOTANICAL KNOWLEDGE IN RESEARCH AND DEVELOPMENT PROGRAMS

8.5.1 International Cooperative Biodiversity Group (ICBG) projects in Nigeria, Cameroon, Suriname, Peru, Vietnam, Laos and Mexico

The objectives of the International Cooperative Biodiversity Groups (ICBG) are to focus on natural products drug discovery, economic development and biodiversity conservation. The accomplishments of this program over the past 10 years are impressive and the specific programs have been described in detail elsewhere.[59] In addition to the bioactive compounds isolated, scientists trained and research conducted, the program has been the most transparent government-sponsored international experiment conducted to date, testing the various processes and methods of implementing the guiding principles of the Convention On Biological Diversity. The ICBG program requires and has a strong focus on prior informed consent. The ICBG participants must demonstrate agreements that provide for the protection of traditional knowledge and IPR contracts that are linked to benefit sharing.

The ICBG program provided 11 major grants between 1993 to 2002. Ethnobotanical and ethnomedical research has been utilised in varying degrees in nine of these 11 major grants. All of these nine major grant programs also utilised a variety of other research and collection activities. The research programs that put the largest emphasis on ethnobotanical and ethnomedical knowledge in the drug discovery process were the programs implemented in Cameroon and Nigeria[60], Peru[61], Vietnam and Laos[62], Surinam and Madagascar[63], and Mexico; a program that was ultimately cancelled.[64]

The ICBG programs are highly dynamic and complex in their goals, methods and accomplishments. No single, simple objective can be identified, measured or highlighted. Several of these programs placed a high priority on anti-malarial and anti-parasitic diseases such as the *Drug Development and Conservation of Biodiversity in West Africa*[65] program and *Peruvian Medicinal Plant Sources of New Pharmaceuticals*.[66] In the West African program, ethnomedical field research methodology yielded a 69 per cent activity rate out of 500 anti-malarial extracts tested. Activity rates of 40–48 per cent were reported for other parasitic diseases such as *leishmania* (40 per cent) and *trypanosomiasis* (48 per cent). In addition, a total of 47 isolated and characterised molecular leads for drug development activities were isolated in this program as of 1999.[67]

The ICBG program in Peru has also demonstrated the importance of collaborating with traditional healers who treat malaria. This research team demonstrated that anti-malarial-targeted ethnomedicinal plants utilised by the *Aguaruna* communities yielded a statistically significant number of anti-malarial extract leads when compared to plants collected on a random.[68]

The demonstrated utility of ethnobotanical research to identify anti-parasitic extracts and compounds around the world should lead to increased collaboration with traditional healers in many cultures. It is likely that a number of infectious diseases can be effectively managed with local botanical and phytomedicines. These treatments are being evaluated and, when shown to be safe and effective, should be made available as standardised extracts in regional public health programs. There are efforts underway to do this in Africa, Southeast Asia and Latin America.

8.5.2 South Africa, the *San* Bushmen, Phytopharm plc and P57

The South African Council for Scientific Research and Industrial Research (CSIR) received a patent on an extract of the *Hoodia* cactus in 1996. This *Hoodia* cactus has been part of the traditional knowledge of the *San* Bushman of Southern Africa for centuries. The *San* use this species to suppress appetite and thirst when they search for food in the desert or during times of famine. In 1997 CSIR licensed this extract, now called P57, to a small British pharmaceutical company Phytopharm plc. This development stage

product P57, derived from the traditional knowledge of the *San* Bushman, is being investigated for its ability to treat obesity and has a very large sales potential. In the United States, is it estimated that there are 35–65 million obese people. In 1998, Phytopharm plc subsequently licensed P57 to Pfizer Pharmaceuticals, one of the largest pharmaceutical companies in the world. In 2001, the *San* Bushman threatened to take legal action against CSIR because no access or benefit-sharing agreement had been made with the *San* to allow CSIR to patent and license this extract based on the indigenous knowledge of the *San*.[69] In March 2002, the *San* and CSIR created a memorandum of understanding which recognised the *San* as the custodians of traditional knowledge associated with the uses of a large variety of plant materials, including the *Hoodia* cactus.[70] The *San* in turn acknowledged that it was necessary for the CSIR to protect the work that had been done in isolating the active ingredient in the plant by patenting it in the CSIR's name. Finally, in March of 2003, the CSIR issued a press release stating that the *San* and CSIR had created a benefit-sharing agreement for the potential anti-obesity drug P57. This was the reverse of how the process *should* have taken place: the CSIR should have initiated the PIC, access and benefit sharing process *before* beginning work on the *San* Bushman pharmacopeia.

In July 2003, Phytopharm plc announced that Pfizer had decided to halt its clinical development of P57 for the treatment of obesity and to return all rights to Phytopharm. Phytopharm has indicated that a great deal of pre-clinical and clinical data had been generated with Pfizer and that they would now seek another partner to complete the product development.[71]

The problems with the timing of the access and benefit-sharing process and agreement highlight the importance of following proper procedures when working with the holders of traditional knowledge. The ethnobotanical knowledge of the *San* Bushman and the discovery of P57 is, however, another example of the effectiveness of collaborating with the holders of traditional knowledge.

8.5.3 Ethnobotanical research in Samoa: The antiviral compound *Prostratin*

Prostratin was identified during field studies in Western Samoa, by Dr. Paul Cox, an ethnobotanist from Brigham Young University and

currently the Director of the US National Tropical Botanical Garden. His primary sources for information about this plant were two Samoan healers, Mariana Lilo and Epenesa Mauigoa, both of whom died in 1993. The healers were using the bark from the stem of the mamala tree to treat a disease they called *fiva samasama*—"yellowing fever," or hepatitis. The bark was used to treat viral infections; the leaves were used to treat back pain; and the root to alleviate diarrhoea. These elderly women also taught Dr. Cox details of 121 different herbal remedies from 90 species of flowering plants.[72]

Selected samples of these native remedies were sent to scientists at the US National Cancer Institute (NCI), where plant-derived substances are routinely screened for activity against different diseases. In 1992, Dr. Michael Boyd and his colleagues at NCI isolated the active chemical from the samples, *Prostratin*, and discovered its powerful effects against HIV, which suggested that *Prostratin* could be used to activate viral reservoirs.[73] HIV reservoirs are a barrier to curing the HIV infection. They may persist for up to 60 years in some patients and are where latently infected cells continue to be present after acute HIV infection. These latently infected cells are invisible to the immune system and are not susceptible to available anti-viral drugs. Many international leaders pursuing HIV and AIDS research and therapy now see latent virus activation as a possible strategic requirement for future advances in the therapeutics of HIV infection and AIDS.[74]

The Medical Director of the AIDS Research Alliance (ARA), Stephen J. Brown, M. D., took notice of NCI's work with *Prostratin* in 1999 and began to direct research on the compound. Most recently, a study in the November 15, 2001 issue of the journal *Blood* confirmed the earlier work of researchers at several institutions—including NCI, ARA and UCLA—where it was learned that *Prostratin* exhibited dual action, inhibiting HIV replication while activating dormant, or "latent," HIV.[75]

In one study, researchers at the NCI and Jefferson Medical College in Philadelphia demonstrated that *Prostratin* could activate dormant HIV in cells taken from HIV-positive patients. The authors suggest that future studies should examine combination therapies involving *Prostratin* and other anti-HIV drugs to activate pockets of dormant HIV in the hope of eradicating the virus.

Data from Dr. Jerome Zack at UCLA indicates that *Prostratin* can induce replication of the latent pool of virus without initiating T-cell replication.[76] Highly active antiretroviral therapy (HAART) often reduces viral load to undetectable levels and can significantly delay progression to symptomatic AIDS. But HIV remains hidden or dormant in various "reservoirs" of the body, and the viral "rebound" that almost always occurs when antiretroviral therapy is discontinued is largely due to continued replication of HIV within these reservoirs despite HAART.

Dr. Zack has described his next research steps[77]:

> Further in-vitro studies will be performed to fully define the effects of *Prostratin* on cells in the immune system. Collaborative studies are planned to assess the effects of *Prostratin* in SIV models, with the eventual intent of bringing this type of approach to clinical trial in infected patients.

Ultimately, the likelihood is that *Prostratin* will be tested as an adjunct to HAART—possibly in combination with additional therapies to boost immune response or target cells that are actively producing the virus. Recently published data has amplified the importance of trying to solve the problem of the latency of the HIV virus.[78] Clearly this compound, derived from a partnership with indigenous healers, has already provided significant medical and scientific advances in field of basic AIDS therapy research.

In August 2001, the AIDS Research Alliance signed an agreement with the Prime Minister of Samoa that was facilitated by Dr. Cox, guaranteeing that a total of 20 per cent of all ARA profits from the development of the antiviral drug *Prostratin* would be returned to Samoa according to the following formula: 12.5 per cent to the government, 6.7 per cent to the village, and 0.4 per cent to each of the families of the two healers who participated in the research. Prior to this national-level agreement, the village council of Falealupo, Samoa negotiated a convenant called "The Falealupo Covenant." This agreement focused on the equitable transfer of benefits as part of the process of collaborative field research. As of 2001, more then US$480,000 in benefits—including schools, medical clinics, water supplies, an aerial rainforest canopy walkway and an endowment for the rainforests—have been transmitted as a result of this covenant.[79]

8.5.4 MerLion Pharmaceuticals Pte. Ltd., Singapore

MerLion Pharmaceuticals was founded in 2002 as one of Singapore's first drug research and development companies. MerLion was created through the privatisation of the former Centre for Natural Products Research (CNPR). The CNPR was established in 1993 to screen natural products samples for new pharmaceutical leads. MerLion acquired all the assets of CNPR, including the natural product library of GlaxoSmithKline (GSK), which is one of the world's largest and most diverse natural product samples. The natural product library of GSK includes natural products derived and isolated from soil samples, marine organisms and terrestial plants. This GSK natural product library, like most large natural product collections, is likely to contain a relatively small number of plants collected based on their use by indigenous peoples of Southeast Asia and other regions of the world. The approach of MerLion is based on high throughput screening, natural product chemistry and medicinal chemistry. Their focus is on the discovery of novel bioactive compounds. MerLion has already established screening partnerships with large pharmaceutical companies such as Fujisawa Pharmaceuticals Co. Ltd., Merck & Co. Inc. and Abbot Laboratories. The company does not conduct ethnobotanical field research. MerLion does, however, explicitly state its company policy: "A significant portion of any royalty payment is expected to be shared with the indigenous local communities in which the samples were collected to support science training and education."[80]

8.5.5 Napo Pharmaceuticals Inc.

One example of a late stage product that is based on collaboration with indigenous people and traditional knowledge is the anti-diarrhoea compound SP-303. This compound was originally developed by Shaman Pharmaceuticals Inc. It was purchased by Napo Pharmaceuticals Inc. in December 2001.

SP-303 was isolated from a plant that is utilised by indigenous people in the Northwestern Amazon basin of South America to treat diarrhoea and other gastro-intestinal problems.[81] SP-303 works via a novel mechanism of action that inhibits the secretion of chloride ions without causing constipation or other side effects associated with opiate-derived anti-motility drugs.[82] SP-303 is well suited to treating cholera and 900,000

doses have been provided for free, as a dietary supplement, to 26 countries in Latin America, Africa and Southeast Asia. There are two pathways through which this compound is being developed for international utilisation. One pathway is the traditional pharmaceutical development of the compound for Irritable Bowel Syndrome (IBS-D diarrhoea predominant), and HIV-associated diarrhoea in both developed and lesser developed nations. The other path is being pursued by a non-profit pharmaceutical company to develop and distribute this compound as a very low cost treatment for paediatric diarrhoea in the biodiversity-rich countries. Paediatric diarrhoea kills more then two million people each year and access to safe, low-cost anti-diarrhoea therapies are urgently needed.

Napo Pharmaceuticals Inc. has adopted the long-term benefits-sharing obligations of Shaman Pharmaceuticals Inc. Napo Pharmaceuticals will utilise the Healing Forest Conservancy (HFC) as the mechanism to implement the long-term benefit-sharing process described in the earlier sections on Shaman Pharmaceutical's benefit-sharing processes.

8.6 RESPECT, DIGNITY AND INTELLECTUAL CREDIT

Some of the most important concerns of indigenous peoples that have collaborated with Shaman Pharmaceuticals Inc. were the issues of respect, dignity, intellectual credit and acknowledgement. In fact the Western IPR system has not yet been able to appreciate or reconcile this fundamental issue. Indigenous peoples wish to be recognised and accorded proper respect for their intellectual contributions to the world's pharmacopia. The US patent system does not allow for a healer, who may have guided scientists to a plant that has yielded important pharmaceuticals, to be recognised as a true "inventor." The list of pharmaceuticals that have been developed based on traditional knowledge is well-known.[83] The authorship of a scientific paper and contracts that provide for benefit-sharing does not address this problem. Textbooks in high schools and medical schools should confer the appropriate intellectual credit to the relevant indigenous communities as a matter of dignity, ethics and respect for the past, present and future innovations that indigenous peoples have provided to the global health care system.

8.7 CONCLUSION

The complex legal and policy issue associated with the use of traditional knowledge and biological resources will require medium and long term international analysis, negotiation and some changes in the international regimes of access and benefit-sharing. This process of change will require time, patience and active listening to traditional and indigenous communities. During this process of change, some traditional communities will continue to seek equitable opportunities to develop and conserve their traditional knowledge and biological resources. The authors hope that the experiences described in this chapter may provide some useful examples so that local partnerships can be created in the midst of the international negotiations on access, benefit-sharing and legal regimes. There is no doubt that cultural diversity and biological diversity is disappearing at a dramatic rate. Any and all approaches that can support the long term vitality of communities and their ecosystems should be pursued in a respectful and collaborative manner.

ENDNOTES

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Contents

9. International trade in indigenous cultural heritage: an argument for indigenous governance of cultural property

Rebecca Tsosie*

1. INTRODUCTION

This chapter examines the possibilities, advantages and limits of adjusting international trade law to protect indigenous cultural heritage, focusing on the international law dimensions of tangible forms of indigenous cultural property, as a distinctive category of cultural heritage.[1] Specifically, I address how indigenous peoples are defined within international cultural property law and how that body of law handles questions of indigenous culture, including definitions of traditional knowledge and traditional cultural expressions. Finally, I explore how indigenous peoples are represented, procedurally or otherwise, within international organisations and institutions.

The overriding issue, of course, is whether it is possible to adjust international trade law to protect indigenous cultural heritage. Specifically, what rules might promote fair trade in indigenous cultural heritage? Many scholars have written important work highlighting the unique nature of cultural expression within indigenous societies and the challenges of reconciling indigenous cultural systems with international trade law.[2] The implicit premise of many scholars is that international trade is the engine for globalisation and our

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[1] Although I reference intangible cultural heritage and assert the relevant linkages between intangible and tangible forms of cultural heritage, primary discussions of that topic in this volume are found within Christoph Antons, 'Intellectual Property Rights in Indigenous Cultural Heritage: Basic Concepts and Continuing Controversies'; Martin Girsberger and Benny Müller, 'International Trade in Indigenous Cultural Heritage: An IP Practitioners' Perspective'; and Rosemary J. Coombe with Joseph F. Turcotte, 'Indigenous Cultural Heritage in Development and Trade: Perspectives from the Dynamics of Cultural Heritage Law and Policy', in this volume.

[2] See, for example, Christoph B. Graber, 'Institutionalization of Creativity in Traditional Societies and in International Trade Law', in Shubha Ghosh and Robin P. Malloy (eds), Creativity, Law and Entrepreneurship, Cheltenham, UK and Northampton, MA: Edward Elgar,

existing rules are set up to favour the attendant norms, which are pervasive and all-encompassing. Our global economy requires free trade of goods and an open marketplace in which competitors flourish. The market system depends upon conceptions of private property and also upon a global commons, the creative domain, in which competitors freely innovate new goods and services for consumption. The nation states structure the system, often to favour their particular interests. Though legal rights may be articulated through multilateral conventions, they are often dependent for their implementation upon effective domestic laws. Indigenous peoples are viewed as distinctive populations, for purposes of international law, but their actual legal rights are dependent upon the willingness of the nation states to acknowledge their interests. Because indigenous peoples lack the status of states within the international structure, they lack any ability to negotiate conventions as equal political actors. This set of circumstances supports the pervasive view that we must fit indigenous peoples into the larger normative structure in a way that honours their interests, while still allowing the dominant economic structure to flourish.

The challenges for indigenous peoples under this approach are enormous. To the extent that indigenous peoples seek to vindicate their rights to their cultural heritage, they must identify alternative norms perhaps stemming from conceptions of distributional justice or human rights law that are sufficient to persuade the nation states to guard against the exploitation of indigenous peoples. Based on the discussions to date, this is an uphill battle and one that depends upon the ability to: (1) define who is an indigenous people; (2) define indigenous cultural heritage; (3) differentiate a series of complex categories of cultural heritage, including cultural property, intellectual property, traditional cultural expressions and traditional knowledge; and, finally, (4) decide whether any of those categories merit legal protection, primarily because the category is the functional equivalent of some European-derived category that merits legal protection, for example property or intellectual property.

Not surprisingly, each prong of this approach represents a challenge for indigenous people. First, there is no universal understanding of which groups fall within the rubric of 'indigenous peoples' and that is a deeply divisive question in many regions of the world, given their disparate histories and settlement patterns.[3] Even in settler societies such as the United States, which have a fairly clear understanding of the distinctions between Native American groups and the dominant society, the issue becomes controversial in relation to the distinction between 'federally recognised' American Indian and Alaskan Native groups and 'non-recognised' groups, including many tribes in California and Native Hawaiians. Secondly, international conventions and declarations have multiple definitions of 'cultural heritage' and these are not always consistent with categories of indigenous cultural heritage, defined under international human rights law or domestic law. And

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2011, pp. 234–63; Christoph B. Graber and Mira Burri-Nenova (eds), Intellectual Property and Traditional Cultural Expressions in a Digital Environment, Cheltenham, UK and Northampton, MA: Edward Elgar, 2008; and Christoph Antons (ed.), Traditional Knowledge, Traditional Expressions and Intellectual Property Law in the Asia-Pacific Region, Alphen aan den Rhijn, Netherlands: Kluwer Law International, 2009.

[3] See S. James Anaya, International Human Rights and Indigenous Peoples, Austin, TX: Wolters Kluwer Law & Business, 2009, at pp. 27–30.

finally, there are hotly contested debates about whether aspects of indigenous cultural heritage in fact constitute 'property' or 'intellectual property' and whether they should be protected under standard legal doctrines, constitute the subject of '*sui generis*' rights or remain unprotected.

Consequently, the 'compare and contrast' approach is really quite fruitless for indigenous peoples and it also evokes the doctrine of discovery within international law. As we know, the doctrine of discovery was a tool for European colonisation of lands occupied by indigenous peoples. The doctrine held that the first Christian European nation to 'discover' and 'settle' such lands could appropriate them, through 'purchase or conquest', because indigenous peoples did not maintain 'property' rights in their lands on the same basis as civilised European peoples.[4] The asserted justification was that indigenous peoples lacked laws that entitled them to the same treatment as civilised European nations (whose citizens would have their property rights protected under the law of conquest while the transition in political governance took place) and that they did not possess the same 'moral right' to their lands because they were seen as nomadic hunters and gatherers, rather than settled agriculturalists.[5] In the eighteenth and nineteenth centuries, the normative differences between indigenous peoples and Europeans were used to deny them equal rights to land.[6] Today, they are used to deny indigenous peoples protection for their cultural heritage under a variety of analogous rationales.

In this chapter, I will advocate that we recognise the rights of indigenous peoples to their cultural heritage, including the right to govern their cultural property and engage in trade with respect to aspects of their cultural heritage that they deem capable of alienation. In undertaking this argument, my starting place is the norm of indigenous self-determination and the necessity for modern nation states to qualify their domestic laws and international agreements accordingly. I am cautiously optimistic that we can develop a workable structure for the regulation of indigenous cultural heritage within domestic and international law, and this chapter is directed toward that end, although I also intend to acknowledge some of the potential pitfalls of such an approach. Section 2 of this chapter offers a foundational account of the norm of indigenous self-determination and the importance of recognising rights to cultural heritage in the service of this norm. Section 3 of the chapter engages the substantive basis for recognising indigenous rights to cultural heritage as an aspect of international law, with an emphasis on the category of 'cultural property'. Section 4 of the chapter examines the premise of indigenous governance of cultural property for purposes of domestic US and tribal law. Section 5 of the chapter examines some of the arguments for and against legal recognition of rights to indigenous cultural heritage and offers recommendations for the future.

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[4] 4 See Johnson v McIntosh (1823) 21 US 543 Marshall J.

[5] See ibid.

[6] See Robert A. Williams Jr, The American Indian in Western Legal Thought: The Discourses of Conquest, New York: Oxford University Press, 1990.

2. SELF-DETERMINATION: THE FOUNDATION OF INDIGENOUS GOVERNANCE OF CULTURAL HERITAGE

The UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples[7] (UNDRIP) by an overwhelming majority vote in 2007. Although the United States originally dissented, as did Canada, New Zealand and Australia, President Obama recently reversed that position, as have the governments of the other settler states.[8] Thus, UNDRIP, while purely prescriptive, represents a universal charter of rights, outlining the minimum standards that ought to guide nation states in their relationship with indigenous peoples to ensure that indigenous peoples thrive under conditions of justice and that their human rights are respected. In this sense, UNDRIP is useful in opening a discussion about the rights of indigenous peoples. I will draw upon UNDRIP's provisions to show that the United States has an obligation to respect the rights of indigenous peoples within its borders, including their rights to cultural heritage, and to implement these rights through domestic law. Other countries have a similar set of duties to the indigenous peoples within their borders, although they may choose to negotiate their own modes of accommodation.

My central argument in this chapter is that indigenous self-determination is best served through an intercultural legal framework that acknowledges the autonomy rights of native peoples. With respect to indigenous rights to cultural heritage, this requires an examination of the interactive framework established by tribal law, domestic federal law and international law. For the sake of clarity, I will limit my discussion to the indigenous groups within the United States, although I believe that the general approach can be extended to indigenous peoples within other nation states.

2.1 The Right to Self-Determination and US Federal Indian Law

The central premise of UNDRIP is that indigenous peoples have a right to self-determination as 'peoples', and that many distinctive rights, for example, to land, resources and culture, flow from that right. UNDRIP takes the position that indigenous peoples ought to have access to all the rights that stem from national citizenship (that is, access to public institutions and services), and that the nation state should also recognise their distinctive status as 'peoples' with a right to 'self-determination'. At first glance, these requirements seem to be present within US law. Since the 1924 Indian Citizenship Act, native peoples in the United States have been entitled to full national citizenship. Furthermore, there are many court cases from the 1960s and 1970s explicitly recognising rights of equal state citizenship, including voting rights and access to public education. In addition, the United States has formally acknowledged the separate political status of federally recognised native nations under federal law and articulated a domestic policy

[7] See UN, Declaration on the Rights of Indigenous Peoples (UNDRIP), GA Res. 61/295 (UN Doc. A/61/L.67 and Add.1) (adopted on 13 September 2007).

[8] See President Obama, 'Remarks by the President at the White House Tribal Nations Conference' (16 December 2010), available at http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference (all online sources were accessed 6 September 2011).

favouring native self-determination. The only residual question is whether the domestic concept of 'self-determination' is compatible with the right described by UNDRIP.

In addressing that question, it is first necessary to examine how the right to 'self-determination' is defined by UNDRIP. Article 3 states that '[i]ndigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development.' This language tracks that of Article 1 of the Covenant on Civil and Political Rights, which identifies the right of self-determination as belonging to all 'peoples'. Article 4 further explains that 'in exercising their right to self-determination', indigenous peoples 'have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions'. Article 46 clarifies that nothing within UNDRIP authorises or supports 'any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states', indicating that the extraordinary remedy of secession is not available in the service of indigenous self-determination.

The language in Articles 3 and 4 appears to be compatible with US federal Indian law, which recognises the inherent sovereignty of federally recognised Indian tribes and their distinctive status as 'domestic dependent nations' which maintain a 'trust relationship' with the federal government. US federal Indian law recognises that tribal governments have inherent sovereignty over their members and their territory, although there are many jurisdictional limitations on the ability of tribal governments to exercise authority over non-members. In the United States, tribal governments are autonomous under their own legislative, judicial and executive bodies, and they also have the capacity to exercise authority under delegations of federal power.[9] Thus, the concept of tribal sovereignty under US federal Indian law provides one context to understand how the right of self-determination is expressed under current law. UNDRIP posits that nation states can negotiate different political models, depending upon their respective circumstances. It is clear that the United States has negotiated a model for self-determination with the federally recognised tribal governments within its borders. Building on that foundation, the United States must engage the interests of indigenous peoples in governing their cultural heritage.

2.2 Indigenous Rights to Cultural Heritage as an Aspect of Self-Determination

As S. James Anaya has explained, there are several composite norms embedded within the concept of indigenous self-determination.[10] One of the primary norms is that of cultural integrity.[11] This norm 'upholds the right of Indigenous groups to maintain and freely develop their cultural identities in coexistence with other sectors of humanity'.[12] The norm of cultural integrity is addressed throughout UNDRIP. For example, Article 11 states that

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[9] See in more detail Carole Goldberg, 'A United States Perspective on the Protection of Indigenous Cultural Heritage', in this volume.

[10] S. James Anaya, Indigenous Peoples in International Law, 2nd edn, Oxford: Oxford University Press, 2004, at p. 129.

[11] Ibid., at pp. 131–41.

[12] Ibid., at p. 131.

'[i]ndigenous peoples have the right to practise and revitalise their cultural traditions and customs', which includes the right to maintain, protect and develop the past, present and future manifestations of their cultures', such as 'historical sites, artefacts, designs, ceremonies, [and] technologies'. Nation states have the obligation to 'provide redress through effective mechanisms', including restitution, for any 'cultural, intellectual, religious [or] spiritual property' taken without the 'free, prior, informed consent' of indigenous peoples, or in violation of their 'laws, traditions and customs'.

Article 12 of UNDRIP recognises that indigenous peoples have 'the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies', which includes the rights to protect sacred sites, control their ceremonial objects, and repatriate their human remains. States have the duty to enable these rights of access and repatriation. Article 13 of UNDRIP specifically protects the rights of indigenous peoples to 'revitalize, use, develop and transmit to future generations' their histories, languages, oral traditions, philosophies, literatures and place-names. Nation states have the obligation to protect these rights within the dominant society's 'political, legal and administrative proceedings'.

These are only representative examples of the many aspects of indigenous cultural heritage that are protected by UNDRIP. 'Cultural heritage' is expressed through tangible and intangible aspects of culture and, as demonstrated above, there are many articles within UNDRIP relevant to the definition of indigenous cultural heritage. UNDRIP recognises that, historically, indigenous peoples have not been adequately protected by the basic 'civil rights' that are guaranteed to all citizens (that is, the right of an individual to religious freedom) and, therefore, nation states must take actions to specifically protect indigenous peoples' rights. The cultural differences responsible for the historic failure of nation states to protect indigenous rights become a positive source of rights under UNDRIP's approach. UNDRIP accurately describes the spiritual context of many indigenous cultures, the unique relationship between indigenous lands and lifeways, and the intergenerational nature of indigenous rights, which depend upon the ability of the group to transmit the relevant knowledge to each successive generation. All of these features provide a context for the expression of indigenous rights to cultural heritage.

Article 31 of UNDRIP is *explicitly* directed toward the right of indigenous peoples to protect their cultural heritage, traditional knowledge and traditional cultural expressions. This Article represents the broadest statement of cultural rights within UNDRIP and therefore provides the best platform for understanding indigenous rights to cultural heritage.[13] This Article should also be read in connection with Article 8(j) of the Convention on Biological Diversity (CBD),[14] an existing multilateral treaty that overtly links indigenous rights to cultural heritage.

This chapter will now turn to a discussion of indigenous 'cultural heritage' as it is expressed by these provisions and other instruments of international law.

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[13] See Jessica C. Lai, 'The Protection of Māori Cultural Heritage: Post-Endorsement of the UN Declaration on the Rights of Indigenous Peoples', University of Lucerne, Switzerland, i-call Working Paper No. 2 (2011), at pp. 33–36, available at http://www.unilu.ch/files/i-call_working_paper_2011_02_lai_maori_cultural_heritage__undrip.pdf.

[14] Rio Convention on Biological Diversity (CBD), 1760 UNTS 79; 31 ILM 818 (opened for signature 5 June 1992, entered into force 29 December 1993).

3. AN ANALYSIS OF INDIGENOUS CULTURAL HERITAGE UNDER INTERNATIONAL LAW

The forces of globalisation have accentuated the need for nation states to consider the rights of native peoples to their lands and natural and cultural resources as they negotiate multilateral treaties on international trade, climate change and the management of shared resources, including water and fish. Article 37 of UNDRIP specifically requires states to 'honour and respect' the 'treaties, agreements, and other constructive arrangements' that they have articulated with indigenous peoples, providing formal validation of an intercultural approach to indigenous rights. Thus, international law explicitly recognises the importance of articulating indigenous rights under domestic law, including treaty law, and with attention to the customary laws of indigenous groups. That is the structure of indigenous self-determination, which provides the starting place for the inquiry about indigenous rights to cultural heritage.

There are a variety of international conventions and declarations on cultural heritage that address rights to cultural property, traditional knowledge and traditional cultural expressions. These instruments are primarily directed to serve the interests of nation states, but they do affect the interests of indigenous peoples. In accordance with my argument in favour of indigenous governance, I will first discuss the instruments that are particular to indigenous cultural heritage, and then address the broader context of international cultural heritage law.

3.1 International Law Focused on Indigenous Cultural Heritage

Article 31 of UNDRIP and Article 8(j) of the CBD are the two provisions most useful for articulating a foundation to protect indigenous rights to cultural heritage.

3.1.1 Article 31 of the UN Declaration on the Rights of Indigenous Peoples

Article 31 of UNDRIP provides that:

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicine, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
>
> In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 31 accurately recognises that most indigenous peoples do not separate the tangible and intangible components of their cultural heritage. For example, a medicine bundle is a tangible object, but it may be the songs and knowledge that go with the bundle that enable

its effective use in the cultural life of a native community.[15] Therefore, it may not be appropriate to abstract the nature of a medicine bundle as 'cultural property' from the traditional knowledge and traditional cultural expressions that are integrated with it. Similarly, native people may consider photographs of human remains or cultural objects to have a similar significance to the tangible objects.[16] The representation and meaning of these objects is of fundamental importance, necessitating limitations on who can see or touch the remains and also on who can see pictures of the remains. Article 31 demonstrates the multiple categories of indigenous cultural heritage and recognises rights in objects and expressions, as well as the ability for indigenous peoples to assert 'intellectual property' rights to aspects of their traditional knowledge which they seek to use or protect from misuse.

This integrated and broad construction of indigenous rights to cultural heritage may be of concern to proponents of free access and trade, as well as a broad 'public domain' or 'creative commons'. In fact, there has been a concerted effort among scholars and policy-makers to separately define and distinguish 'cultural property' and 'intellectual property' from 'traditional knowledge' and 'traditional cultural expressions', recognising only the former two categories as worthy of legal protection. For example, Stephen Munzer and Kal Raustiala acknowledge the need to give limited protection to certain interests associated with indigenous 'traditional knowledge' (for example, where 'unjust enrichment' would result from pirating indigenous knowledge for commercial benefit), but argue that most of the interests within the category of 'traditional knowledge' do not support legal protection under property theories or any other theory, and would in fact jeopardise the integrity of the public domain.[17] UNDRIP counsels a different approach. According to UNDRIP, it is unjust to refuse to recognise indigenous norms purely because they might conflict with the interests of the dominant society. UNDRIP takes the position that it is necessary to engage in dialogue with indigenous peoples about their rights and interests, and following that dialogue, nation states are asked to 'take effective measures' to protect the rights of indigenous peoples. This mode of accommodation places a sense of responsibility upon indigenous groups to articulate their interests, which suggests the primacy of tribal law in structuring a further accommodation of rights. At that point, the nation state has an obligation to effectively protect the rights of indigenous peoples within its domestic law, and ensure that those rights are respected within international accords.

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[15] See William E. Farr, 'Troubled Bundles, Troubled Blackfeet: The Travail of Cultural and Religious Renewal', Montana The Magazine of Western History (Autumn 1993), at pp. 3–17 (discussing the dispute over a set of Blackfeet medicine bundles entrusted by their native owners to a non-Indian trader, who, without authorisation, published pictures of the bundles and their contents in an art book and then sold the collection to a Canadian museum, asserting that the bundles were no longer 'alive' in the cultural life of the community, because the knowledge of the songs and stories had been 'lost').

[16] See, for example, Kathryn Milun, 'Keeping While Giving Back: Computer Imaging and Native American Repatriation' (2001) Political and Legal Anthropology Review, 24 (2), pp. 39–57, at p. 39 (presenting the dispute over ownership of digital depictions of a set of Native American human skeletal remains between the Northern Paiute people and the anthropologist who took the pictures and claimed them as her 'intellectual property').

[17] See Stephen R. Munzer and Kal Raustiala, 'The Uneasy Case for Intellectual Property Rights in Traditional Knowledge' (2009–10) Cardozo Arts & Entertainment Law Journal, 27, pp. 37–97.

The CBD exemplifies the procedural approach recommended by UNDRIP, in the context of indigenous rights to biodiversity. In that sense, both documents support the general claim of Christoph B. Graber that international legal instruments are most effective when they support procedural approaches to protection of indigenous rights, rather than substantive approaches that would require comprehensive and universal solutions.[18]

3.1.2 Article 8(j) of the Convention on Biological Diversity

The Convention on Biological Diversity represents a collective effort among nation states to articulate the global importance of managing biological diversity in the service of preservation and also benefit-sharing. Article 8 of the CBD describes the primary set of Convention obligations to conserve biological diversity and recognises the *in situ* approach as being the best mechanism to achieve this. Under Article 8, each contracting party has the obligation to establish protected areas where special measures must be taken to preserve biological diversity, and then develop guidelines for the selection, establishment and management of protected areas.

Article 8(j) explicitly recognises the rights of indigenous peoples to their traditional knowledge and provides that 'subject to its national legislation', each contracting party ought to:

> respect, preserve and maintain knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations, and practices.

This provision is important because it acknowledges that natural resources can also be cultural resources, that intangible knowledge exists in relationship to tangible aspects of the environment. It also recognises that indigenous peoples and other land-based communities are part of the ecosystems that the Convention seeks to protect and that they possess knowledge and expertise that can be of utility to the nation states. This provision not only recognises that indigenous communities possess 'traditional knowledge' about their environments and resources, but also conditions benefit-sharing upon the 'approval and involvement' of indigenous peoples. Thus, the norm of indigenous governance is to some extent represented within the CBD, even though it is a document intended for adoption only by the nation states.[19]

UNDRIP also speaks to these issues, agreeing that indigenous peoples have the right to 'maintain, control, protect and develop' their traditional knowledge (Article 31) and that the 'states shall consult and cooperate in good faith' with indigenous peoples 'in order to

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[18] See in more detail Christoph B. Graber, 'Stimulating Trade and Development of Indigenous Cultural Heritage by Means of International Law: Issues of Legitimacy and Method', in this volume.

[19] For the representation of indigenous governance in the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (UN Doc. UNEP/CBD/COP/DEC/X/1) (adopted on 29 October 2010), see John Scott and Federico Lenzerini, 'International Indigenous and Human Rights Law in the Context of Trade in Indigenous Cultural Heritage', in this volume.

obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them' (Article 19).

In conclusion, UNDRIP and the CBD work together to promote a sense of responsibility among nation states to consider the unique rights of indigenous peoples to their lands and natural and cultural resources as they govern these resources through domestic law and through international agreements with other nation states. The United States ought to focus on its responsibility towards native peoples – which is articulated as a 'trust responsibility' under US federal Indian law – rather than viewing these international instruments as a 'limitation' upon its power to promote national policies, even if these policies may harm important tribal interests. The premise of international human rights laws is that nation states should strive to ensure that their laws and policies do not harm vulnerable groups, including indigenous peoples, who lack adequate political power to ensure that their interests are respected.

3.2 International Cultural Heritage Law

International cultural heritage law is diffuse and the enforceable provisions are directed primarily toward the protection of tangible cultural property, while those provisions engaging intangible cultural heritage are largely prescriptive. Although conventions are international treaties and may become binding upon nation states upon their acceptance and ratification, their enforceability is generally premised upon the nation state's agreement to enter an optional protocol submitting itself to an international forum for cases of alleged breach.[20] In the United States, Congress must ratify all treaties and must also enact domestic legislation in order to implement the provisions of a treaty. Consequently, very few international instruments relevant to cultural heritage are enforced as a matter of US domestic law.

Having acknowledged the limitations of international cultural heritage laws in the United States, it is useful to examine them to see how cultural heritage is defined and protected domestically. The concepts of 'cultural resources' and 'cultural preservation' are fairly recent innovations within European and American law (dating in most cases to the nineteenth and twentieth centuries), although the notion that cultural objects should be given special treatment during time of war dates back to the Roman Empire.[21] Cicero distinguished between 'ordinary war booty' and the illegal removal of art and architectural decoration from public monuments. Similarly, Emeric de Vattel distinguished 'cultural property' from the types of movable property that could constitute legitimate war booty.[22] These views were incorporated into international treaties. For example, the Treaty of Vienna in 1815 required France to return art works that had been taken from throughout Europe during the Napoleonic wars or to make restitution if the artwork had already been

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[20] One example of an Optional Protocol is found in the UN, International Covenant on Civil and Political Rights, 999 UNTS 171 and 1057 UNTS 407; 6 ILM 368 (adopted on 16 December 1966, entered into force 23 March 1976).

[21] See Patty Gerstenblith, Art, Cultural Heritage and the Law, Durham, NC: Carolina Academic Press, 2004, at p. 469.

[22] Emeric de Vattel, *The Law of Nations or the Principles of Natural Law*, translated and edited by Joseph Chitty, 1844 (first published 1758, in French), at book 3, ch. 13–14.

sold to other nations.[23] No similar requirement existed for the looting of indigenous cultural property from the lands colonised in the Americas, Australia or New Zealand. 'Primitive art' was distinguished from 'fine art' until quite recently, justifying the wholesale plunder of indigenous cultural objects and human remains from their rightful communities of origin. The lack of effective protection for indigenous cultural property remains an ongoing issue within international human rights law. Millions of cultural objects and human remains exist in museums and in the hands of private collectors throughout the world. International repatriations to indigenous groups have taken place in a limited number of cases, as a matter of grace and moral persuasion, not because there is any law requiring this to occur.

In the modern era, the nation states have articulated their interests in cultural heritage within a variety of conventions. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict defines 'cultural property' as 'moveable or immovable property of great importance to the cultural heritage of every people' and emphasises the importance of preserving cultural heritage during times of armed conflict, stating that any harm to national cultural property is a 'harm to the cultural heritage of all mankind'.[24] Significantly, nations are asked to identify their cultural property through the use of distinctive emblems.[25] Similarly, the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention)[26] pertains to natural sites and historic sites within the territorial boundaries of nation states and calls for states to protect these sites from damage. Nation states are asked to nominate sites for inclusion in a register, and all parties to the Convention are then required to refrain from taking any deliberate measures that might damage the site. This Convention may indirectly assist the interests of indigenous peoples. For example, to the extent that a nation state acts to nominate an indigenous sacred site to the register, it would have the obligation to protect the site under its national laws and all state parties would be required to refrain from taking actions that would harm the site (for example, through mining operations or dam projects).[27]

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 Convention)[28] is

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[23] See Gerstenblith, supra note 21, at pp. 470–71.

[24] The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 240 (adopted on 14 May 1954, entered into force 7 August 1956), Article I.

[25] Ibid., Article VI.

[26] UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage, 1037 UNTS 151 (adopted on 16 November 1972, entered into force 17 December 1975).

[27] The United States, for example, currently has 21 sites listed on the World Heritage list, available online at http://whc.unesco.org/en/list. This list includes eight cultural sites, 12 natural sites and one mixed site. There are indigenous sites on the list, including Cahokia Mounds, Chaco Canyon, Mesa Verde National Park and the Pueblo of Taos. There is also a site in Hawaii, Papahanaumokuakea, which is of cultural significance to the Native Hawaiian people, and is listed as a mixed cultural and natural site. See on the World Heritage Convention also Coombe and Turcotte, supra note 1.

[28] UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 823 UNTS 231 (adopted on 14 November 1970, entered into force 24 April 1972).

directed toward the protection of national cultural property from illicit transfer within international trade. Prior to 1970, the problem of looting had been the subject of several treaties, for example those between the United States and Mexico protecting the rights of the Mexican government to its pre-Columbian artefacts, and was to some extent covered by domestic US laws, such as the National Stolen Property Act[29] criminalising the interstate or foreign transfer of 'stolen property'. The 1970 Convention defines 'cultural property' as property which, on religious or secular grounds, is specifically designated by each state as being of importance for archaeology, prehistory, history, literature, art or science. The Convention follows the 'common heritage of mankind' rationale for protecting national interests in cultural property, and requires all state parties to respect the cultural heritage within the territories for which they are responsible, taking all appropriate measures to prohibit and prevent the illicit transfer of cultural property. Thus, as of 1970, all items of cultural property must be exported and imported in accordance with the source country's laws. The United States became a party to the Convention in 1983 and Congress enacted the Cultural Property Implementation Act of 1983 (CPIA) to enforce the provisions of the Convention.[30]

The CPIA implements the Convention primarily through two mechanisms. First, the statute prohibits importing into the United States cultural material (including cultural property, archaeological resources at least 250 years old and ethnographic material) that is identified as stolen from an institution in another State Party, and requires the United States to assist in its recovery if it is imported. Secondly, the CPIA applies specific import or other controls at the request of another State Party to archaeological and ethnological materials (produced by a 'tribal or nonindustrial society') when those materials are specifically identified as comprising a state's cultural patrimony and in danger of being pillaged. Thus, the 1970 Convention addresses indigenous cultural property as an aspect of national cultural patrimony and its effective implementation is dependent upon the enactment of domestic laws within the source nation. The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects[31] is complementary to the 1970 Convention and is intended to deal with the issues of limitation (repose) and good faith acquisition in the private marketplace. So far, only 29 states have signed onto this Convention. These issues are dealt with under US law by the CPIA.

All of the above Conventions are directed toward the protection of tangible cultural property. They all reflect the 'cultural heritage of all mankind' rationale for protecting tangible cultural property, typically espoused by nation states. To the extent that indigenous cultural heritage is considered to be an aspect of a nation state's protected cultural property, it may become eligible for protection under the standards of the Conventions at issue, as well as under the domestic laws (such as the CPIA) that implement these protections. International law protecting intangible cultural heritage is still emergent and is, for the most part, not effective to protect the interests of indigenous peoples. As Rosemary Coombe and Joseph Turcotte observe, the term intangible cultural heritage only recently emerged in the context of the 2003 UNESCO Convention for the Safeguarding of

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[29] National Stolen Property Act, 18 U.S.C. §§ 2314–2315 (2006).

[30] Cultural Property Implementation Act of 1983, 19 U.S.C. §§ 2601–2613 (2011).

[31] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 34 ILM 1322 (adopted on 24 June 1995, entered into force 1 July 1998).

the Intangible Cultural Heritage (2003 Convention),[32] although earlier initiatives sought to affirm the importance of creative diversity and promote the actions of nation states to protect specific forms of creative expression, for example folklore.[33] The obstacles to development of a coherent legal framework to protect intangible cultural heritage are daunting. Perhaps most importantly, there is lack of clear agreement on the definition of intangible cultural heritage. Legal protection for intangibles is generally confined to categories of intellectual property law (such as copyright, patent and trade mark). These categories contain clear definitions within domestic law and are suitable subjects for international conventions. As Coombe and Turcotte note, there is a perceived overlap between intangible cultural heritage and intellectual property, which emphasises proprietary models for protection. Not only is this understanding antithetical to many of the cultural interests that indigenous peoples have, but it inspires resistance on the part of nation states to adopt enforceable protections for intangible cultural heritage. The nation states are unwilling to impair the dominant economic model for intellectual property protection. As a result, the nation states have treated indigenous peoples' interests as a form of moral claim, which can be protected by soft law in the form of recommendations for the conservation and protection of diverse forms of cultural expression.

The international conventions on intangible cultural heritage that are currently in place largely operate as prescriptive suggestions to the nation states. For example, the 2003 UNESCO Convention serves its stated objective by counselling respect for local communities, the need to raise awareness about the importance of intangible cultural heritage and the need to provide for international cooperation and assistance.[34] The 2003 Convention tracks the approach of the World Heritage Convention, attempting to foster global recognition that some societies live their cultural traditions and that is where protection is needed, rather than focusing attention on artefacts. In this respect, the 2003 Convention provides that each State Party should prepare one or more inventories of the intangible cultural heritage present in its territory, as part of a consultative process with relevant communities, groups and non-governmental organisations, and transmit this report to the Intergovernmental Committee set up to promote the Convention's purposes.[35] Although the Convention has a special process to identify intangible cultural heritage in need of urgent safeguarding, there are no enforcement provisions attached to this Convention that would deter state actors from destroying such resources, and the obligation of nation states to contribute funding to assist in protecting intangible cultural heritage is purely optional.[36]

Similarly, the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005 Convention) serves its stated objective by encouraging dialogue among cultures to foster intercultural respect and build bridges

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[32] UNESCO, Convention for Safeguarding of the Intagible Cultural Heritage, 2368 UNTS 1 (adopted on 17 October 2003, entered into force 20 April 2006) [hereinafter 2003 Convention].

[33] See Coombe and Turcotte, supra note 1.

[34] 2003 Convention, Article 1.

[35] See ibid., at Articles 5–7 (organisation and functions of Committee); Article 11 (role of State Parties); Article 12 (inventories).

[36] See ibid., at Articles 16–18.

among peoples.[37] The Convention seeks to articulate the link between culture and development for all countries, and it encourages countries to work cooperatively with one another in a spirit of partnership. Importantly, the Convention affirms the sovereignty of the nation states to implement measures that they deem necessary to foster diversity of cultural expressions within their territorial boundaries.[38]

The 2005 Convention supports the predominant economic values of the existing international trade structure, while encouraging the nation states to be sensitive to particular cultural values and forms of expression. In particular, the Convention counsels nation states to pay attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples.[39] In this respect, indigenous peoples are treated as vulnerable social groups in need of the fostering care of the national governments. Similarly, where a particular circumstance arises that places cultural expressions at risk of extinction, under serious threat or in need of urgent safeguarding, the Convention identifies a process to report this exigency to the Intergovernmental Committee set up to administer the Convention and obtain the Committee's recommendations.[40] The 2005 Convention provides suggestions to nation states on how to promote cultural diversity and a procedural mechanism to encourage nation states to take protective measures on behalf of vulnerable populations, particularly when certain forms of cultural expression may be in imminent danger of destruction. However, the Convention does not establish legal rights for cultural groups, nor does it provide a tangible enforcement structure to ensure that the stated purposes are met.

Both the 2003 and 2005 Conventions contain broad and ambiguous definitions of intangible cultural heritage and cultural expressions. In fact, Lyndel Prott attributes the lack of effectiveness of the 2003 Convention to its vague definition of intangible cultural heritage.[41] The 2003 Convention maintains that:

> The 'intangible *cultural* heritage' means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their *cultural* heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.[42]

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[37] UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2440 UNTS 311 (adopted on 20 October 2005, entered into force 18 March 2007), Article 1 [hereinafter 2005 Convention].

[38] Ibid.

[39] Ibid., at Article 7(1)(a).

[40] Ibid., at Article 8.

[41] See generally Lyndel Prott, 'UNESCO International Framework for the Protection of the Cultural Heritage', in James A.R. Nafziger and Ann M. Nicgorski (eds), Cultural Heritage Issues: The Legacy of Conquest, Colonization and Commerce, Leiden: Martinus Nijhof, 2009, pp. 257–85.

[42] Ibid., at p. 273.

Despite the vague language of its definition, the 2003 Convention at least prescribes an inventory process to identify intangible cultural heritage in need of protection. The 2005 Convention, however, defines cultural expressions as those expressions that result from the creativity of individuals, groups and societies, and that have cultural content, a description that is so broad that it is legally meaningless.[43] Other scholars have noted a similar ambiguity within the many definitions of traditional knowledge and traditional cultural expressions generated within the committees of the World Intellectual Property Organization (WIPO), which makes it difficult to associate these concepts with standard categories of intellectual property law, which do create legally enforceable rights.[44]

An additional complication, as Prott observes, is that the major market nations do not agree on the relevance of culture to international trade. Prott asserts, for example, that France and Canada favour the protection of cultural interests within the global marketplace, while the United States is committed to a truly open market that fosters competition.[45] According to Prott, the primary value of the cultural heritage conventions is to foster a policy of mutual supportiveness among the nation states by establishing intergovernmental bodies to facilitate collaboration on the objectives of each treaty. The committees provide a forum for the discussion of best management practices and have an important educational function. The governance role resides with the nation states who choose to become parties to the convention. Within each convention, the national sovereignty of the states is emphasised and parties adhere to their obligations within an environment that supports the mutual and multiple functions of the national governments, including interests of national security, sustainable development and economic stability.

Indigenous peoples are affected by these international conventions and agreements, but they do not have the governance role. The definitions generated by committees within UNESCO and WIPO attempt to characterise the importance of 'intangible cultural heritage' to traditional indigenous communities, but the attempt results in a vague and potentially unlimited set of cultural attributes which do not resemble anything that the law recognises as capable of 'ownership'. This massive 'top–down' effort by international policy-makers has little resonance with tribal governance structures. Building on the effort to articulate an effective foundation for indigenous self-determination, I will argue that indigenous governance of cultural heritage primarily exists as an aspect of domestic US and tribal law. Tribal governments can grapple with the issues of what aspects of their cultural heritage ought to be protected and how this can occur. They can then engage with the US government about what modifications ought to be made to domestic law to enable the enforcement of tribal law. Because the primary responsibility for discussing US law regulating indigenous cultural heritage resides with Carole Goldberg in this volume, I will

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[43] 2005 Convention, Article 4(3). See Christoph B. Graber, 'Substantive Rights and Obligations under the UNESCO Convention on Cultural Diversity', in Hildegard Schneider and Peter van den Bossche (eds), Protection of Cultural Diversity from an International and European Perspective, Antwerp: Intersentia, 2008, pp. 141–62.

[44] See, for example, Christoph Antons, 'Introduction' to Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region, supra note 2, at pp. 1–5.

[45] Prott, supra note 41, at p. 272.

keep the following discussion very brief and focused on the argument that I am making here with respect to indigenous governance of cultural property.

4. INDIGENOUS GOVERNANCE OF CULTURAL PROPERTY AS AN ASPECT OF DOMESTIC AND TRIBAL LAW

In my view, indigenous self-determination is best served through an intercultural framework that acknowledges the autonomy rights of native peoples. With respect to indigenous rights to cultural heritage, this requires an inquiry into the interactive framework established by tribal law and domestic federal law. With respect to the sub-category of indigenous cultural heritage described as 'cultural property', I will point out some of the conceptual challenges to broad recognition of indigenous rights to cultural property, and then engage a discussion of how US domestic law has dealt with some of those challenges.

4.1 Conceptual Challenges to the Legal Protection of Indigenous Cultural Heritage

In other work, I have discussed several of the conceptual challenges to the legal protection of indigenous cultural heritage.[46] In particular, the following conceptual challenges relate to the argument I am developing. First, there is a pervasive inability among scholars and policy-makers addressing indigenous cultural heritage to distinguish 'objects of art' from 'cultural objects'. As a result, discussions about indigenous rights to cultural heritage get stymied by a discussion about the merits of an open marketplace and a robust public domain.[47] This might be useful to a discussion of 'art' and the marketplace, but it seems misguided in relation to the concept of 'cultural property' used by national governments to protect their own cultural patrimony from free trade in the open market. Secondly, there is a similar disconnect between scholars and policy-makers addressing indigenous rights to cultural heritage that stems from competing viewpoints about the significance of 'culture' to notions of 'ownership' (for example, within property law) and 'access' (for example, in the service of benefit-sharing). There is a pervasive tendency to associate the rights of indigenous peoples with those of nation states that encompass them, rather than recognising their rights to their cultural property as equal to the rights of the nation states. Nation states have the right to claim cultural property and protect it under international agreements. Indigenous peoples are dependent upon the nation states to recognise indigenous cultural property as part of the nation state's cultural patrimony for purposes of international protection, which leads to the assumption that the rights of the nation state in some sense are representative of the rights of the indigenous peoples within its borders. So, for example, the United States might claim aspects of Native American cultural identity as constituent parts of 'American' identity. In that sense, the distinctive claims of

[46] See Rebecca Tsosie, 'Who Controls Native Cultural Heritage? "Art", "Artifacts", and the Right to Cultural Survival', in James A.R. Nafziger and Ann M. Nicgorski (eds), Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce, Leiden: Martinus Nijhoff Publishers, 2009, pp. 3–36. [hereinafter Tsosie, 'Who Controls Native Heritage'].

[47] See Munzer and Raustiala, supra note 17.

indigenous peoples to their cultural heritage either become subsumed within the protection afforded to the nation state or go unprotected.

4.1.1 The difference between native 'art' and native 'artefacts'

Many of the current difficulties with the legal protection of Native American art and culture relate to the conceptual gaps between the respective cultural understandings of native people and Anglo-American people about the difference between 'art' and 'artefacts'.[48] Following on the history of plunder that was attached to European colonisation of native peoples and their lands, Euro-Americans tend to see all Native American cultural objects as 'art'. The carved poles of Northwest Coast Indians, such as the Haida and Tlingit, are highly sought as objects of art, as are Hopi kat'sinas and the Zuni war gods. There is a huge black market in the American Southwest for Anasazi pottery looted from ancient sites, and in many cases, the actual mummified and skeletal human remains of these native peoples are traded as well. In contemporary times, artefact hunters have claimed to be ignorant of the difference between 'pre-historic artefacts' and contemporary sacred objects, such as medicine bundles and ceremonial masks, which are also sought by collectors.[49] To complicate the issue, some collectors will assert that native people are active players in the marketplace for Native American art, placing jewellery, rugs and other items for sale, allegedly along with cultural and ceremonial artefacts. The result appears to be a profound confusion about what aspects of native cultural heritage are permissibly placed into commerce as 'art', and which, if any, ought to be protected from sale or trade as 'cultural property'.

I believe that it is necessary to make a fundamental distinction between '*cultural property*', meaning items that are part of the cultural heritage of a tribal government or native people and which are significant to the native nation's survival as a distinctive people and culture, and '*commercial products*', which are items intentionally manufactured and created by native artists for the purpose of economic development. I believe that native nations should have the same ability as nation states to define what constitutes their cultural property and they should not be forced to accept the 'common heritage of mankind' theory for cultural preservation because native cultural property is used to promote *cultural survival*. Harm to indigenous cultural property threatens the core survival of a living people and is not merely a harm to the 'cultural heritage of all mankind'. I believe that native people are entitled to govern their own cultural heritage and that this is one very important feature of the right of self-determination. I also believe that native people have the right to profit from their cultural expressions, if they choose to do so. The Hopi people, for example, claim the kat'sinas as a central aspect of their culture and there are very sacred figurines which may not be alienated from the tribe and which certainly constitute tribal cultural property. On the other hand, the Hopi people have developed a secular art form derived from cultural symbols, and Hopi artists are authorised

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[48] See Tsosie, 'Who Controls Native Heritage?', supra note 46, at pp. 5–7.

[49] See, for example, United States v Diaz (1974) 499 F 2d 113 Merrill J (9th Cir) (upholding defendant's argument that the Antiquities Act of 1906, 16 U.S.C. § 433 (2011) was unconstitutionally void for vagueness as applied to the charge of stealing a ceremonial mask from the San Carlos Apache reservation because the mask was created within recent years and could not constitute 'an object of antiquity').

to create kat'sinas for the marketplace. The Hopi people have claimed a form of cultural copyright to these commercial products, asserting that non-Hopis (even if they are Native American) have no right to produce or market these figurines. It is and should be the domain of the Hopi people to differentiate symbols and items as 'cultural property' or as 'commercial products'.

4.1.2 Culture, ownership and access

Another central problem with the existing framework for cultural resources protection is that it does not correspond to native understandings of cultural heritage. Rights to 'ownership' and 'access' within native and western cultures are developed in accordance with disparate cultural norms. So, for example, American cultural resources law is premised on the notion that heritage resources belong to the 'collective past' of the American people as a 'melting pot' of different cultures. Similarly, American cultural resources law distinguishes between 'history' and 'prehistory', and there is a pervasive belief that no one can own aspects of 'prehistory'. That is why there is a significant controversy in the United States over who should have the right to control ancient human remains and whether they are sufficiently related to modern groups to be designated as 'Native American' human remains.[50]

In comparison, most native peoples, such as the Navajo, do not even have a word for 'prehistory'. Rather, their histories begin at the creation of life and of this world. Not surprisingly, tribal cultural heritage laws tend to adopt a very comprehensive definition of cultural heritage. For example, the Code of the Confederated Tribes of the Warm Springs Reservation in Oregon defines tribal cultural heritage protection as a 'trust' on behalf of all tribal members, which includes 'the management of ancient and contemporary cultural use sites and materials which are fundamental in the recognition of the traditional lifeways, values and histories' of those tribes. The Code is inclusive of traditional foods, medicines, sacred sites and associated aspects of tribal culture, whether these are found on or off the reservation and regardless of the current 'ownership' of the lands. Similarly, the Code of the Eastern Band of Cherokee Indians specifically protects all ancestral human remains regardless of where they are found, and the Code provides that the graves and remains of the Cherokee people and their ancestors are sacred and must not be disturbed. If they are inadvertently disinterred, the Code provides that the remains and associated funerary objects should be immediately reburied and must not be subjected to destructive skeletal analysis. There are, of course, jurisdictional challenges to the full implementation of these tribal laws. However, they comprise a core structure for the legal articulation of native rights to cultural heritage, including cultural property.

Another challenge to refining notions of ownership and access is that native cultures do not commonly differentiate between the tangible and intangible aspects of their cultural heritage. Under Euro-American law, tangible items may be protected under 'property law' and intangibles are selectively protected as 'intellectual property'. This property rights framework, which dominates both national and international law, posits that property can be 'owned' by individuals or by groups that possess a corporate identity. 'Cultures' do not 'own' property under this view. Rather, individuals own real and personal property and

[50] See Bonnichsen v United States (2004) 367 F 3d 864 Gould J (9th Cir).

nation states own cultural property that is emblematic of their national identity, as well as public lands and resources. Churches and other religious organisations can own religious property on behalf of their members, but the larger 'cultural group' associated with a religion (for example, the 'Jewish culture') is not perceived to have analogous rights of ownership. So, for example, the state of Israel may own property, as may a specific Jewish synagogue, or an individual Jewish person. However, it would be considered nonsensical to try to define a property right of all 'Jewish' people to their 'culture'.

In fact, the pervasive view is that 'culture' is not static, but is a dynamic, constantly shifting collection of symbols, values and norms, that is shared and transformed through a multitude of processes. Property, on the other hand, is a 'specific bundle of rights' that is protected by the state in accordance with theories supporting the private ownership of resources and the transfer of such rights in the marketplace to their highest and best use. Culture cannot and should not be 'commodified', under this view, although to the extent that native people have true 'property' interests, these might be protected under standard legal doctrines. These views are carefully analysed by Kristen Carpenter, Sonia Katyal and Angela Riley in their comprehensive work, 'In Defense of Property', which endorses the importance of indigenous cultural property as an aspect of 'personhood' and in the furtherance of 'tribal sovereignty, self-determination and cultural survival'.[51] I will not replicate their excellent analysis, but agree with their central premise that the dominant views on 'property' and 'culture' consistently work against recognition of indigenous peoples' rights to 'cultural property'.

Therefore, the autonomy rights associated with native self-determination are quite important to generating an effective theory of indigenous governance of cultural property. Native peoples as governments are appropriate holders of cultural property. Tribal law must explicate what is 'cultural property' and may not be alienated from the tribe, as compared with 'commercial products', which derive from tribal culture but are appropriately placed in commerce. This effort is emergent within US domestic law and I will highlight some of the features of this system of Native American cultural resource laws.

4.2 The Existing Framework for Protection of Indigenous Cultural Property in the US

To date, indigenous cultural heritage in the United States has been protected to some extent through the combined effect of federal and tribal law (and to a lesser extent, state law), as it pertains to particular categories of cultural heritage. The Native American Graves Protection and Repatriation Act (NAGPRA),[52] for example, protects native rights to human remains, funerary objects, sacred objects and objects of cultural patrimony, if the objects meet the statutory definitions of these terms and if the objects are either held by federal agencies or federally funded institutions as of the effective date of the statute or are thereafter excavated from federal or tribal lands, or if the objects are commercially 'trafficked' within interstate commerce. Under NAGPRA, tribal law is used to delineate the nature of an object as a 'sacred object' or 'object of cultural patrimony', and both sets

[51] Kristen A. Carpenter, Sonia K. Katyal, Angela R. Riley, 'In Defense of Property' (2009) Yale Law Journal, 118, pp. 1022–32, at p. 1024.

[52] 25 U.S.C. §§ 3001–3012, 18 U.S.C. § 1170.

of objects can be accurately designated as tribal cultural property. Under NAGPRA, 'sacred objects' are defined as 'specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents'. This definition requires an active and ongoing use for the object in the cultural and religious life of native practitioners. 'Cultural patrimony', on the other hand, includes objects 'having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual Native American'. Such objects must have been considered inalienable by the Native American group at the time the object was separated by the group.

To date, there have been several federal court cases protecting medicine bundles, ceremonial masks and other regalia as tribal 'cultural patrimony'.[53] Federal law criminalises the interstate transfer of Native American human remains or cultural objects in commerce and also carefully regulates the excavation of these items from federal lands, in order to protect the interests of native nations. If the remains or objects are in the custody of a federal agency or federally funded museum, NAGPRA requires that the items be repatriated to the community of origin upon the request of the native nation. Many states, such as Arizona, have adopted statutes prescribing similar protections for Native American human remains, funerary objects (and in some cases, cultural objects), excavated on state or private land.[54]

The protections for Native American cultural heritage are limited and largely restricted to tangible objects. There are other statutes that impact tangible cultural heritage, such as the National Historic Preservation Act,[55] which covers historical sites and also protects eligible 'Traditional Cultural Properties', including some Native American sacred sites. The Archaeological Resources Protection Act[56] protects archaeological resources on public lands, including human remains and cultural objects. However, these respective statutory protections are largely confined to cultural resources on federal public lands or those impacted by federally funded projects.[57] American property law governs many other cases, allowing private owners to maintain an 'ownership' interest in Native American cultural objects that are located on private land or where 'title' was conveyed prior to the effective date of any protective law, allowing the holder to assert a valid 'right of possession'. In sum, the fundamental precepts of American property law, which construct a 'private property' interest that is protected against undue governmental interference by the Fifth Amendment, have constrained a broader application of federal or state law that would require the reversion of land or personal property to the original Native American owners in order to serve broader cultural interests.

It is even more difficult for native people to protect the 'intangible' aspects of their cultural heritage, such as their songs, ceremonies, stories and traditional knowledge. The reason for this is that US domestic law supports a broad construction of 'intangible'

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53 See, for example, United States v Corrow (1997) 119 F 3d 796 Porfilio J (10th Cir).
54 Arizona Revised Statutes Annotated §§ 41–844 to 41–846 (2004).
55 National Historic Preservation Act of 1966, 16 U.S.C. §§ 470a-470w-6.
56 The Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm.
57 For more details, see Goldberg, supra note 9.

cultural heritage as a 'commons' that is widely accessible to all ('the public domain') and limits the right of any individual to 'exclude' others from the 'cultural commons'.[58] Federal law confers only limited protection to authors, artists and inventors, allowing an exclusive property right to emerge primarily where the creator/inventor has generated value through his or her own labour and initiative, thus earning an 'intellectual property right' that falls within one of the constitutionally protected categories of rights: copyrights, patents and trade marks. To a lesser extent, the law of trade secrets or misappropriation can be used to protect certain creations or inventions that do not fit squarely within the logic of the standard doctrines of intellectual property law. This has a positive construction because it indicates that the constitutional framework does not preclude recognition of other rights to intangible resources, when this is necessary to serve the interests of justice. However, because Native American claims are often a poor fit for both the standard categories of intellectual property rights, as well as the limited doctrinal expansions that have been recognised through collateral laws, their interests are often entirely disregarded.

One important exception is the Indian Arts and Crafts Act (IACA),[59] originally enacted in 1935 to promote a market for Indian arts and crafts and to prevent goods falsely marketed as 'Indian art' from impairing this market. The statute was substantially amended in 1990 and 2000 to provide enhanced civil and criminal penalties for the fraudulent sale and misrepresentation of goods as 'Indian made'. The statute is patterned after US trade mark law, giving eligible tribes and their members the exclusive right to market goods as 'Indian made'. The IACA serves the economic interests of Indian nations in creating a vibrant market for their commercial products. It does not protect the interests of native peoples in protecting the intangible aspects of their cultural heritage from other harms, including the harm of cultural appropriation. Non-Indians are free to copy Native American designs, symbols, songs and other cultural forms so long as they do not fraudulently misrepresent the origin of their products. This 'free cultural exchange' is considered beneficial and, in fact, many aspects of tribal cultures are considered to be part of the 'public domain'.

In sum, US domestic law provides limited protection for indigenous rights to tangible cultural property, primarily in the context of 'sacred objects' and 'objects of cultural patrimony'. US domestic law also protects the economic interests of Indian tribes in marketing their commercial products as 'Indian art'. Thus, to some extent, US domestic law responds to the notion that indigenous 'cultural property' should be protected from illicit trade, while also recognising the right of native peoples to actively participate in the marketplace by developing a commercial product premised upon indigenous art forms. There is still much work to be done, primarily to elaborate the aspects of intangible cultural heritage that must be protected from appropriation and misuse.

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[58] See on this topic Brigitte Vézina, 'Are They In or Are They Out? Traditional Cultural Expressions and the Public Domain: Implications for Trade', in this volume.

[59] 25 U.S.C. § 305. For details, see Goldberg, supra note 9.

5. RECOMMENDATIONS FOR THE FUTURE

This chapter has described a framework for understanding the significance of indigenous cultural heritage and generated an argument in favour of indigenous governance of cultural property. I am aware of the challenges to this approach, many of which are raised by Michael F. Brown in his book, *Who Owns Native Culture?* and in his response to Carpenter, Katyal and Riley's article, 'In Defense of Property'.[60] I will distil those objections into the following points. Brown raises a concern that indigenous peoples are attempting to claim an unlimited and exclusive 'property right' in all aspects of their cultures, and, in so doing, are mimicking the worst behaviour of private corporate actors, while truly underestimating the value of the public domain to them. He asserts that appeals to 'sovereignty' are merely a 'slogan', and do not constitute a supportable justification for group control over cultural heritage. According to Brown, 'even the most resilient political sovereignty cannot insulate a community from outside influence'.[61] Brown is troubled by the 'vaguely defined and expansive' notion of cultural property endorsed by Carpenter, Katyal and Riley and other proponents of indigenous cultural rights. He sees no limitations to the asserted claims of indigenous peoples to their cultural productions, knowledge and biological inheritance, and thus fears that this expansive set of claims will intrude upon the legitimate interests of others within a pluralistic society. Brown maintains that cultural production is served by a robust 'commons' and cases of explicit injustice can be resolved through an appeal to more limited remedies, such as the denial of intellectual property rights to non-native actors seeking to profit from the appropriation of indigenous knowledge.

Although Brown raises some valuable concerns, his argument is beset by the same conceptual mistakes outlined earlier in this chapter. Brown adopts the same 'compare and contrast' approach that is typically used to deny indigenous peoples recognition of their distinctive interests in their cultural heritage, and he conflates appeals to tribal political sovereignty with the right of indigenous peoples to self-determination. Brown also presents the standard 'slippery slope' argument that is used to discredit novel claims (meaning those that are not a good fit for standard categories of rights), along with a general appeal to the paramount value of cultural pluralism.

UNDRIP affirms that indigenous peoples have the *right to self-determination*, meaning autonomy over their 'internal and local affairs'. Within domestic federal Indian law, the principle of inherent sovereignty is used to denote a similar constellation of autonomy rights. Importantly, the *political* sovereignty of native nations under US law, which is qualified by their status as 'domestic dependent nations' under federal law, is distinct from their *cultural* sovereignty, which is the unqualified right of tribal governments to articulate their own norms and values in structuring their collective futures.[62] Tribal cultural heritage

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[60] Michael F. Brown, Who Owns Native Culture?, Cambridge, MA: Harvard University Press, 2003; and 'Culture, Property, and Peoplehood: A Comment on Carpenter, Katyal, and Riley's "In Defense of Property"' (2010) International Journal of Cultural Property, 17, pp. 569–79, at p. 569.

[61] Brown, 'Culture, Property, and Peoplehood', supra, note 60, at p. 571.

[62] See Wallace Coffey and Rebecca Tsosie, 'Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations' (2001) Stanford Law & Policy Review, 12 (2), pp. 191–221, at p. 196.

in many ways constitutes the core of inherent sovereignty and cultural integrity is a fundamental part of indigenous self-determination. The cultural sovereignty of native nations is not limited by the same jurisdictional framework that limits their political sovereignty (that is, through limitations on tribal jurisdiction over non-members).[63] Native peoples have always been the owners of their cultural property, traditional knowledge and traditional cultural expressions. For purposes of rights to cultural heritage, there should be no analogy to the 'doctrine of discovery' which separated the Indians' 'right of occupancy' in their aboriginal lands from the remainder of the bundle of rights that constitutes 'title' under Anglo-American property law.

It is abundantly clear that tribes have full authority to regulate their tangible and intangible cultural heritage under tribal law. This falls within their inherent sovereign authority and has never been affirmatively taken away by Congress. It is up to tribal governments to structure the positive content of their rights to cultural heritage, both tangible and intangible. This is the realm of tribal cultural sovereignty and the responsibility rests with native nations. Tribal political sovereignty *will* become an issue with respect to determining who is bound by tribal law. Tribal governments have the right to regulate the conduct of their members with respect to the rights that are attached to tribal cultural heritage.[64] Tribal governments also have the capacity to enact ordinances that preclude removal of tangible cultural patrimony that is collectively owned by the tribe, and such restrictions are binding upon both members and non-members.[65] This right is also recognised by NAGPRA, which effectuates the tribe's right to repatriate objects of cultural patrimony that were designated under tribal law as 'inalienable' at the time they were taken from the tribe and criminalises 'trafficking' in protected cultural objects.

The only difficulty will be in deciding how existing jurisdictional limitations constrain tribal power to protect aspects of their cultural heritage that have fallen into the hands of non-members and are being misappropriated for commercial gain or other uses. The challenges of protecting intangible cultural heritage are of particular concern. So, for example, can a non-Indian appropriate a traditional tribal song and then gain a 'copyright' to his or her 'original expression' of that song in a different medium (for example, rap

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[63] Ibid., at pp. 194–5.

[64] Tribal governments enjoy full civil and criminal jurisdiction over tribal members on their reservations, subject to the specific protections of the Indian Civil Rights Act (ICRA) of 1968, 25 U.S.C. §§ 1301–1303. ICRA claims are adjudicated in tribal court, using tribal law. See Matthew Fletcher's analysis of free speech: Matthew L.M. Fletcher, 'Theoretical Restrictions on the Sharing of Indigenous Biological Knowledge: Implications for Freedom of Speech in Tribal Law' (2005) Kansas Journal of Law and Public Policy, 14 (3), pp. 525–60. Thus, tribes are free to employ a different set of norms to adjudicate whether the expressive conduct is indeed authorised under tribal law. For example, it is clear that many expressive acts (such as the ability to take photographs) can be sharply limited to protect tribal interests in maintaining the sanctity of ceremonial activities.

[65] See, for example, Chilkat Indian Village v Johnson (1993) 20 Indian Law Report 6127 (Chilkat Tr Ct) (applying tribal ordinance forbidding sale or removal of 'artifacts, clan crests' and other art forms collectively owned by members of the Chilkat Indian Village to a non-Indian art collector who removed important cultural objects from the Village, with the assistance of certain tribal members, and ordering the return of the objects). For more details, see Goldberg, supra note 9.

music)?[66] This is an area that ought to be protected under federal law. An analogy can be made to the IACA. Although individual Indians can apply for a trade mark under US law if they meet the requirements, very few have the economic means and commercial presence to do so. The IACA recognised that non-Indians were appropriating the traditional art forms of Native Americans and then falsely marketing these items as 'Indian made', which harmed the economic interests of the tribal governments and tribal members, and also resulted in a harm to the market because consumers would have no way of knowing what was 'authentic' Indian art. So, that statute effectively gives Indians (as defined by the statute) the right to exclude non-Indians from producing 'Indian art', and thereby gives a 'trade mark' to Indians to protect the integrity of the market. If the IACA was not 'pre-empted' by US trade mark law, then, by analogy, other injustices that are currently not covered by the technical requirements of patent and copyright law might also be addressed by innovative applications of federal law. There is some support for this in Australia, where the Federal Court in the *Bulun Bulun v R & T Textiles* case recognised an indigenous group's communal interest in the visual depiction of a sacred site, describing the group as the equitable owner of the copyright, while the individual Aboriginal artist was the legal owner, acting as a 'fiduciary' for the group in defending it against infringement by a non-native company that appropriated the design for use on t-shirts.[67] The notion of an 'equitable' ownership may be constructive in preventing the type of cultural harm that accompanies many cases of explicit cultural appropriation of sacred symbols, songs and ceremonies.

Similarly, to the extent that a tribe maintains traditional knowledge about the medicinal use of a plant, this is most often not protected by patent law, although pharmaceutical companies can manufacture a product from the active compound of the plant which can be protected by patent law. This is the type of traditional knowledge which may be of broad public benefit, but is also of great importance to tribal governments. Traditional knowledge is a valuable cultural resource which ought to be protected against misuse, misappropriation and exploitation. If the general US laws do not protect this resource, the United States has a responsibility to protect the unique rights of indigenous peoples through alternative laws. An equitable extension of US patent law might be useful toward this end, and it would be perfectly supportable under principles of US federal Indian law which describe the United States as a 'trustee' for its native peoples and authorise Congress to enact laws for the benefit of native peoples. It would also be consistent with the provisions of UNDRIP and Article 8(j) of the CBD.[68]

The ultimate point is to acknowledge that tribal customary law systems maintain a basic concept of 'property', meaning a bundle of rights with respect to resources. There are clearly cultural differences which mean that principles such as 'equitable group ownership' may more accurately describe the way rights must be protected. In addition, with respect to traditional knowledge, there may be conditions upon the transfer of the knowledge, even within the group. It should not be assumed that all members of a group

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[66] See Angela Riley, 'Straight Stealing' (2005) Washington Law Review, 80, pp. 69–164 (giving an account of such a controversy).

[67] Bulun Bulun v R & T Textiles Pty Ltd (1998) 157 ALR 193. On this case see Kathy Bowrey, 'International Trade in Indigenous Cultural Heritage: An Australian Perspective', in this volume.

[68] See Scott and Lenzerini, supra note 19.

are entitled to equal access to traditional knowledge. Nor should it be assumed that groups are willing to create databases for the knowledge, in order to prevent the attempts of corporations to patent products based on traditional knowledge. The disclosure or recording of cultural knowledge may constitute a separate harm. Indeed, the concept of 'cultural harm' underlies many tribal objections to the use of genetic data and samples, as well as DNA testing of human remains.[69] The fact that there are differences in cultural understandings about property is not a reason to deny rights to the resources. Rather, it is a point of reference to open dialogue about the rights of specific native nations to their cultural property and other aspects of their cultural heritage.

6. CONCLUSION

I return full circle to the question that inspired this chapter: 'can we adjust international trade law to protect indigenous cultural heritage?' This is a complex and fascinating question that requires careful thought. I have taken the position that the nation states have a duty to engage in a dialogue with indigenous peoples about their respective rights and interests in their cultural heritage. In the United States, this means (at a minimum) a consultation between the US government and the federally recognised American Indian and Alaskan Native tribes, and an effort to develop effective modifications within US domestic law to protect the central interests of native nations in governing their cultural property. The United States should also engage multilateral treaties on cultural heritage in a way that respects domestic treaties and laws protecting native peoples. Native peoples have a responsibility to engage in a tribal process to articulate the positive content of tribal inherent sovereignty as cultural sovereignty, and they must generate effective laws regulating aspects of their cultural heritage which they hope to protect from harm. Without this initial step to protect tribal cultural heritage from within, it will be quite difficult to persuade the United States or other nation states to step in and protect what they think of as 'cultural heritage'. Through this combined effort by nation states and native governments, we have the capacity to generate new categories of law that can overcome the mythology of discovery and effectively protect the rights of indigenous peoples.

[69] See, for example, Rebecca Tsosie, 'Cultural Challenges to Biotechnology: Native American Genetic Resources and the Concept of Cultural Harm' (2007) Journal of Law, Medicine & Ethics, 35 (3), pp. 396–411.

Principles of International Law for Multilateral Development Banks

The Obligation to Respect Human Rights

By
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January, 2009

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The Obligation to Respect Human Rights

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Deep and widespread concern about the environmental, human rights, and other social impacts of development projects financed by multilateral development banks (MDBs) has resulted in a proliferation of voluntary codes and voluntary principles and policies for corporations and other businesses. But despite the development and adoption of these voluntary codes and principles by many businesses, as we discuss below, few observers today believe that corporate performance, or state performance for that matter, in developing countries in respecting human rights and protecting the environment is adequate. Nor would an informed observer conclude that the law for protecting human rights and the environment is yet sufficiently effective, especially in guarding against human rights violations and environmental harm resulting from MDB supported projects.

It is notable that none of the voluntary codes, principles or policies contains or proposes any binding rules of international law that would apply to MDBs and that would require MDBs, like the states that comprise them, to respect, promote, and protect human rights in all MDB activities. It is axiomatic that important community and civic values, such as human rights, environmental rights, and environmental protection must be incorporated into enforceable rules of law both at the international level and at the domestic or state level. This has been done to a significant degree as regards the obligations of states to respect and promote human rights. But MDBs have generally insisted that they are not legally required to respect, promote, and protect human rights as states are.

The World Bank, for example, has taken the position, in accordance with the opinion of its then General Counsel, that, in its financing activities, it cannot take into consideration non-economic matters such as human rights. This position was based upon a restrictive interpretation of the Articles of Agreement, Article IV, Section 10 of the International Bank for Reconstruction and Development (the WB) and Article 5, Section 6 of the International Development Association (IDA) Articles of Agreement.[1]

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[1] Memorandum from the General Counsel of the World Bank, Ibrahim Shihata, Issues of "Governance" in Borrowing Members – The Extent of their Relevance under the Bank's Articles of Agreement (1999) (on file with Indian Law Resource Center).

However, there are no provisions in MDBs' constitutive instruments expressly preventing their consideration of human rights issues, and the Articles of Agreement can no longer be interpreted as precluding MDBs' consideration of human rights obligations under international law, because the protection of human rights has become a matter of legitimate international concern.[2] MDBs are parts of larger intergovernmental organizations which, by the terms of their Charters or constitutional instruments, require respect for human rights. For instance, the WB is a specialized agency of the United Nations (UN), according to the agreement entered into with the UN Economic and Social Council (ECOSOC)[3] in accordance with related Articles of the UN Charter.[4] The UN Charter expressly calls for universal respect for human rights and fundamental freedoms without discrimination,[5] as well as for action in cooperation with the UN for the achievement of this purpose.[6]

In January of 2006, the outgoing WB General Counsel released a legal opinion recognizing that the balance has now shifted in favor of protecting human rights.[7] The General Counsel pointed out that the Articles of Agreement permit, and in some cases require, the Bank to recognize the human rights dimensions of its development policies and activities, because it is now evident that human rights are an intrinsic part of the Bank's mission.[8]

This legal opinion constituted a clear advance from the previous restrictive legal interpretation. However, a subsequent opinion of the WB General Counsel regards the Articles as permissive in regard to human rights: allowing but not mandating action on the part of the Bank in relation to human rights.[9] According to this opinion, the WB's role is a facilitative one, helping its members realize their human rights obligations.[10] Human rights would not be the basis for increased conditions on Bank financing, nor should they be seen as an agenda that could present an obstacle for disbursement or increase the cost of doing business.[11]

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[2] Andrew Clapham, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 143 (Oxford Univ. Press 2006).
[3] World Bank, Relationship Agreement, art. 1(2).
[4] *See* U.N. Charter, art. 57. Finally, Article 63(2) provides that ECOSOC "…may co-ordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations." *Id.* art. 63(2).
[5] U.N. Charter, art. 55(c).
[6] U.N. Charter, art. 56. *See* Mac Darrow, BETWEEN LIGHTS AND SHADOWS, THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW 125 (Oxford Portal Oregon 2003).
[7] Memorandum from the General Counsel of the World Bank, Roberto Danino, Legal Opinion on Human Rights and the Work of the World Bank 17 (Jan. 27, 2006) (on file with Indian Law Resource Center).
[8] *Id.* at 25.
[9] Memorandum from the General Counsel of the World Bank, Ana Palacios, The Way Forward: Human Rights and the World Bank (2006). Available at http://www1.worldbank.org/devoutreach/october06/article.asp?id=388.
[10] *Id*.
[11] *Id*.

MDBs have developed operational policies on specific human rights topics, but these policies do not reflect accepted international human rights related standards. For their operational policies, MDBs generally choose their own definitions and standards of human rights. These standards are seldom based directly on internationally agreed standards, though they are influenced by them.[12] These choices have as much to do with what is politically acceptable within and among the participating entities as with objective human rights needs.[13] For instance, the Inter-American Development Bank (IDB) has adopted an Operational Policy on Indigenous Peoples that does not reflect the existing international standards on the collective rights of indigenous peoples.[14]

MDBs have also developed inspection mechanisms for accountability purposes. Some scholars consider that, legally, these mechanisms have turned out to be "effective" forums in which project-affected people can raise claims that relate to their rights as indigenous peoples or as involuntarily resettled people, and in which they can challenge the interpretation and implementation of MDBs' internal policies and procedures.[15] But, from an international human rights law viewpoint, they are not effective in addressing human rights violations resulting from MDB financed projects. The UN Secretary General's Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises has found these mechanisms to be ineffective.[16]

Having in mind the enormous and often irreversible human rights and environmental consequences of MDB financed projects and the inadequacy of the present legal and policy framework for protecting human rights and the environment, we feel that concrete and enforceable rules of international law must be recognized and applied to MDBs. Such rules of international law are justified both by existing principles of international law and by the fact that, as a practical matter, such concrete rules are needed to protect the Earth and our human rights.

The draft Principles of Law flow from existing and widely accepted rules of international human rights law, and they are offered here as a starting point for further discussion and elaboration by all concerned. We have no illusion that this set of draft Principles is necessarily correct or complete, and we look forward to criticisms, suggestions, and alternative drafts. If it is agreed that international law should be clarified and extended explicitly to reach MDBs, and we believe it should, then the

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[12] U.N. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, *Interim Report*, ¶ 53, U.N. Doc. E/CN.4/2006/97 (2006).

[13] *Id.* at 53.

[14] *See generally* Indian Law Resource Center, *Comentarios al Borrador de Politica Operativa sobre Pueblos Indigenas publicado por el Banco Interamericano de Desarrollo*, July 29, 2005. Available at http://www.indianlaw.org/main/resources/1/4.

[15] Daniel Bradlow D., *Private Complaints and International Organizations: a Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO. J. INT'L L. 410 (2005) (analyzing the legal and practical significance of MDBs' inspection mechanisms).

[16] U.N. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, *Interim Report*, *supra* note 12, at 53.

particular human rights and environmental rules should be or could be elaborated in further detail. Just as Principle 4 contains certain detailed rules particularly addressing certain rights of indigenous peoples, the Principles might usefully be enlarged and improved to embrace more clearly all individuals and peoples and to provide greater specificity as to the rights to be protected.

We believe that these Principles should be written so as to command respect by MDBs for the human rights of all, not just indigenous peoples. We have drafted the Principles in that way, but we have also included some specific elements to protect human rights of particular importance to indigenous peoples. We recognize that further detailed principles would be justified to address other issues particularly affecting other categories of individuals or groups. Such additions and suggestions are welcomed and encouraged.

These draft Principles, or a refined and improved version of them, are proposed with a view toward eventual adoption and recognition as existing principles of international law applying directly to multilateral development banks. These are not conceived as merely voluntary or aspirational principles. They are elements of international law that are evolving and crystallizing as binding rules of law through the regular practice of states and through the growing recognition of the legal rules by states. While they are in the process of becoming universally accepted, there would be great value in clarifying and developing this area of law in a positive manner. It would, therefore, be desirable for the UN Human Rights Council or the regional organizations such as the Organization of American States (OAS) to formally recognize and adopt these Principles of Law or some similar principles that result from further dialogue and debate.

Draft Principles of International Law for Multilateral Development Banks

1. Multilateral development banks, as inter-governmental organizations, are subject to the legal obligations to respect, protect, and promote human rights that apply to states generally. A multilateral development bank is not, however, subject to treaty obligations concerning human rights, unless all the member countries are parties to a human rights treaty.

2. Multilateral development banks, in all their activities, shall take reasonable and prudent measures to assure their activities, loans, or other actions do not cause, enable, support, encourage, or prolong the violation of human rights by any state, agency, corporation, or business.

3. Multilateral development banks shall exercise due diligence to investigate, gather evidence, examine the law, and review proposals in order to assure that proposals, projects and businesses that receive any sort of support from them (MDBs) do not directly or indirectly violate or infringe upon the human rights of anyone or any community or people.

4. In particular, multilateral development banks shall, with respect to projects or businesses receiving multilateral development bank support in any form, assure through the project review process and through on-going review and monitoring that the following standards, *inter alia*, are met:

1) Projects, their sponsors, directors, and participating entities shall respect the human rights of all individuals and communities, including indigenous peoples, as those rights are established both by international law and by the law of the country where the project or business is located.

2) Projects, their sponsors, directors, and participating entities shall respect the traditional and collective ownership of land by indigenous peoples and local communities, as well as individual rights of ownership.

3) Projects, their sponsors, directors, and participating entities shall recognize, respect and work to preserve the cultures and ways of life of indigenous peoples, national, cultural, and linguistic minorities, and other such communities.

4) Projects, their sponsors, directors, and participating entities and the states where they are located shall recognize the duly established governments of indigenous peoples and other communities as representatives of the interests of their respective communities and respect their systems of governance.

5) Projects, their sponsors, directors, and participating entities shall assess the potential social and environmental impacts of the projects, including human rights impacts, prior to MDB funding or support for such projects.

6) Businesses and the states where they are located shall consult in good faith with indigenous and local communities prior to undertaking a project that may affect the community.

7) Projects, their sponsors, directors, and participating entities shall include the participation of indigenous and local communities in the design and implementation of the projects to lessen any adverse impact on them.

8) Projects, their sponsors, directors, and participating entities shall not dislocate indigenous or other communities without their free, prior, and informed consent. If relocation occurs with such consent, the community must receive compensation, including compensation in the form of land of comparable quantity and quality, if possible and so desired by the community.

9) Projects, their sponsors, directors, and participating entities shall have precise, written policies consistent with these Principles to govern their interaction with indigenous and local communities.

5. Multilateral development banks have the on-going responsibility to monitor and periodically review the human rights performance of all projects or businesses receiving support.

6. Multilateral development banks shall undertake measures to implement these Principles, including educational measures for MDB staff, for MDB member states, and for the clients of the MDBs, among others.

7. Multilateral development banks shall institute written procedures for the submission and consideration of complaints of human rights violations on behalf of any person or group with respect to any project or activity of the bank. Such procedures shall result in a written report where a human rights violation has occurred and recommendations for corrective action by the bank and by the project as appropriate. Multilateral development banks shall take prompt and effective action to correct any human rights violation identified by such a report and shall take effective measures to prevent future violations.

* * *

In considering and drafting this body of Legal Principles for multilateral development banks, we have drawn upon a rich and extensive body of human rights instruments, treaties, and international legal jurisprudence.[17] We refer throughout to human rights instruments relevant to indigenous peoples, especially the UN Declaration on the Rights of Indigenous Peoples and ILO No. Convention 169 concerning Indigenous

[17] *See, e.g.*, UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, UN Doc. A/RES/61/295 (2007); Proposed American Declaration on the Rights of Indigenous Peoples (Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th Regular Session), OEA/Ser/L/V/.II.95 Doc.6 (1997); International Labor Organization, Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 328 UNT.S. 247, 28 I.L.M. 1382 (1989); International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195; International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3; Committee on the Elimination of Racial Discrimination, General Recommendation 23, Rights of indigenous peoples (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V at 122 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 212 (2003); International Finance Corporation's Performance Standards on Social and Environmental Sustainability, *Performance Standard 7: Indigenous Peoples*, at 28-31, Apr. 30, 2006, available at http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf; Inter-American Development Bank, Sustainable Development Department Indigenous Peoples and Community Development Unit, *Operational Policy on Indigenous Peoples* (Feb. 22, 2006), available at http://www.iadb.org/sds/ind/index_ind_e.htm.

and Tribal Peoples. The UN Declaration was adopted by the General Assembly in 2007 and is formally non-binding, though it contains much that is already part of customary international law. The ILO Convention No. 169 is binding on the 17 states that have ratified it. We give attention to the rights of indigenous peoples because of our particular interest, but we believe that these draft Principles are equally important for protecting the rights of all persons and all peoples.

In addition, we have considered and drawn from many voluntary principles of businesses, NGOs, and others, including some lesser known standards and norms regarding corporate responsibility, business and human rights, and environmental and social justice. See below at note 40 *et seq*. Some of the most relevant legal authorities and other materials are set forth following each of the draft Principles.

Principle 1. Multilateral development banks, as inter-governmental organizations, are subject to the legal obligations to respect, protect, and promote human rights that apply to states generally. A multilateral development bank is not, however, subject to treaty obligations concerning human rights, unless all the member countries are parties to a human rights treaty.

MDBs are international intergovernmental organizations (IOs) created by agreements among states,[18] on either a universal or regional basis,[19] focused on the public or private sector[20] to carry out their respective mandates for economic and social development of developing member states.[21] MDBs are exclusively comprised of states.[22] Although there is neither a definition of the term "non-state actor" under

[18] MDBs are creatures of states since states create them through instruments such as the Articles of Agreements. MDBs' Articles of Agreement are treaties within the meaning of that term in Article 2 of the Vienna Convention on the Law of Treaties (Vienna Convention) of 1969. *See* Vienna Convention on the Law of Treaties, art. 2(1)(a), May 23, 1969, U.N.T.S. 18232. According to Article 5, the Vienna Convention applies to MDBs' Articles of Agreements, because they are treaties constituting international organizations. *See id.* art. 5.

[19] Universal MDBs, like the World Bank (WB), operate in developing member countries around the world. *See* World Bank, Articles of Agreement, art. I (i), Dec. 27, 1945. Regional MDBs operate in specific regions of the world. *See, e.g.*, Inter-American Development Bank, available at http://www.iadb.org/; European Bank for Reconstruction and Development, available at http://www.ebrd.com/; Asian Development Bank, available at http://www.adb.org/; and African Development Bank, available at http://www.afdb.org/portal/page?_pageid=473,1&_dad=portal&_schema=PORTAL.

[20] On one hand, the WB and the IDB mainly carry out their operations and projects in the public sector, providing loans to states to promote development in developing member countries. On the other hand, only the IFC focuses on private enterprises operating in member countries. *See* International Finance Corporation, Articles of Agreement, art. 1.

[21] For instance, the IDB operates in Latin American developing countries. According to the IDB's Articles of Agreement, the Bank's purpose is to contribute to the development of the regional developing member countries, individually and collectively. *See* Inter-American Development Bank, Agreement Establishing the Inter-American Development Bank, art. I, sec. 1 (Dec. 30, 1959).

[22] MDBs' membership is only open to states, whether regional or non-regional. For instance, according to the IDB's Articles of Agreement, the original members are the members of the Organization of American States, but the membership is also open to non-regional countries that are members of the International Monetary Fund if admitted by the Bank under the rules of its Board of Directors. *See* Inter-American

international law nor a uniform use of the term by legal authorities,[23] MDBs should not be considered non-state actors, inasmuch as they are intergovernmental organizations in which states act collectively. Multilateral development banks include the World Bank Group, the Inter-American Development Bank, the European Bank for Reconstruction and Development, the African Development Bank Group, and the Asian Development Bank.

MDBs are governed by the collective decisions adopted by their decision-making organs, which are exclusively comprised of member states. For instance, according to the IDB's Articles of Agreement, all the power of the Bank is vested in the Board of Governors who can delegate functions to the Board of Executive Directors[24] – all these organs are exclusively comprised of member states.[25] Member states' voting rights in the decision-making organs are proportional to a country's subscription in the Bank's capital stock.[26] Moreover, MDBs themselves expressly regulate their "relations with other organizations" under their respective Articles of Agreement.[27]

There is a growing legal consensus that intergovernmental organizations such as MDBs are subjects of international law, and, therefore, legal rights and obligations under international law apply to them. Several sources support this view, including: (1) the jurisprudence of the International Court of Justice (ICJ);[28] (2) the Vienna Conventions;[29]

Development Bank, Agreement Establishing the Inter-American Development Bank, art. II, sec. 1, *supra* note 21.

[23] For some scholars, the term "non-state actor" refers to armed opposition groups within a domestic context that are independent of states, e.g., rebel groups, irregular armed groups, insurgents, dissident armed forces, guerrillas, liberation movements, etc. *See generally* Philip Alston, *The 'Not-a-Cat' Syndrome*, *in* NON-STATES ACTORS AND HUMAN RIGHTS 15 (Philip Alston ed., Oxford Univ. Press 2005) (defining non-state actors and identifying key factors concerning their performance under international human rights law). For others, non-state actors are all those actors, not state agents, that operate at the international level and are relevant to international relations. *Id*. at 15. Finally, a third position considers non-state actors to be those affected people with no contractual relationship with MDBs whose living conditions are directly or indirectly affected by the MDB-financed operations. *See generally* Daniel Bradlow D., *Private Complaints and International Organizations: a Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO. J. INT'L L. 403, 411 (2005) (analyzing the legal and practical significance of MDBs' inspection mechanisms).

[24] Inter-American Development Bank, Agreement Establishing the Inter-American Development Bank, art. VIII sec. 2, *supra* note 21.

[25] *Id*. art. VIII, sec. 3(a) and (b).

[26] John Ruthrauff, AN INTRODUCTION TO THE WORLD BANK, INTER-AMERICAN DEVELOPMENT BANK, AND THE INTERNACIONAL MONETARY FUND 6 (2d ed. 1997).

[27] *See, e.g.*, Inter-American Development Bank, Agreement Establishing the Inter-American Development Bank art. XIV sec. 2, *supra* note 21. *See also* World Bank, Articles of Agreement, art. V, sec. 8, "Relationship to Other International Organizations"; and International Finance Corporation, Articles of Agreement, art. IV, sec. 7, "Relationship to Other International Organizations".

[28] The ICJ has concluded that the United Nations, as an IO, is a subject of international law. In the *Reparations* opinion of 1949, the Court stated that the UN was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, 1949 I.C.J. 179 (Apr. 11, 1949). Since this opinion, the debate about the legal personality of IOs has evolved considerably. Indeed, thirty years later, in the *WHO* opinion of 1980, the Court established that international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon

and (3) the International Law Commission's draft treaty provisions on the responsibility of IOs.[30] Thus, the obligations and responsibilities of international human rights law, especially, should be applied to MDBs. As established in the principal human rights treaties and rules of customary international law, these obligations are: (1) to respect human rights;[31] (2) to adopt domestic measures;[32] and (3) to redress human rights violations.[33] Though these obligations were originally stated in a form applying to individual states, they are suitable for application, *mutatis mutandis*, to IOs such as MDBs.

MDBs, in all their activities, are obligated to respect human rights; but many affirmative human rights obligations cannot be applied in the same way as to states. For example, MDBs are not obliged as such to fulfill obligations that, by their nature, can

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them under general rules of international law, under their constitutions, or under international agreements to which they are parties. Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 173 (Dec. 20, 1980).

[29] The Vienna Convention on the Law of Treaties of 1969 refers to international organizations when defining its scope of application and the term "international organizations". *See* Vienna Convention on the Law of Treaties, art. 5 and art. 2(1)(i), *supra* note 18. In addition, three other Vienna Conventions use the same legal definition and take the same approach: (1) the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975, art. I(1)(1) (Mar. 14, 1975); (2) the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978, art. 2(1)(n) (Aug. 23, 1978); and (3) the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986, art. 2(1)(i).

[30] The International Law Commission (ILC), which has responsibility for elaborating the Draft Convention on Responsibility of International Organizations, has defined an international IO, in Article 2, as "…an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to states, other entities." U.N. Internat'l L. Comm'n, *Responsibility of international organizations - Titles and texts of the draft articles 1, 2 and 3 adopted by the Drafting Committee*, ¶ 1, U.N. Doc. A/CN.4/L.632 (June 4, 2003).

[31] Some of the relevant international instruments are: Organization of American States, American Convention on Human Rights, art. 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 1, Nov. 17, 1988, O.A.S.T.S. No. 69; U.N. Charter, art. 55(c); Universal Declaration of Human Rights, preamble, G.A. Res. 217A (Dec. 12, 1948); International Covenant on Civil and Political Rights, arts. 2(1) and 2(2), G.A. Res. 2200A (XXI) (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, art. 2(2), G.A. Res. 2200A (XXI) (Dec. 16, 1966); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art. 7, G.A. Res. 45/158 (Dec. 18, 1990); International Convention on the Elimination of All Forms of Racial Discrimination, preamble, G.A. Res. 2106 (XX) (Dec. 21, 1965); Council of Europe, European Convention for the Protection of the Human Rights and Fundamental Freedoms, art. 1, Nov. 4, 1950**,** 213 U.N.T.S 221; Council of Europe, European Social Charter, preamble (Oct. 18, 1961); Organization of African Unity, African Charter of Human and People's Rights, art. 1 (June 27, 1981); League of Arab States, Arab Charter of Human Rights, art. 2 (Sept. 15, 1994).

[32] *See* Organization of American States, American Convention on Human Rights, art. 2, *supra* note 31; Organization of African Unity, African Charter of Human and People's Rights, art. 1, *supra* note 31; International Covenant on Economic, Social and Cultural Rights, art. 2(1), *supra* note 31; International Covenant on Civil and Political Rights, art. 2(2), *supra* note 31.

[33] *See* Organization of American States, American Convention on Human Rights, art. 63(1), *supra* note 31. The obligation in question is a well-established rule of customary international law. *See* Case of De la Cruz-Flores v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 115 (Nov. 18, 2004), para. 139.

only be fulfilled by the state itself, such as implementing the right to basic primary education, or the obligation to enact domestic legislation.[34] But MDBs would, under these Principles, have obligations not to act in a way that prevents a borrowing state from fulfilling its obligations to provide such education.[35] While MDBs cannot themselves enact domestic legislation, MDBs can be complicit in a state violation of human rights by causing, forcing, or enabling a state to violate human rights. This is particularly true, for instance, when MDBs finance projects which involve the adoption of new domestic legislation that is not in accordance with accepted international human rights standards. With respect to the obligation to redress human rights violations, MDBs can breach this obligation by financing projects in states that have been condemned by international tribunals for human rights violations or for failing to redress such violations. This concept was asserted by the UN Economic and Social Council when it called upon the WB to pay enhanced attention in their activities to respect for economic, social and cultural rights, including facilitating the development of appropriate remedies for responding to violations of those rights.[36]

Other relevant legal authorities relating to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 41:
  > The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration [on the Rights of Indigenous Peoples] through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.
- ILO Convention No. 169, Article 2(1):
  > Governments shall have the responsibility for developing, with the participation of the [indigenous] peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

Principle 2. Multilateral development banks, in all their activities, shall take reasonable and prudent measures to assure their activities, loans, or other actions do not cause, enable, support, encourage, or prolong the violation of human rights by any state, agency, corporation, or business.

In order to comply with this Principle, MDBs should institute appropriate procedures or other measures to avoid human rights violations that could foreseeably occur in connection with projects they finance or support. Diligent and rigorous human

[34] Andrew Clapham, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 151 (Oxford Univ. Press 2006).
[35] *Id.*
[36] U.N. ECOSOC, *Procedural Decisions*, U.N. Doc. E/1999/22, para. 515 (1999)

rights impact assessments or equivalent measures should be required by MDBs prior to funding decisions that could have human rights implications.

"Human rights" includes, at least, all those rights recognized in customary international law, in any treaty applicable in the particular situation, or in the domestic law of the state concerned. International human rights tribunals have construed the obligation of states to prevent, investigate and punish human rights violations. In the *Velasquez-Rodriguez* case, the Inter-American Court determined that the state has a legal duty to take reasonable steps to prevent human rights violations, as well as to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim receives adequate compensation.[37] This principle places analogous obligations on MDBs in connection with their activities and operations in member states' territories, especially the IFC, when dealing with the private sector.

Other relevant legal authorities relating to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 8(2*)*:
  States shall provide effective mechanisms for prevention of, and redress for: (*a*) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (*b*) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (*c*) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (*d*) Any form of forced assimilation or integration; (*e*) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Principle 3. Multilateral development banks shall exercise due diligence to investigate, gather evidence, examine the law, and review proposals in order to assure that proposals, projects and businesses that receive any sort of support from them (MDBs) do not directly or indirectly violate or infringe upon the human rights of anyone or any community or people.

This Principle adds specific requirements to the more general rule in Principle 2. The Inter-American Court has emphasized the importance of due diligence when considering human rights violations. In the *Velasquez-Rodriguez* case, the Court stated that an illegal act that violates human rights and that is initially not directly imputable to a state can lead to the international responsibility of that state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the American Convention on Human Rights.[38] Likewise, the Court concluded that what is decisive is whether a violation of the rights recognized by the

[37] Case of Velásquez-Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988), para. 174.
[38] *Id*. at 172.

American Convention on Human Rights has occurred with the support or the acquiescence of the government, or whether the state has allowed the act to take place without taking measures to prevent it or to punish those responsible.[39] The legal rationale of the *Velasquez-Rodriguez* case is applicable to MDBs, as they can contribute to the violation by a state of human rights by funding projects that result in or contribute to human rights violations.

Other relevant legal authorities relating to indigenous peoples include:

- ILO Convention No. 169, Article 7(3):
  > Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

Principle 4. In particular, multilateral development banks shall, with respect to projects or businesses receiving multilateral development bank support in any form, assure through the project review process and through on-going review and monitoring that the following standards, *inter alia*, are met:

Principle 4 states nine specific requirements, all relating to MDB decisions to finance or not finance public and private sector projects in developing countries. The requirements form a kind of checklist for human rights issues that could be used by an MDB in its review process.

The particular requirements included in this draft of Principle 4 are related primarily, but not exclusively, to indigenous peoples and some of the key human rights issues that affect them. It is clear that this list of requirements could be enlarged to embrace more issues and more possible human rights concerns. Indeed it would be desirable to make the list as complete as possible, within the limits of reasonableness and practicability. As we have mentioned previously, we believe that these Principles should be as universal as possible, applying to and making applicable all relevant human rights.

The specific requirements of Principle 4 are based in part upon some of the many voluntary business principles and codes that have been developed and espoused by businesses, human rights organizations and advocates, environmental organizations, and others. They are also based upon the relevant human rights treaties, international human rights declarations, and other instruments, as well as the human rights jurisprudence of international courts and human rights bodies.

For many years, there has been an increasing trend in business to promote socially responsible investment, which includes protecting the human rights and interests of local

[39] *Id*. at 173.

communities. As part of this trend, businesses themselves, NGOs, other entities, and experts have developed policies and general guidelines to demonstrate devotion to corporate responsibility for investors and to actually act responsibly. Businesses that have developed policies that relate to human rights and environmental and social justice include Barrick,[40] BHP Billiton,[41] Chevron,[42] Conoco,[43] Newmont Mining,[44] and Shell.[45] Some companies, such as EnCana,[46] Alcan,[47] JP Morgan,[48] Total,[49] and Enbridge,[50] have formed policies or guidelines that relate specifically to indigenous peoples and their special needs. Companies working with certain industries, such as cement,[51] mining,[52] banking,[53] and oil,[54] have attempted to address human rights issues and spearhead corporate responsibility initiatives. International initiatives have also addressed human rights in business, and these include the Global Compact,[55] the UN

[40] Barrick, *Corporate Social Responsibility Charter*, available at www.barrick.com/Theme/Barrick/files/docs_ehss/CSR_Charter.pdf.
[41] BHP Billiton, *Sustainability Report (*2007), available at www.bhpbilliton.com/bb/aboutUs/annualReports.jsp.
[42] Chevron, *Energy Partnership: 2007 Corporate Responsibility Report*, available at www.chevron.com/globalissues/corporateresponsibility/2007/documents/Chevron_2007CR_1_intro.pdf; Chevron, *Human Rights Statement, available at* www.chevron.com/globalissues/humanrights/.
[43] ConocoPhillips, *Code of Business Ethics and Conduct for Directors and Employees* (Feb. 9, 2007), available at www.conocophillips.com/NR/rdonlyres/147E8B57-9169-4FA7-BB23-A41207B26D2D/0/13_CodeofEthics.pdf.
[44] Newmont Mining, *Proposal No. 4—Stockholder Proposal Requesting a Report Regarding Newmont's Community Policies and Practices* (2007), available at www.newmont.com/en/pdf/CRR_Shareholder_proposal_2007.pdf.
[45] Shell, *Sustainability Report 2007*, available at http://sustainabilityreport.shell.com/2007/servicepages/welcome.html.
[46] EnCana, *Aboriginal Guidelines*, available at www.encana.com/responsibility/consultation/aboriginal/index.htm.
[47] Alcan, *Indigenous Peoples Policy*, available at www.alcan.com/web/publishing.nsf/content/Alcan+Indigenous+Peoples+Policy.
[48] JP Morgan Chase, *Indigenous Communities*, available at http://www.jpmorganchase.com/cm/cs?pagename=Chase/Href&urlname=jpmc/community/env/policy/indig.
[49] Total, *Policy regarding indigenous peoples*, available at www.total.com/static/fr/medias/topic1492/Total_Indigenous_People_Policy.pdf.
[50] Enbridge, *Indigenous Peoples Policy*, available at http://www.enbridge.com/pipelines/right-of-way/pdf/indigenouspeoplespolicy.pdf.
[51] Cement Sustainability Initiative (CSI), *Environmental and Social Impact Assessment (ESIA) Guidelines: Land and Communities* (April 2005), available at www.wbcsdcement.org/pdf/cement_initiative_arp.pdf.
[52] Mining and Environment Research Network, *Corporate Social Responsibility and the Mining Sector*, available at www.mineralresourcesforum.org/docs/pdfs/merncsr.pdf.
[53] Equator Principles (July 2006), available at www.equator-principles.com.
[54] Energy and Biodiversity Initiative, *Integrating Biodiversity Conservation into Oil and Gas Development*, available at www.celb.org/xp/CELB/downloads/ebi.pdf.
[55] United Nations Global Compact, *The Ten Principles*, available at http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html. United Nations Global Compact, Business Leaders Initiative on Human Rights, Office of the High Commissioner on Human Rights, *A Guide for Integrating Human Rights into Business Management*, available at www.unglobalcompact.org/docs/issues_doc/human_rights/guide_hr.pdf.

Special Representative on Business and Human Rights,[56] and the ISO Standard on Social Responsibility.[57]

Increased environmental awareness, both in law and practice, has also contributed to the increasing focus on corporate responsibility and how business affects the environment.[58] In the wake of growing demand for corporate responsibility, some companies have become specifically devoted to promoting social investment, which can also promote respect for human rights generally.[59] These so-called social investment companies screen companies for investment based on human rights and socially responsible activities.[60]

NGOs and other entities have also engaged in the effort to force companies to become more socially responsible, including Amnesty International,[61] Rainforest Action Network,[62] Greenpeace,[63] OECD,[64] Conservation International,[65] Sierra Club,[66] and

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[56] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Business and human rights: mapping international standards of responsibility and accountability for corporate acts, A/HRC/4/35 (Feb. 19, 2007); Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including Right to Development, Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5 (Apr. 7, 2008).

[57] International Standards Organization (ISO), *About the Standard*, available at http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/07_gen_info/aboutStd.html.

[58] *See generally* Mary Lou Egan, et. al., *France's Nouvelles Regulations Economiques: Using Government Mandates for Corporate Reports To Promote Environmentally Sustainable Economic Development*, A paper prepared for presentation at the 25th Annual Research Conference of the Association for Public Policy and Management, Washington, DC (November 2003), available at www.bendickegan.com/pdf/EganMauleonWolffBendick.pdf; Gary S. Guzy, *Memorandum: EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting* (Dec. 1, 2000), available at www.epa.gov/compliance/resources/policies/ej/ej_permitting_authorities_memo_120100.pdf; Executive Order 12898, FEDERAL ACTIONS TO ADDRESS ENVIRONMENTAL JUSTICE IN MINORITY POPULATIONS AND LOW-INCOME POPULATIONS (Feb. 11, 1994), available at www.epa.gov/Region2/ej/exec_order_12898.pdf.

[59] *See, e.g.*, Calvert Group, *Issue Brief: Indigenous Peoples' Rights*, available at http://www.calvertgroup.com/sri_ibindigenouspeoplesrights.html.

[60] *See, e.g.*, Social Investment Forum, *Socially Responsible Mutual Fund Charts: Screening & Advocacy*, available at www.socialinvest.org/resources/sriguide/srifacts.cfm.

[61] Amnesty International, *Human Rights Principles For Companies*, AI Index: ACT 70/01/98 (January 1998), *available at* www.amnesty.org/en/library/info/ACT70/001/1998/en.

[62] *See, e.g.*, Rainforest Action Network, *Agribusiness Impact on Indigenous Communities Fact Sheet*, available at http://ran.org/campaign/rainforest_agribusiness/resources/fact_sheets/peoples_rights_vs_agribusiness_the_case_of_food_sovereignty/.

[63] Greenpeace, *Bhopal Principles on corporate accountability*, available at www.sacredland.org/PDFs/Greenpeace_Bhopal.pdf.

[64] Organization for Economic Co-Operation and Development, The OECD Guidelines for Multinational Enterprises (2000), available at www.oecd.org/document/28/0,2340,fr_2649_34889_2397532_1_1_1_1,00.html.

[65] Conservation International, *Reinventing the Well: Approaches to Minimizing the Environmental and Social Impact of Oil Development in the Tropics*, Volume 2/1997, available at www.celb.org/xp/CELB/downloads/PublicationOrderForm.pdf.

Nature Conservancy.[67] Some organizations, such as Ceres,[68] Forest Peoples Programme,[69] and Oxfam,[70] have advocated for recognition of particular human rights by creating relevant principles or guidelines that can then be adopted by specific companies.

Experts, including scholars and advocates for the interests of business and indigenous peoples, have also addressed the intersection between indigenous peoples and business. From a rights based perspective, some of these experts have focused on indigenous peoples' rights to existence, self-determination, and non-discrimination, which, in essence, protect the way of life of indigenous peoples.[71] Experts from various fields have also come together to create principles or guidelines related to corporate responsibility generally and indigenous peoples, directly or indirectly.[72]

Finally, several international documents and summits have addressed how to involve and protect indigenous peoples in global efforts to preserve the environment and biodiversity. For example, at the 2002 World Summit on Sustainable Development, the parties addressed how to implement environmental policies and repeatedly called for cooperation with and participation of indigenous peoples.[73] The Summit is an international conference mainly organized by the UN, at which heads of states, national delegates, and leaders from NGOs, businesses, and other major groups meet to discuss direct action toward meeting difficult challenges, including improving people's lives and conserving natural resources.[74]

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[66] Sierra Club, *Sierra Club Guidelines* (Oct. 17, 1998), available at www.sierraclub.org/policy/conservation/transcorp.asp.

[67] Nature Conservancy, *The Nature Conservancy and Indigenous Peoples*, available at www.nature.org/partners/partnership/art14301.html.

[68] Ceres Principles (1989), available at www.ceres.org/.

[69] Forest Peoples Programme and Tebtebba Foundation, Indigenous Peoples' Rights, Extractive Industries and Transnational and Other Business Enterprises A Submission to the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises (Dec. 29, 2006), available at http://www.business-humanrights.org/Documents/Forest-Peoples-Tebtebba-submission-to-SRSG-re-indigenous-rights-29-Dec-2006.pdf.

[70] Oxfam International and Social Capital Group, *Corporate Social Responsibility in the Mining Sector in Peru*, available at http://www.oxfamamerica.org/newsandpublications/publications/research_reports/corporate-social-responsibility-in-the-mining-sector-in-peru.

[71] *See generally* Marcos A. Orellana, *Indigenous Peoples, Mining, and International Law*, MINING MINERALS AND SUSTAINABLE DEVELOPMENT (January 2002), available at www.iied.org/mmsd/mmsd_pdfs/002_orellana_eng.pdf.

[72] The Global Sullivan Principles, available at http://www.thesullivanfoundation.org/gsp/principles/gsp/default.asp.

[73] United Nations, Report of the World Summit on Sustainable Development, Johannesburg, South Africa, Aug. 26-Sept. 4, 2002, Annex: Plan of Implementation of the World Summit on Sustainable Development.

[74] The Tenth Session of the UN Commission on Sustainable Development acted as the global Preparatory Committee for the 2002 Summit, which was focused on turning plans into action by evaluating the obstacles to progress and the results achieved in Agenda 21 since its adoption in 1992. Agenda 21 is an unprecedented global plan of action for sustainable development adopted by 178 governments at the UN Conference on the Environment and Development, Rio de Janeiro, 1992. Agenda 21 is available at http://www.un.org/esa/sustdev/documents/agenda21/index.htm

Principle 4(1). Projects, their sponsors, directors, and participating entities shall respect the human rights of all individuals and communities, including indigenous peoples, as those rights are established both by international law and by the law of the country where the project or business is located.

Every project, especially those that receive public financing, must respect the human rights of all persons, including the rights of communities, peoples and other groups. Of course, the human rights referred to are those established by applicable international law and standards, as well as by domestic law. These rights apply equally to all persons regardless of race, gender, age, disability, economic status, or any other distinguishing feature. Such human rights include, but are not limited to, the rights to life, liberty, property, due process of law, access to justice, nondiscrimination, food, water, shelter, and self-determination.

Other relevant legal authorities relating to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 1:
  Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.
- UN Declaration on the Rights of Indigenous Peoples, Article 2:
  Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.
- UN Declaration on the Rights of Indigenous Peoples, Article 7:
  1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
  2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.
- UN Declaration on the Rights of Indigenous Peoples, Article 17(1):
  Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
- ILO Convention No. 169, Article 3(1):
  Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.
- ILO Convention No. 169, Article 4(1):

Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

Relevant existing policies and principles include:

- Amnesty International, *Human Rights Principles For Companies*, AI Index: ACT 70/01/98 (January 1998), at 4-5: "Companies should cooperate in creating an environment where human rights are understood and respected … . Human rights are designed to protect the inherent dignity of the human person, regardless of her or his culture or background, and by their very nature are universal … . These rights cover civil, political, economic, cultural and social activities and are regarded not only as universal, but also as indivisible and interdependent. Multinational companies should adhere to these international standards even if national laws do not specify them."
- United Nations Global Compact, *The Ten Principles*: "Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and Principle 2: make sure that they are not complicit in human rights abuses." The UN Global Compact is a global corporate citizenship initiative, which set up a framework for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labor, the environment, and anti-corruption.[75]
- United Nations, Report of the World Summit on Sustainable Development, Johannesburg, South Africa, Aug. 26-Sept. 4, 2002, Annex: Plan of Implementation of the World Summit on Sustainable Development, at 44(j): "Subject to national legislation, recognize the rights of local and indigenous communities who are holders of traditional knowledge, innovations and practices, and, with the approval and involvement of the holders of such knowledge, innovations and practices, develop and implement benefit-sharing mechanisms on mutually agreed terms for the use of such knowledge, innovations and practices."
- Greenpeace, *Bhopal Principles on corporate accountability*: " 4. Protect Human rights: Economic activity shall not infringe upon basic human and social rights. States have the responsibility to safeguard the basic human and social rights of citizens, in particular the right to life; the right to safe and healthy working conditions; the right to a safe and healthy environment; the right to medical treatment and to compensation for injury and damage; the right to information and the right of access to justice by individuals and by

[75] United Nations Global Compact, *The Ten Principles*, available at http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html.

groups promoting these rights. Corporations must respect and uphold these rights. States must ensure effective compliance by all corporations of these rights and provide for legal implementation and enforcement."

- Global Sullivan Principles: "Express our support for universal human rights and, particularly, those of our employees, the communities within which we operate and parties with whom we do business." The Global Sullivan Principles of Social Responsibility is a voluntary code of conduct built on a vision of corporate social responsibility by the Leon H. Sullivan Foundation. Its objective is to have companies and organizations of all sizes, in widely disparate industries and cultures, working toward the common goals of human rights, social justice, and economic opportunity.[76]

Principle 4(2). Projects, their sponsors, directors, and participating entities shall respect the traditional and collective ownership of land by indigenous peoples and local communities, as well as individual rights of ownership.

Unquestionably, the right of all persons and groups to the land and other property they own must be respected, but because of its unusual and complex nature, indigenous peoples' land and resource ownership deserves particular attention. As is well recognized in law and materials that address indigenous peoples, indigenous peoples are intricately linked to their land, as they have typically inhabited the land since time immemorial and their ways of life often depend on the land and natural resources. Indigenous peoples usually own their land and natural resources collectively, and, although they may not hold formal title to the land, they own it by reason of their long-standing occupation and use. This part of Principle 4 is intended to call special attention to this particular concern, and it calls upon MDBs and the projects they fund to respect the land and natural resources belonging to indigenous peoples.

Relevant legal authorities relating to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 8(2)(b):
  2. States shall provide effective mechanisms for prevention of, and redress for… *(b)* Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- UN Declaration on the Rights of Indigenous Peoples, Article 26:
  1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
  2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by

[76] The Global Sullivan Principles are available at www.thesullivanfoundation.org/gsp/default.asp.

reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

- UN Declaration on the Rights of Indigenous Peoples, Article 27:
  States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.
- ILO Convention No. 169, Article 4(1):
  Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
- ILO Convention No. 169, Article 13(1):
  … governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.
- ILO Convention No. 169, Article 14:
  1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

  2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

  3. …
- ILO Convention No. 169, Article 15(1):
  The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
- The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C) No.79 (Judgment of Aug. 31, 2001); The Case of the Saramaka People v. Suriname, Inter-Am. Ct. H. R.

(Ser. C) No. 172 (Judgment of Nov. 28, 2007); Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Report No. 40/04 (October 12, 2004); The Case of Mary and Carrie Dann v. United States, Case 11.140, Report No. 75/02, Inter-Am. Commission on Human Rights (December 27, 2002).

Relevant existing policies and principles include:

- United Nations, Report of the World Summit on Sustainable Development, Johannesburg, South Africa, Aug. 26-Sept. 4, 2002, Annex: Plan of Implementation of the World Summit on Sustainable Development, at 7(h): "Provide access to agricultural resources for people living in poverty, especially women and indigenous communities, and promote, as appropriate, land tenure arrangements that recognize and protect indigenous and common property resource management systems."
- Calvert Group, *Issue Brief: Indigenous Peoples' Rights*: "Companies that fail Calvert's Indigenous Peoples rights criteria do so because they: Do not respect the lands and rights of Indigenous Peoples, and have direct ongoing conflicts with indigenous communities regarding livelihoods, cultures, habitat, and environment … ."
- Enbridge, Indigenous Peoples Policy: "respect indigenous peoples' traditional ways, the land, heritage sites, and the Environment."
- Energy and Biodiversity Initiative, *Integrating Biodiversity Conservation into Oil and Gas Development*, at 9: "Many areas with significant biodiversity remaining are also the traditional areas of indigenous, tribal or traditional peoples. Indigenous people often are ethnically different from the dominant national culture, and frequently their traditional territories, whether terrestrial or marine, are not recognized by national governments. The economies, identities and forms of social organization of indigenous people are often closely tied to maintaining the biodiversity and ecosystems that contain them intact. However, multiple pressures exerted on indigenous and other rural communities have made this a challenging proposition in many settings. There are often overlaps between lands set aside for legally designated parks and protected areas and lands customarily owned or used by indigenous peoples. Because of these factors, issues related to indigenous people and oil and gas development are complex and require special measures to ensure that indigenous people, like other local communities, are not disadvantaged and that they are included in and can benefit from projects supporting biodiversity conservation or oil and gas development." The Energy and Biodiversity Initiative is a partnership between companies and major conservation organizations, which began in 2001 and ceased in 2007. It has produced practical guidelines, tools and models to improve the

environmental performance of energy operations, minimize harm to biodiversity, and maximize opportunities for conservation wherever oil and gas resources are developed.[77]

- *The Nature Conservancy and Indigenous Peoples*: "Included in The Nature Conservancy's seven core values is a 'Commitment to People,' which states that we 'respect the needs of local communities by developing ways to conserve biological diversity while at the same time enabling humans to live productively and sustainably on the landscape.'"

Principle 4(3). Projects, their sponsors, directors, and participating entities shall recognize, respect and work to preserve the cultures and ways of life of indigenous peoples, national, cultural, and linguistic minorities, and other such communities.

Indigenous peoples, as well as all other peoples and communities, should enjoy the right to culture and to live in keeping with that culture if they so choose, as their cultures and ways of life are intrinsically valuable and worthy of preservation. Moreover, indigenous peoples, as discussed above, often depend on the land and natural resources for subsistence, to practice their religion, and to engage in cultural activities. For this reason, projects should particularly recognize the link between indigenous cultures and ways of life and the land that they inhabit. For example, in projects that may affect the environment and biodiversity, the projects should recognize and take account of the traditional knowledge of indigenous peoples regarding preservation of the environment and biodiversity according to their traditional and cultural ways. Projects should avoid sacred sites and other areas vitally important to indigenous peoples.

Relevant legal authorities include:

- International Covenant on Civil and Political Rights,[78] Article 27: In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.
- UN Declaration on the Rights of Indigenous Peoples, Article 5: Indigenous peoples have the right to maintain and strengthen their distinct…social and cultural institutions … .
- UN Declaration on the Rights of Indigenous Peoples, Article 8: 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

[77] Energy and Biodiversity Initiative, *Integrating Biodiversity Conservation into Oil and Gas Development*, available at www.celb.org/xp/CELB/downloads/ebi.pdf.

[78] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* March, 23, 1976.

2. States shall provide effective mechanisms for prevention of, and redress for: (*a*) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; …

- UN Declaration on the Rights of Indigenous Peoples, Article 9:
  Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.
- UN Declaration on the Rights of Indigenous Peoples, Article 11:
  1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.
  2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.
- UN Declaration on the Rights of Indigenous Peoples, Article 12(1):
  Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
- UN Declaration on the Rights of Indigenous Peoples, Article 31:
  1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions …
  2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.
- ILO Convention No. 169, Article 2:
  1. Governments shall have the responsibility for developing, with the participation of the [indigenous] peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.
  2. Such action shall include measures for: …(b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions; … .
- ILO Convention No. 169, Article 4(1):

Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

- ILO Convention No. 169, Article 8(2):
  These peoples shall have the right to retain their own customs and institutions …

Relevant existing policies and principles include:

- United Nations, *Report of the World Summit on Sustainable Development*, Johannesburg, South Africa, Aug. 26-Sept. 4, 2002, Annex: Plan of Implementation of the World Summit on Sustainable Development, at 7(e): "Develop policies and ways and means to improve access by indigenous people and their communities to economic activities and increase their employment through, where appropriate, measures such as training, technical assistance and credit facilities. Recognize that traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people and their communities." 40(d): "Promote programmes to enhance in a sustainable manner the productivity of land and the efficient use of water resources in agriculture, forestry, wetlands, artisanal fisheries and aquaculture, especially through indigenous and local community-based approaches." 54(h): "Promote the preservation, development and use of effective traditional medicine knowledge and practices, where appropriate, in combination with modern medicine, recognizing indigenous and local communities as custodians of traditional knowledge and practices, while promoting effective protection of traditional knowledge, as appropriate, consistent with international law."
- EnCana, *Aboriginal Guidelines*: "EnCana's community relations program will build, enhance and maintain positive relations in the Aboriginal community by… Respecting cultural and individual differences ... ."
- Alcan, *Indigenous Peoples Policy*: "Alcan accepts the diversity of indigenous peoples. We acknowledge the unique and important interests that they have for the land and environment as well as their history, culture and traditional ways of life."
- BHP Billiton, *Sustainability Report (*2007), at 238: "Recognizing and respecting Indigenous people's culture, heritage and traditional rights and supporting the identification, recording, management and protection of Indigenous cultural heritage. There are many Indigenous communities around the world that are traditional owners of land impacted by our operations or live nearby."

- Chevron, *Human Rights Statement*: "We value and respect the cultures and traditions of the many communities in which we work."

Principle 4(4). Projects, their sponsors, directors, and participating entities and the states where they are located shall recognize the duly established governments of indigenous peoples and other communities as representatives of the interests of their respective communities and respect their systems of governance.

Indigenous peoples, in addition to mechanisms of the state, have their own systems of government. These governments are able to represent the interests of their communities both within and without the community. As some businesses, states, and other organizations focus on Western forms of government, they have sometimes overlooked and discounted traditional forms of government of indigenous peoples. In implementing projects that will affect indigenous peoples, among others, it is vital to use indigenous peoples' own system of government and respect their governance during the consultation and subsequent participation process.

Relevant legal authorities include:

- International Covenant on Civil and Political Rights, Article 1:
  1. All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
  2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
  3. …
- UN Declaration on the Rights of Indigenous Peoples, Article 3:
  Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
- UN Declaration on the Rights of Indigenous Peoples, Article 4:
  Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
- UN Declaration on the Rights of Indigenous Peoples, Article 5:
  Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic … institutions … .
- UN Declaration on the Rights of Indigenous Peoples, Article 20(1):
  Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in

the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

- ILO Convention No. 169, Article 4(1):
  Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

Relevant existing policies and principles include:

- J. Hunt and D.E. Smith, *Ten key messages from the preliminary findings of the Indigenous Community Governance Project* (2005), at 1: "… strengthening Indigenous community governance starts first with negotiating and clarifying the appropriate contemporary relationships among the different Indigenous people within a region or community. That leads directly into the work of designing systems of representation and organizational arrangements which reflect those important relationships. Working through Indigenous relationships and systems of representation thus becomes the basis for working out organisational structures, institutions and procedures. The emphasis should be on starting with locally relevant Indigenous relationships and forms of representation, and designing governance structures from there."
- JP Morgan Chase, *Indigenous Communities*: "They have given indigenous people the opportunity and, if needed, culturally appropriate representation to engage in informed participation and collective decision-making … . Consultation approaches that rely on existing customary institutions, the role of community elders and leaders, and the established governance structure for tribal and indigenous communities; Governmental authorities at the local, regional or national level have provided mechanisms for the affected communities to be represented or consulted, and international and local laws have been upheld … . "

Principle 4(5). Projects, their sponsors, directors, and participating entities shall assess the potential social and environmental impacts of the projects, including human rights impacts, prior to MDB funding or support for such projects.

Before undertaking measures to initiate any project, the state, business or IFI itself should fully and accurately assess the social and environmental impact of the proposed project. Such an assessment should provide insight into whether and how to proceed with the project, including how to minimize the impact of the proposed project on the environment and affected communities.

Relevant legal authorities pertaining to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 29(1):
  Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
- ILO Convention No. 169, Article 4(1):
  Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
- ILO Convention No. 169, Article 7(4):
  Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Relevant existing policies and principles include:

- Cement Sustainability Initiative (CSI), *Environmental and Social Impact Assessment (ESIA) Guidelines: Land and Communities* (April 2005): "The World Business Council for Sustainable Development (WBCSD) Cement Sustainability Initiative (CSI) has initiated a task force (one of six) to address the local impacts of the cement industry on land and communities. Impacts from quarries and cement plants may be positive (e.g. creating jobs and providing products and services) or negative (e.g. disturbance to the landscape and biodiversity, dust and noise). The most useful tool for evaluating and managing the impacts of a cement site is a thorough Environmental and Social Impact Assessment (ESIA), undertaken with rigorous scientific analysis and stakeholder engagement. … An ESIA report will cover methods and key issues, the legislative framework, the consultation process, the social and environmental baseline, consideration of alternatives, prediction and evaluation of significant social and environmental impacts, mitigation or offset measures, and environmental and social management and monitoring plans." The Cement Sustainability Initiative was formed by major cement companies for the purpose of helping the cement industry to address the challenges of sustainable development. Among others, its purpose is to explore what sustainable development means for the cement industry and identify and facilitate actions that companies can take as a group and individually to accelerate the move towards sustainable development.[79]

[79] Cement Sustainability Initiative, *Environmental and Social Impact Assessment (ESIA) Guidelines: Land and Communities* (April 2005), available at www.wbcsdcement.org/pdf/cement_initiative_arp.pdf.

- Energy and Biodiversity Initiative, *Integrating Biodiversity Conservation into Oil and Gas Development*, at 28: "Oil and gas companies traditionally use Environmental Impact Assessments (EIAs) to identify and address the potentially significant environmental effects and risks associated with a project. In many cases, companies have also begun to use Social Impact Assessments (SIAs) to understand their potential impact on surrounding communities. Recently, some companies have begun to address environmental and social impacts in a single assessment process, an Environmental and Social Impact Assessment (ESIA). This increasing integration of the two processes has resulted from the recognition that environmental and social impacts are often inextricably linked, particularly related to issues such as the health impacts of pollution or traditional use of ecological resources by indigenous and rural communities."
- Greenpeace, *Bhopal Principles on corporate accountability*: "9. Implement the precautionary principle and require environmental impact assessments: States shall fully implement the Precautionary Principle in national and international law. Accordingly, States shall require corporations to take preventative action before environmental damage or heath effects are incurred, when there is a threat of serious or irreversible harm to the environment or health from an activity, a practice or a product. Governments shall require companies to undertake environmental impact assessments with public participation for activities that may cause significant adverse environmental impacts."
- BHP Billiton, *Sustainability Report (*2007), at 83: "All sites are required to identify their key stakeholders and consider their expectations and concerns for all operational activities, across the life cycle of operations. Sites are also required to specifically consider any minority groups (such as Indigenous groups) and any social and cultural factors that may be critical to stakeholder engagement."
- Chevron, *Stakeholder Engagement: Growing Successful Partnerships*: "Our Environmental, Social and Health Impact Assessment (ESHIA) process, deployed as a corporate process in early 2007, requires that all new capital projects be evaluated for potential environmental, social and health impacts. ESHIA is used to anticipate and plan the manner in which significant impacts are mitigated and benefits are enhanced during the planning, construction, operation and decommissioning of a project. Stakeholder engagement is central to the ESHIA process throughout the life of a project."
- Equator Principles (July 2006): "*Principle 2: Social and Environmental Assessment:* For each project assessed…the borrower has conducted a Social and Environmental Assessment ("Assessment") process to address, as appropriate and to the EPFI's satisfaction, the

> relevant social and environmental impacts and risks of the proposed project. … The Assessment should also propose mitigation and management measures relevant and appropriate to the nature and scale of the proposed project." The Equator Principles constitute a banking industry framework for addressing environmental and social risks in project financing.[80]

Principle 4(6). Businesses and the states where they are located shall consult in good faith with indigenous and local communities prior to undertaking a project that may affect the community.

A necessary precursor to undertaking any project that will affect indigenous and local communities or their lands and resources is consultation in good faith with the potentially affected peoples or communities. This necessarily includes providing the affected peoples or communities in a timely manner with full and accurate information about the project and its potential consequences. The information should be portrayed in a culturally sensitive and appropriate manner to the members of the community or the indigenous government as the case may be who will communicate with the rest of the community and make decisions on behalf of the community. Such information is essential to meaningful consultation and participation of indigenous and local communities in later steps of the project.

Consultation in good faith with affected communities, especially with indigenous peoples, is essential, but it is not a simple or self-evident process. As recognized in several international instruments related to indigenous peoples, indigenous peoples have the right to be consulted prior to beginning any project that will affect them or their lands and natural resources. Consultation must be meaningful, in that indigenous peoples must actually have the opportunity to influence the project, including whether and how it is undertaken, and in good faith, in that the businesses and government must actually take the opinions of the indigenous and local communities into consideration.

The right of consultation is not to be confused with the right to control the occupation, use and disposition of one's own lands and resources. Where an indigenous people, or anyone, owns land or resources that will be developed or materially affected by a project, then mere consultation will not suffice. Where the lands or resources are owned by an indigenous people or by a person or community, then the consent of the owner is indispensable. The right to own property is covered in Principle 4(2) above.

[80] They were originally developed by the banks gathered in October 2002 in London, including the International Financial Corporation, and launched in June 2003 in Washington DC. They were adopted by more than forty financial institutions and are intended to serve as a common baseline and framework for the implementation by each Equator Principles Financial Institution of its own internal social and environmental policies, procedures and standards related to its project financing activities. *See* Equator Principles, available at www.equator-principles.com.

Relevant legal authorities pertaining to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 19:
  States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
- UN Declaration on the Rights of Indigenous Peoples, Article 32(1):
  Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
- ILO Convention No. 169, Article 6:
  1. In applying the provisions of this Convention, governments shall:
  (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
  (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
  …
  2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Relevant existing policies and principles include:

- EnCana, *Aboriginal Guidelines*: "EnCana's community relations program will build, enhance and maintain positive relations in the Aboriginal community by … Ensuring that potentially affected communities are provided with the necessary information required for open collaborative dialogue. ... Where EnCana is active the Company will encourage the development of community-based Aboriginal businesses which benefit both the Aboriginal communities and the Company by: Advising local Aboriginal communities of EnCana's activities… ."
- Ceres Principles (1989): "We will inform in a timely manner everyone who may be affected by conditions caused by our company that might endanger health, safety or the environment. We will regularly seek advice and counsel through dialogue with persons in communities near our facilities."

- Total, *Policy regarding indigenous peoples:* "… communicate plans of the operations to the indigenous groups through presentations and local meetings, in accordance with the existing regulations … inform the indigenous groups about the development of operations … ."
- JP Morgan Chase, *Indigenous Communities*: "Provided information on the ways in which the project may have a potentially adverse impact on them in a culturally appropriate manner at each stage of project preparation, implementation and operation."
- *OECD Guidelines for Multinational Enterprises*, at para. 35: "Information about the activities of enterprises and associated environmental impacts is an important vehicle for building confidence with the public. This vehicle is most effective when information is provided in a transparent manner and when it encourages active consultation with stakeholders such as employees, customers, suppliers, contractors, local communities and with the public-at-large so as to promote a climate of long-term trust and understanding on environmental issues of mutual interest." The *Guidelines for Multinational Enterprises* were developed by the Organization for Economic Co-operation and Development, an organization that provides a setting where governments compare policy experiences, seek answers to common problems, identify good practices and coordinate domestic and international policies.[81]
- Equator Principles (July 2006): "*Principle 5: Consultation and Disclosure*: ... the government, borrower or third party expert has consulted with project affected communities in a structured and culturally appropriate manner. For projects with significant adverse impacts on affected communities, the process will ensure their free, prior and informed consultation and facilitate their informed participation as a means to establish, to the satisfaction of the EPFI, whether a project has adequately incorporated affected communities' concerns… ."
- EnCana, *Aboriginal Guidelines*: "EnCana's community relations program will build, enhance and maintain positive relations in the Aboriginal community by…Ensuring timely discussions with local Aboriginal communities when EnCana's activities might impact on those communities… ."
- Alcan, *Indigenous Peoples Policy*: "We will strive to increase our awareness of the concerns and interests of indigenous peoples through respectful, open and transparent dialogue."

[81] The Guidelines constitute a set of voluntary recommendations to multinational enterprises in all the major areas of business ethics, including employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. *See OECD Guidelines for Multinational Enterprises,* available at www.oecd.org/document/28/0,2340,fr_2649_34889_2397532_1_1_1_1,00.html.

- Enbridge, *Indigenous Peoples Policy*: "ensure forthright and sincere consultation with indigenous peoples about Enbridge's projects that affect them, to facilitate a shared understanding of interests and appropriate courses of action, … ."
- BHP Billiton, *Sustainability Report (*2007), at 240: "At our operations and projects, we undertake early consultations and assessments with Indigenous peoples to ascertain whether our proposed activities are likely to impact cultural heritage values and, in conjunction with Indigenous peoples and relevant authorities, how best to plan and undertake those activities to avoid or minimize such impacts."
- Chevron, *Human Rights Statement*: "We consult actively with a diverse range of knowledgeable stakeholders to build upon our understanding of the human rights issues present in our operating environments."

Principle 4(7). Projects, their sponsors, directors, and participating entities shall include the participation of indigenous and local communities in the design and implementation of the projects to lessen any adverse impact on them.

If indigenous and local communities will be affected by a project, they should be involved in its design and implementation throughout the life of the project. Their participation in the project ensures that they are able to participate in the decision making related to the project to lessen the impact on the communities and perhaps bring benefits to the communities from the project. The participation of indigenous and local communities must be meaningful and real, which means that they must have the ability to sway decisions or even stop the project according to their interests. Participation must be an active role, and it must be much more than mere consultation or a seeking of indigenous views or a sharing of information.

Relevant legal authorities pertaining to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions.
- UN Declaration on the Rights of Indigenous Peoples, Article 23: Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

- UN Declaration on the Rights of Indigenous Peoples, Article 32:
  1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
  2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
  3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Relevant existing policies and principles include:

- United Nations, *Report of the World Summit on Sustainable Development*, Johannesburg, South Africa, Aug. 26-Sept. 4, 2002, Annex: Plan of Implementation of the World Summit on Sustainable Development, at 40(h): "Enact, as appropriate, measures that protect indigenous resource management systems and support the contribution of all appropriate stakeholders, men and women alike, in rural planning and development." 42(e): "Promote full participation and involvement of mountain communities in decisions that affect them and integrate indigenous knowledge, heritage and values in all development initiatives." 44(l): "Promote the effective participation of indigenous and local communities in decision and policy-making concerning the use of their traditional knowledge." 45(h): "Recognize and support indigenous and community-based forest management systems to ensure their full and effective participation in sustainable forest management." 46(b): "Enhance the participation of stakeholders, including local and indigenous communities and women, to play an active role in minerals, metals and mining development throughout the life cycles of mining operations, including after closure for rehabilitation purposes, in accordance with national regulations and taking into account significant transboundary impacts."
- Global Sullivan Principles: "Work with governments and communities in which we do business to improve the quality of life in those communities — their educational, cultural, economic and social well-being — and seek to provide training and opportunities for workers from disadvantaged backgrounds."
- EnCana, *Aboriginal Guidelines*: "EnCana's community relations program will build, enhance and maintain positive relations in the Aboriginal community by: Maintaining dialogue between the

Company and Aboriginal people; … Considering support of Aboriginal events and programs in areas where EnCana conducts its business; and Taking pride in our contributions to communities and in our care for the environment. EnCana will seek Aboriginal input on proposed developments and business plans to encourage the involvement of those who may be affected by our operations."

- Barrick, *Corporate Social Responsibility Charter*, at 2: "Barrick fully considers social, cultural, environmental, governmental and economic factors when evaluating project development opportunities. In those communities in which we operate, we interact with local residents, governments, non-governmental organizations, international agencies and other interested groups to facilitate long-term and beneficial resource development. We give priority to building partnerships in entrepreneurial endeavors that contribute to enhancing local capacity and we also commit to providing financial support of organizations through our charitable donations, budgets and policies. The employment of indigenous peoples and local community members is also a priority. Barrick respects the interests of all members of the communities in which we conduct business and encourages open and constructive dialogue and interaction with them. We take the responsibility to listen carefully, be responsive and provide information that is accurate, appropriate and timely."
- Enbridge, *Indigenous Peoples Policy*: "promote participation by indigenous communities in Enbridge's community investment funding programs."

Principle 4(8). Projects, their sponsors, directors, and participating entities shall not dislocate indigenous or other communities without their free, prior, and informed consent. If relocation occurs with such consent, the community must receive compensation, including compensation in the form of land of comparable quantity and quality, if possible and so desired by the community.

Dislocation of indigenous and local communities must be avoided at all costs. Projects that dislocate indigenous and local communities must first have the genuine consent of the communities to be relocated. Obviously, such projects should not be undertaken unless absolutely necessary for economic development and human wellbeing. In such rare situations in which dislocation is agreed to by the affected communities, the displaced indigenous and local communities should not receive monetary compensation alone, rather they should receive comparable land in quantity and quality. As indigenous peoples in particular rely on the land to live, it is vital that they be able to continue their way of life and reliance on the land.

Relevant legal authorities pertaining to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 8(2)(c):
  2. States shall provide effective mechanisms for prevention of, and redress for…(*c*) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; … .
- UN Declaration on the Rights of Indigenous Peoples, Article 10:
  Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.
- UN Declaration on the Rights of Indigenous Peoples, Article 28:
  1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
  2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.
- UN Declaration on the Rights of Indigenous Peoples, Article 32:
  1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
  2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
  3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.
- ILO Convention No. 169, Article 16:
  1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
  2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.
4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

Relevant existing policies and principles include:

- Forest Peoples Programme and Tebtebba Foundation, Indigenous Peoples' Rights, Extractive Industries and Transnational and Other Business Enterprises A Submission to the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises (Dec. 29, 2006), at 55-56: "Due to the importance attached to indigenous peoples' cultural, spiritual and economic relationships to land and resources, international law treats relocation as a serious human rights concern. In international instruments, strict standards of scrutiny are employed and indigenous peoples' free and informed consent must be obtained. Additionally, relocation may only be considered as an exceptional measure in extreme and extraordinary cases."
- Rainforest Action Network, *Agribusiness Impact on Indigenous Communities Fact Sheet*: "Forced displacement is a serious issue for communities worldwide who live in areas proposed for agricultural expansion. The issue is particularly threatening for Indigenous peoples, who are rarely granted official land rights to their native territories by national governments. Indigenous peoples face racial discrimination that impedes their rights to self-determination and sovereignty. Agricultural expansion threatens not only their homes, but their sacred sites and the lands they have traditionally used for subsistence."
- Conservation International, *Reinventing the Well: Approaches to Minimizing the Environmental and Social Impact of Oil Development in the Tropics*, Volume 2/1997, at 4.1.3: "Even if governments and corporations act to protect people and their environment, it is only through the active involvement of affected communities and stakeholders that their interests can be fully safeguarded. Local people should participate in the process from the start, planning, questioning, designing, challenging and

evaluating projects under consideration in their territories. Interested stakeholders should increase their knowledge of potential social impacts, seek professional assistance to fully understand their legal rights, and demand the right to participate in all social impact assessments and management contingency plans. Empowered stakeholders should elicit the participation of local populations, help disseminate information throughout communities and conduct environmental and social hearings."

Principle 4(9). Projects, their sponsors, directors, and participating entities shall have precise, written policies consistent with these Principles to govern their interaction with indigenous and local communities.

All of the above mentioned principles should be encompassed in a working and practical policy that has direct application to the project, and the policy should be firmly established and implemented before the project receives MDB funding. Such a policy, which may be provided in part by the MDB itself, would aim to ensure that the principles are known and followed throughout the process of the project. The policy would govern the project as well as inform others about their rights and responsibilities related to indigenous peoples throughout the process of the project. In order to be implemented effectively, such a policy may include training and educating those involved with the project, a method of complaint or recourse in the case of violation, and a process for periodic review of the policy.

Relevant existing policies and principles include:

- Amnesty International, *Human Rights Principles For Companies*, AI Index: ACT 70/01/98 (January 1998), at 5-6: "Multinational companies can improve their ability to promote human rights by developing an explicit company policy on human rights. … The primary responsibility for monitoring company policies and practices lies with the company itself. However, all systems for monitoring compliance with voluntary corporate codes of behavior should be credible and their reports should be independently verifiable." Annexed Checklist: "Company policy on human rights. All companies should adopt an explicit company policy on human rights which includes public support for the Universal Declaration of Human Rights. Companies should establish procedures to ensure that all operations are examined for their potential impact on human rights, and safeguards to ensure that company staff are never complicit in human rights abuses. The company policy should enable discussion with the authorities at local, provincial and national levels of specific cases of human rights violations and the need for safeguards to protect human rights. It should enable the

establishment of programs for the effective human rights education and training of all employees within the company and encourage collective action in business associations to promote respect for international human rights standards."

- *OECD Guidelines for Multinational Enterprises*, para. 7: "Governments have the right to prescribe the conditions under which multinational enterprises operate within its national jurisdiction subject to international law and to the international agreements to which it has subscribed ... ."
- Equator Principles (July 2006): "*Principle 6: Grievance Mechanism:* … to ensure that consultation, disclosure and community engagement continue throughout construction and operation of the project, the borrower will, scaled to the risks and adverse impacts of the project, establish a grievance mechanism as part of the management system. This will allow the borrower to receive and facilitate resolution of concerns and grievances about the project's social and environmental performance raised by individuals or groups from among project-affected communities. The borrower will inform the affected communities about the mechanism in the course of its community engagement process and ensure that the mechanism addresses concerns promptly and transparently, in a culturally appropriate manner, and is readily accessible to all segments of the affected communities."
- ConocoPhillips, *Code of Business Ethics and Conduct for Directors and Employees* (Feb. 9, 2007), at 8: "Upon receipt of a complaint, the Corporate Ethics Office and the General Counsel will (1) determine whether the complaint actually pertains to Accounting Matters and (2) when possible, acknowledge receipt of the complaint to the sender. Complaints relating to Accounting Matters will be reviewed under Audit and Finance Committee direction and oversight by the General Counsel, Internal Audit or such other persons as the Audit and Finance Committee determines to be appropriate. Confidentiality will be maintained to the fullest extent possible, consistent with the need to conduct an adequate review. Prompt and appropriate corrective action will be taken when and as warranted in the judgment of the Audit and Finance Committee. The Company will not discharge, demote, suspend, threaten, harass or in any manner discriminate against any employee in the terms and conditions of employment based upon any lawful actions of such employee with respect to good faith reporting of complaints regarding Accounting Matters or otherwise as specified in Section 806 of the Sarbanes-Oxley Act of 2002."
- Newmont Mining, *Proposal No. 4—Stockholder Proposal Requesting a Report Regarding Newmont's Community Policies and Practices* (2007), at 2: "The Board of Directors has established the Environmental, Health and Safety Committee, a standing committee

of the Board, which is comprised of at least three independent directors. The Committee is charged with overseeing a wide variety of Company policies and practices designed to achieve environmentally sound and responsible resource development. Therefore, it is well suited to review and evaluate the Company's policies and practices relating to its engagement with host communities around its operations. In conducting its review and evaluation of such policies, the Committee will also evaluate any existing and potential opposition to Newmont's operations from those communities. The results of that review will be included in a report (omitting confidential information and prepared at reasonable cost) made available to the stockholders prior to the 2008 annual meeting of stockholders. In particular, the Committee will meet at least twice a year to (a) review the effectiveness of the policies and systems for managing community risks associated with the Company's activities; (b) prepare a public assessment of the Company's community affairs performance; (c) report to the Board the Committee's findings, conclusions and recommendations on specific actions or decisions the Board should consider; (d) engage independent experts or advisors, to the extent it is deemed necessary, who have recognized expertise in community affairs; and (e) oversee Newmont's policies, standards, systems and resources required to conduct its activities in accordance with the Company's Core Values."

Principle 5. Multilateral development banks have the on-going responsibility to monitor and periodically review the human rights performance of all projects or businesses receiving support.

The UN Economic and Social Council (ECOSOC) has emphasized that IOs and states that have created and managed them, have a strong and continuous responsibility to take whatever measures they can to assist governments to act in ways which are compatible with their human rights obligations and to seek to devise policies and programmes which promote respect for those rights.[82]

Relevant legal authorities pertaining to indigenous peoples include:

- UN Declaration on the Rights of Indigenous Peoples, Article 40:
  Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules

[82] U.N. ECOSOC, *Procedural Decisions*, *supra* note 36.

and legal systems of the indigenous peoples concerned and international human rights.

Principle 6. Multilateral development banks shall undertake measures to implement these Principles, including educational measures for MDB staff, for MDB member states, and for the clients of the MDBs, among others.

This Principle requires MDBs to take the kind of ordinary implementation measures that would be required of states. Examples of such implementation requirements can be found in nearly all human rights instruments.

Principle 7. Multilateral development banks shall institute written procedures for the submission and consideration of complaints of human rights violations on behalf of any person or group with respect to any project or activity of the bank. Such procedures shall result in a written report where a human rights violation has occurred and recommendations for corrective action by the bank and by the project as appropriate.

The internal complaint procedure required by this Principle is critical in order for MDBs to address the human rights concerns that frequently emerge from their projects and/or activities they support. These procedures should be carried out by MDBs in an effective and transparent fashion, and these procedures must allow project-affected people to make complaints of human rights violations concerning a project and/or operation to an MDB body or official. The body or official should be independent from those who have responsibility for the project or activity in question. Naturally, the normal rules of fairness, openness and record keeping must be observed.

If you would like to:

- **Make comments, suggestions, or corrections relating to this memorandum or to the draft Principles of Law for Multilateral Development Banks; or**

- **Learn what you can do to promote stronger laws for protecting human rights and the environment,**

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Article

*1133 INDIGENOUS PEOPLES AND EPISTEMIC INJUSTICE: SCIENCE, ETHICS, AND HUMAN RIGHTS

Rebecca Tsosie [FNa1]

Abstract: This Article explores the use of science as a tool of public policy and examines how science policy impacts indigenous peoples in the areas of environmental protection, public health, and repatriation. Professor Tsosie draws on Miranda Fricker's account of "epistemic injustice" to show how indigenous peoples have been harmed by the domestic legal system and the policies that guide the implementation of the law in those three arenas. Professor Tsosie argues that the theme of "discovery," which is pivotal to scientific inquiry, has governed the violation of indigenous peoples' human rights since the colonial era. Today, science policy is overtly "neutral," but it may still be utilized to the disadvantage of indigenous peoples. Drawing on international human rights law, Professor Tsosie demonstrates how public policy could shift from treating indigenous peoples as "objects" of scientific discovery to working respectfully with indigenous governments as equal participants in the creation of public policy. By incorporating human rights standards and honoring indigenous self-determination, domestic public policy can more equitably respond to indigenous peoples' distinctive experience. Similarly, scientists and scientific organizations can incorporate human rights standards into their disciplinary methods and professional codes of ethics as they respond to the ethical and legal implications of their work.

***1134** INTRODUCTION

Scientists and scientific organizations are increasingly challenged to ***1135** incorporate human rights standards into their disciplinary methods and professional codes of ethics and to explore the impact of their work on indigenous peoples. In particular, indigenous knowledge and benefit-sharing are vital considerations for contemporary biomedical researchers. [FN1] These concepts are also relevant to adaptation planning in an era of climate change. [FN2] In many ways, these fields of research are at the cutting edge of scientific inquiry relative to human health and the environment, and they will continue to be of vital importance to our collective future. In the United States, public policy often promotes certain forms of scientific research, for example, by providing grant initiatives from government entities such as the National Institutes of Health or Department of Energy. However, this research often implicates many legal and ethical controversies, indicating that there is still a great deal of work to be done at the intersection of scientific ethics and human rights.

This Article discusses the use of science as a tool of public policy and examines how science policy impacts indigenous

peoples. More specifically, this Article focuses on three areas of public policy in which science has disregarded indigenous human rights: environmental protection, public health, and the repatriation of ancestral human remains. Ignoring indigenous rights in setting policy over these three areas impairs tribal interests in protecting their land, identity, and cultural heritage. These interests are all key components of the right to self-determination recognized by the U.N. Declaration on the Rights of Indigenous Peoples, [FN3] which provides important standards to improve domestic public policy. Today, federally-recognized Native Nations within the United States operate as separate sovereign governments. [FN4] They exercise jurisdiction over their members, as well as their territory, including nonmembers who enter tribal lands or enter transactions with the tribe or its members. [FN5] Although contemporary tribal governments have a growing presence in the domestic political arena, prevailing ***1136** federal policies governing environmental protection, public health, and the repatriation of ancestral human remains, continue to impact them heavily. Historically, the federal government did not consider the interests of the tribal governments in shaping domestic policy in these three areas. Consequently, the application of these policies has often harmed Native peoples. [FN6]

Unfortunately, standard legal theories cannot redress many of these harms because the existing frameworks of property, torts, and contract law often fail to adequately account for the indigenous peoples' interests. Of course, that does not mean that the harm did not exist. Drawing on Miranda Fricker's account of "epistemic injustice," this Article argues that indigenous peoples have been harmed by the domestic legal system in their capacity as "giver[s] of knowledge" and in their capacity as "subject[s] of social understanding." [FN7] In particular, the theme of "discovery," which is pivotal to scientific inquiry, has governed the violation of indigenous peoples' human rights since the colonial era.

This Article takes the position that science policy can promote effective partnerships and facilitate the realization of human rights if guided by appropriate ethical constructs. Too often, public policy discourse portrays the interests of scientists as being opposed to those of indigenous peoples. This is a false dichotomy. Scientific knowledge can be used for broad public benefit, thereby serving indigenous peoples as well as others. All this requires is that the relevant harms are identified and addressed. International human rights law presents an array of principles that can structure a more positive collaboration between scientists and Native peoples on issues of mutual concern, thereby leading to positive changes in domestic law and policy.

Part I of this Article will discuss the history of science policy as it has impacted indigenous peoples. Part II of the Article draws upon Miranda Fricker's account of epistemic injustice to illustrate the nature of indigenous peoples' claims and the harms that have arisen through the legal system's inability to recognize these claims. In Part III, the Article discusses three areas of policy development that have created conflicts between indigenous peoples and scientists. Finally, Part IV discusses several principles of international human rights law relevant to future policy development in these three areas and suggests how existing scientific and legal frameworks can be transformed to better reflect ***1137** contemporary human rights norms.

I. NATIVE NATIONS AND THE JURISPRUDENCE OF "DISCOVERY": INDIGENOUS PEOPLES AND NINETEENTH CENTURY SCIENCE

Commentators often mischaracterize the interests of Native Americans as being in opposition to those of scientists. [FN8] It is more productive to examine how science policy reflects certain principles of thought and a particular research methodology. This methodology may be used for beneficial or harmful purposes. In some cases, conflicts between indigenous peoples and researchers arise because the two groups have disparate systems of thought. In other cases, the conflicts arise because the dominant society has different goals than the indigenous peoples do, and there is disagreement over the concepts of "benefit" or

"harm." As this section demonstrates, these two sets of conflicts have persisted in U.S. society since the nineteenth century. In the text below, the Article first discusses the differences between Western and indigenous thought as to the categories of knowledge that inform human experience. This provides the foundation necessary to understand "epistemic" forms of injustice. The Article will then discuss the impact of nineteenth century science policy upon indigenous peoples, and its continuing legacy in modern public policy discourse.

A. The Differences Between Western and Indigenous Thought

Western thought, at least since the Enlightenment era, has worked to separate science, ethics, and religion into separate domains and to create distinctive principles to govern each of them. [FN9] Ethics is generally placed within the discipline of philosophy. [FN10] The analytical tradition of Western philosophy has developed a secular form of rationalism to test the normative aspects of specific policies, thereby determining whether certain actions--like human subject research--are beneficial or harmful ***1138** to human beings. [FN11]

The analytical tradition of Western philosophy is quite complementary to scientific thought, as science is devoted to generating hypotheses that can be confirmed or disproved, and generating a factual basis for what we understand as the truths of our natural world. [FN12] These truths include our world's structure, form, and mode of operation. [FN13] Religion once served as both the dominant force within Western European thought and as the basis to assess ethical action. [FN14] However, today it has been segregated into the domain of "faith." [FN15] Consequently, within secular American democracy, religion is formally excluded from public life and relegated to the area of "personal conscience." [FN16] A principle of "toleration" pervades, rather than any robust attempt to marry religious and secular precepts.

In comparison, most traditional Native societies did not separate their systems of thought into separate domains of "religion," "philosophy," and "science," although their epistemologies contain all of those functions. [FN17] To the contrary, many Native societies operate within a holistic understanding of the rules and responsibilities that govern the relations between people and all components of the natural world, whether human or non-human. [FN18]

This functional interdependency often influences tribal governance structures. [FN19] Some Native peoples were and are governed by ***1139** theocracies. [FN20] Others maintain secular and religious forms of government that interact to regulate the group's domestic affairs. [FN21] Similarly, the group's overall identity expresses itself both culturally and politically, and is closely associated with the group's traditional lands and resources. [FN22] Indigenous communities generally possess a great deal of "scientific" knowledge about their local environments due to the length of time they have lived on the lands and their subsistence-based traditional lifeways. [FN23] This "traditional ecological knowledge," however, is often inseparable from the ethical commands of appropriate resource use. [FN24] For example, many Native peoples in the Pacific Northwest maintain an impressive scientific knowledge of the wild salmon runs and their cycle from ocean to inland waterways. [FN25] However, they also consider salmon to be one of their First Foods and a sacred resource, describing salmon within their indigenous language as a distinct "people." [FN26] Thus, the salmon harvest may be viewed "scientifically" as a set of management strategies designed to promote sustainability of a "resource." But, it would be equally accurate to view tribal salmon management as an ethical system with corresponding rights and duties between the human and non-human "peoples" that affects systems of governance.

Indigenous identity is intergenerational. [FN27] This means that the contemporary people honor duties and obligations to

their ancestors and to the future unborn generations. [FN28] Although these categories of human beings are not currently lives in being, they nonetheless have an identity and are deserving of respect and protection. [FN29] The essence of these relationships--with land, ancestral or future generations, or other living beings--is sometimes described as a "spiritual" connection between the ***1140** indigenous peoples and the various components of the universe. [FN30] The spiritual nature of these relationships represents a fundamental metaphysical understanding about life and the source of animation, which is understood as energy or movement. [FN31] Such a concept cannot be neatly distilled into contemporary scientific principles associated with a mechanistic understanding of the universe, such as the laws of physics or chemistry. [FN32]

However, these thought systems should not be conflated with a particular "religious view" about "God" or divine commandments. Each indigenous people maintains its own religious system, with a unique set of ceremonial and ritual practices. Yet, indigenous peoples throughout the world are unified by a particular understanding of the natural world, which the late Vine Deloria, Jr., termed a distinct "metaphysics." [FN33] As Vine Deloria noted, this understanding does not correspond to any existing category within Western thought. [FN34]

These fundamental differences in epistemology must be acknowledged in order to truly understand the conflicts between scientists and indigenous peoples. In addition, as Professor Leroy Little Bear has observed, the concept of science itself is one that is culturally relative. [FN35] What is understood as "science" depends upon the cultural worldview of the definer. [FN36] Little Bear contends that "Western paradigmatic views of science are largely about measurement using Western mathematics" as a model for what constitutes "reality." [FN37] This model, of course, omits "the sacredness, the livingness, the soul of the world." [FN38] It treats these qualities, which indigenous peoples know to be real based on their own observations over centuries, as non-existent.

Little Bear defines science on a more fundamental level as the "pursuit of knowledge," and claims that Native peoples and Western peoples equally participate in this pursuit. [FN39] However, they do so in ***1141** different ways and with different understandings of the universe. [FN40] In this way, the effort of Western scientists to define the parameters of a valid "pursuit of knowledge" may negate alternative accounts that would reveal valuable information. Another danger is that Western scientists will seek an incomplete form of knowledge and perhaps unwittingly endanger the environment or human health. This is one problem with contemporary scientific innovation that seeks to mine indigenous "traditional knowledge" but rejects the ethical constraints that indigenous cultural norms place on such knowledge. [FN41]

In sum, many conflicts between scientists and indigenous peoples result from fundamental differences on what "science" encompasses and what forms of knowledge might be used to access information for society's benefit. [FN42] A second set of conflicts arises from the use of science as a tool of public policy. In the public policy sense, science becomes a tool to effectuate a particular set of interests. As the following discussion demonstrates, conflicts between Western scientists and indigenous peoples typically arise because indigenous peoples are treated as the "objects" of Western scientific discovery rather than as equal participants in the creation of knowledge or public policy (as a shared endeavor). This is not the fault of science or scientists. It is largely the fault of a public policy discourse that uses terms such as "knowledge" and "benefit" as though they are neutral and fully capable of intercultural exchange. In fact, the terms are often used as political devices to advance or suppress particular interests and values.

B. The Impact of Nineteenth Century Science Policy upon Indigenous Peoples

Although science policy has experienced normative shifts over the past two centuries, the practice of using science to privilege particular ***1142** social interests continues. [FN43] In addition, the policies of past eras continue to impact Native peoples. [FN44] This claim is best understood in relation to the genesis of American science as a public policy tool in the nineteenth century. It was this era that had the most enduring impact on the rights of indigenous peoples in the United States. Indeed, the frameworks developed in the nineteenth century continue to influence contemporary domestic policies, sometimes in ways that policymakers do not see or appreciate.

The nineteenth century was America's enlightenment era, and the scientific quest for "new knowledge and understanding" was pivotal to the formation of a new nation, as demonstrated by the Lewis and Clark Expedition of 1803. The Lewis and Clark Expedition is generally understood as an undertaking to map the lands that the United States acquired through the Louisiana Purchase. However, for indigenous peoples, the expedition meant much more than that. The Lewis and Clark Expedition incorporated the Doctrine of Discovery in a literal sense to claim the aboriginal homelands of indigenous nations as the sovereign territory of the United States. [FN45] However, in a symbolic sense, the Lewis and Clark Expedition used the trope of discovery to legitimize the acquisition of new knowledge about particular subjects, including indigenous peoples. [FN46] Discovery has remained a dominant theme of scientific inquiry and one that is protected by the United States Constitution, which is the foundation for property rights in technology and innovation. [FN47] Thus, for indigenous peoples, "discovery" is a theme that has operated continuously within American policy to impair their rights to land and cultural heritage. [FN48]

The history of the Lewis and Clark Expedition proves these points. On January 18, 1803, President Thomas Jefferson sent a confidential message to Congress recommending a Western exploratory expedition to give the United States the information necessary to acquire these uncharted lands. [FN49] At that time, other European sovereigns had claimed ***1143** the lands through "discovery." [FN50] The popular mythology of the day posited that these remote lands were the home of wooly mastodons, erupting volcanoes, and "men of a savage race." [FN51] Jefferson's message to Congress was less imaginative and much more instrumental. Jefferson specifically identified a need to acquire further information about the Indian tribes residing in these areas. [FN52] Jefferson noted that Indian tribes were generally becoming very dissatisfied with the diminution of their territories by European settlement and were actively resisting further land transfers. [FN53] Jefferson advised that federal Indian policy should incentivize Indians to adopt a "civilized" agricultural lifestyle, which required less land than hunting. [FN54] In addition, Jefferson encouraged the use of trading houses, which would invoke within the Indian people a desire to acquire trade goods and ideally would also place them in debt. [FN55] Jefferson theorized that this debt would force them to enter land exchanges as a means of paying off their debts. [FN56] Congress quietly approved Jefferson's request on February 28, 1803, allocating the sum of $3000 to fund the Corps of Discovery, which would be led by Meriwether Lewis and William Clark. [FN57]

A few months later, on April 30, 1803, Jefferson signed a treaty with France, concluding the Louisiana Purchase, which effectively doubled the United States' territory. [FN58] Rather than being a covert expedition through foreign territory, the Lewis and Clark Expedition was publicized ***1144** as a survey of "American-owned land." [FN59] In this way, the Lewis and Clark Expedition epitomized the "Enlightenment" thinking that Jefferson espoused: "the triumph of reason, the rightness of nature, and the improvement of society through knowledge." [FN60]

Jefferson asked Lewis and Clark to find a navigable waterway from St. Louis to the Pacific Ocean. [FN61] Jefferson also asked them to make contact with the Indians they encountered and document their habits, both to record examples of human beings living in a natural state and to ascertain the best mode of transacting business with them to further the interests of the

United States. [FN62] Furthermore, he instructed Lewis and Clark to scientifically document all the plant and animal species they encountered and map the landscape's key features. [FN63] This scientific expedition had a direct and enduring effect on indigenous peoples. They were studied as objects of scientific inquiry, much like the region's plants and animals. [FN64] Although tribal lands were annexed to the United States through the treaty with France, [FN65] the Indian Nations had no right as nations to consent or object. [FN66] The European Doctrine of Discovery only pertained to "civilized nations" that could acquire "title" to newly discovered lands merely by virtue of being the first to "discover" the lands and establish a minimal settlement upon them. [FN67]

The Doctrine of Discovery may have originated in the international law authorizing European colonialism, but it was ultimately incorporated into domestic law. [FN68] In the 1823 case Johnson v. M'Intosh, [FN69] Chief ***1145** Justice John Marshall held that the United States acquired the title by discovery as the successor to Great Britain, and that the Indian Nations had only a "title of occupancy," which could be extinguished by the United States through "purchase or by conquest." [FN70] At the material level, the Lewis and Clark Expedition gave the United States the information it needed to extinguish Native land titles and promote westward expansion by white settlers [FN71]--the only group entitled to U.S. citizenship at the time. [FN72]

At the level of ideology, the Lewis and Clark Expedition appropriated Native places and identities to give birth to the United States as a modern nation. In the process, Native lands, cultures and political identities were claimed, discarded, or transformed into those of "America." While the material impact of this "voyage of discovery" is visible in the tangible appropriation of Native lands that followed the Expedition, its ideological impact is more subtle. For example, as Lewis and Clark mapped the mountains, valleys and rivers of the region, they discarded the names already given to these places by Native peoples and substituted names of importance to them, for example, "Clark's Fork." This re-naming process constitutes a form of "cultural trespass," in which indigenous understandings of place are transformed into American understandings. Specifically, this occurs when the Native stories attached to place names--including stories about the creation of the people, their migrations, and their experiences over time--are lost or ***1146** subsumed within the "American" narrative of creation. [FN73]

This "remapping" process significantly impacted Native identity. [FN74] The United States annexed tribal lands and renamed them as the lands of the United States. Native American peoples inhabiting these lands were involuntarily incorporated into the United States not as citizens, but as "wards" of the federal government. [FN75]

This "guardian/ward" relationship is a cornerstone of federal Indian law. This is represented in the Cherokee cases, which, like Johnson v. M'Intosh, are also authored by Chief Justice John Marshall. [FN76] The Cherokee cases stated that as the "guardian," the United States had the power to coerce Native peoples into accepting the "arts of civilization." [FN77] Thus the United States maintained the exclusive power of regulating trade with them. [FN78] Because all other purchases were excluded, this power to regulate trade resulted in the maximum transfer of land to the United States. The United States carefully employed a combined policy of war and peace to coerce the tribes' submission as "dependents" of the United States. [FN79] The Lewis and Clark Expedition actually followed a formal protocol in which the "captains would explain to the tribal leaders that their land now belonged to the United States" [FN80] and that President Jefferson was their new "great father." [FN81] The captains would then give the Indian leader a "peace medal," with Jefferson on one side and two hands clasping each other on the reverse side, as well as trade goods. [FN82] The Corps men would then march in uniform, shooting their guns, in a parade of military strength and unity. [FN83]

The journal entries made by Lewis and Clark documented the Indian ***1147** peoples' "moral character" by listing the Native

peoples' perceived traits and comparing those traits with the traits of "civilized men." [FN84] In fact, Thomas Jefferson was a proponent of the view that white Europeans were at the apex of civilization by virtue of their moral and intellectual superiority. [FN85] Jefferson posited that Indians had the natural capacity to adopt the habits of civilization. [FN86] He distinguished the Indians' ability to "adopt civilization" from what he saw as the more primitive African-Americans, who were so far below the moral capacity of a white man that they had little hope for anything beyond the status of slaves to the white race. [FN87] Lewis and Clark identified categories of good and bad Indians in reference to whether they had the ability to be friendly to whites and adopt the habits of civilization. [FN88] This ultimately became the touchstone for U.S. Indian policy, which encouraged treaty cessions with compliant Native leaders (the "Peace Policy") and used military expeditions to forcibly appropriate tribal lands from resistant Native leaders (the "War Policy"). [FN89]

Although the Lewis and Clark Expedition seems quite distant in the United States' collective memory, the theme of discovery is alive and well in contemporary science policy. Indigenous peoples have been uniquely harmed by this theme of discovery. Of all the groups that may have been disadvantaged within American society as a historical matter, indigenous peoples are the group that continues to be treated as "objects" of scientific inquiry, rather than co-creators in the categories of knowledge that inform scientific inquiry. [FN90]

***1148** C. Contemporary Science Policy and the Legacy of the Past

Most modern scientists have rejected the overt scientific racism of the nineteenth century, which differentiated the moral and intellectual capacity of the different races. [FN91] The point of the discussion above is not to resurrect an embarrassing history, but to show how prevailing notions of what is scientifically "true" become central to the development of specific laws and policies. For example, the scientific racial hierarchy of the nineteenth century validated the differential treatment of human beings within American society in the exercise of fundamental rights. Such differential treatment occurred with the right to become a citizen through naturalization, the right to marry, the right to enter contracts, and the right to hold property. [FN92] Although the post-Civil War constitutional amendments banned slavery and called for African-Americans to enjoy "equal" citizenship, state governments relied upon the Supreme Court's perverted logic in Plessy v. Ferguson, [FN93] which distinguished between "political" and "social" rights, to maintain the second-class status of African-Americans until the 1960s. [FN94] Scientific studies of gender differences validated policies according women different standards for civil rights--such as voting rights-- and employment. [FN95] It took the Civil War, a set of constitutional amendments, and a century of legal efforts to vindicate the civil rights of African Americans and other minorities to equal citizenship. However, the political status of Indians as "wards" and their exclusion from U.S. constitutional citizenship (though the 1924 Indian Citizenship Act naturalized Indians to citizenship by virtue of federal law) has complicated the notion of equal citizenship for Native peoples. [FN96]

***1149** Significantly, several American philosophers at the turn of the century rejected the scientific racism of the nineteenth century as unethical and immoral. [FN97] This led to a shift in scientific ethics that persisted until the McCarthy Era of the 1950s. [FN98] At that time, many progressive scientists, including Albert Einstein, were targeted as "communists," and had their careers and livelihoods placed in jeopardy. [FN99] The impact of science as a tool of social justice was minimized as research funding became conditioned upon scientists adhering to an apparent "neutrality" of perspective. [FN100] Research funding continues to play an important role in promoting scientific inquiry. Today, private industry often funds scientists to assess the environmental and health risks of products and industrial development. Activist organizations may also employ scientists to generate studies to contest these findings. [FN101] The disparity between the two sets of studies often mystifies consumers and complicates the work of public policymakers.

Although the active scientific racism of the nineteenth century was ultimately rejected as a tool of social policy, it remains an important dynamic for Native peoples. Few people would deny that the 1868 Surgeon General's Order directing U.S. military personnel to collect Indian crania and other body parts from deceased Indians and ship them to the Army Medical Museum for scientific study constituted racism. [FN102] However, as of 2012, that original historic injustice has now resulted in over 118,000 sets of Native American remains being housed in federal agency and museum collections under the label of "culturally unidentifiable" human remains. [FN103] Many of these remains are the bodies of Indian people that were murdered, dismembered, and had their ***1150** personal belongings plundered by U.S. servicemen on the battlefield. [FN104] The military shipped the human remains to Washington, D.C. in crates without any way to identify the names or, in many cases, even the tribal nations of the deceased. [FN105] Their personal objects became the "property" of the very men who plundered their bodies. [FN106] Museums collected many of these pieces over time through purchase and donations. [FN107] This gruesome history underlies today's Native American repatriation movement. The scientists who seek to study the deceased Indian peoples' bones assert that such study may produce new knowledge that will provide a broad public benefit. [FN108] This argument is akin to the arguments "craniologists" made in the nineteenth century. The "craniologists" argued that the measurement and dissection of human heads could lead to important knowledge about the fundamental capacity of the different races. [FN109]

As Section III discusses, the themes of nineteenth century science policy continue to shape domestic environmental policy, health policy, and repatriation policy. The theme of discovery is more apparent in some areas of public policy than others, and this Article does not attempt to argue otherwise. The central point is that all of these areas of national policy are informed by science, and all of them significantly impact indigenous peoples. Because of this, contemporary science policy often manifests as "injustice" to Native peoples. Of course, the terms "justice" and "injustice" are used loosely, frequently serving as mere polemical tools in modern social discourse. Therefore, the next section of this Article will construct an argument about the specific nature of the injustice before discussing several legal controversies that illustrate the point.

II. SCIENCE AND ETHICS: THE PROBLEM OF EPISTEMIC INJUSTICE

Many contemporary philosophers have invoked the principle of justice to examine potential unfairness in the distribution of goods, such ***1151** as information or education, that are necessary to ensure the full realization of liberties by all citizens within civil society. [FN110] However, it is not always clear what "justice" entails. Under the pervasive utilitarian calculus that has informed many of our policies, substantial benefits to a large segment of society are asserted to justify some disadvantages to a few. For example, in the 1970s, the American Academy of Sciences designated Navajo lands in the Four Corners region as a "national sacrifice area," acknowledging the permanent damage and pollution caused by coal strip mining. [FN111] Those lands are home to hundreds of Navajo residents, [FN112] and the health impacts of the mining industry have been severe and ongoing. [FN113] Is this an instance of "injustice"?

It is not easy to reach a conclusion on the issue because tribal governments often depend upon the jobs and revenues that come to the reservation through mining operations. [FN114] In many other parts of the country, the impacts of environmental degradation on particular communities inspired the "environmental justice" (EJ) movement. [FN115] The EJ movement found significant environmental impacts concentrated among many poor and often minority communities. [FN116] The EJ movement asserted that these disadvantaged groups faced a disproportionate amount of the burdens that toxic industry causes, such as nearby landfills and air pollution, while affluent communities receive most of the benefits. [FN117] One could call this a form of "racism," but of a type far more subtle than its nineteenth century counterparts. For this reason, the term "environmental

justice" seems to be preferred to that of "environmental racism." [FN118] Today, the U.S. Environmental Protection Agency (EPA) has incorporated environmental justice concerns into the policies that determine whether a given industry may build and operate a toxic or ***1152** dangerous facility within a community. [FN119]

The EPA's response to the EJ movement represents an attempt to mitigate social inequities through domestic law and policy. The theoretical work on justice, however, is more provocative and promotes a more nuanced analysis of the public policy response. For example, John Rawls' influential theory of justice specifically rejects the utilitarian calculus, asserting that "in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests." [FN120] Rawls' account would argue in favor of a public policy that ensured an equal distribution of risks and benefits. However, society can only achieve this model of justice if it truly appreciates and understands the interests and rights particular social policies might impair, despite a fair and neutral appearance under prevailing standards.

This section of the Article draws upon Miranda Fricker's philosophical work [FN121] to explain how "epistemic" forms of injustice--those injustices relating to the categories of knowledge and experience that law and public policy sanctions--affect indigenous peoples. This Article will also discuss why the resulting harms caused by epistemic injustice are often invisible within the domestic legal and public policy arenas. Section II provides the foundation for Section III's analysis of specific case studies. Section II first describes the problem of epistemic injustice and then explores two forms of epistemic injustice that indigenous peoples have experienced within domestic law and public policy. Section II then associates the key components of Fricker's theory of epistemic injustice with the Rawlsian claim for equal citizenship, which is the predominant focus of justice theory.

A. Understanding Epistemic Injustice

As demonstrated above, many of the conflicts between indigenous peoples and scientists revolve around fundamental differences in their respective systems of thought, particularly as these concern the categories of experience that are relevant to understanding the natural world. These epistemological differences, in turn, heavily influence the formation of public policy and can operate to cause forms of "epistemic injustice" for the affected groups.

Within the United States, domestic policymaking is dependent upon a ***1153** model of secular pluralism. [FN122] Secular pluralism privileges Western European understandings of science, economics, and technology as the appropriate constructs for domestic public policy. [FN123] Although indigenous peoples have analogous concepts, such as traditional ecological knowledge, [FN124] these understandings are routinely disregarded within public policy discourse. [FN125] Policymakers and jurists tend to understand indigenous cultural worldviews as "religious beliefs" and marginalize these interests as matters of "private conscience." [FN126] To the extent that Western society excludes indigenous worldviews from important social interactions within domestic policy structures, indigenous peoples are likely to suffer epistemic forms of injustice. In most cases, these harms will not be seen or appreciated by others, meaning that the legal system will be unable to provide any redress. Miranda Fricker's account of "epistemic injustice" facilitates an understanding of the subtle ways in which indigenous peoples have been excluded from full participation in shaping domestic law and public policy. Although Fricker's account is potentially illuminating for all societies, this Article discusses its utility for understanding the effect of U.S. public policy upon Native peoples in this country.

Fricker's work examines the impacts of our basic social interactions, many of which center on knowledge and social experience. [FN127] She maintains that there are "ethical aspects of two of our most basic everyday epistemic practices: conveying knowledge to others by telling them, and making sense of our own social experiences." [FN128] These practices, in turn, implicate the operation of social power in epistemic interactions, promoting an inquiry into the "politics of epistemic practice." [FN129] The politics of epistemic practice determine how social power--or social disadvantage--operates to produce injustice in our everyday epistemic practices.

Social power, of course, is a fact of social discourse. In that sense, ***1154** Fricker argues, we need not describe social power as "bad." [FN130] Instead, Fricker encourages us to notice when social power is being exercised and then ask "who or what is controlling whom, and why." [FN131] Moreover, some social interactions will hinge upon the participants' mutual understanding of their social identity, which might indicate that some form of "identity power" is at work. [FN132] For example, this could occur when a man makes some use of his male identity to influence a woman, perhaps by patronizing or otherwise intimidating her. [FN133] This subtle form of domination requires an explicit focus, and Fricker's theory of epistemic injustice provides such a lens.

Fricker's account of epistemic injustice has critically important implications. The law is a social institution that broadly invokes power relations between the government and its citizens and between the U.S. and Native Nations. In the former case, the government and its citizens share a sense of identity within civic society, although they may also depart from this shared conception in the exercise of pluralism or multiculturalism. In the latter case, however, the essential interaction of the two groups (U.S. and Native Nations) does not rest upon a shared conception of identity. In fact, the principle of indigenous self-determination depends upon the ability of an indigenous people to express its own identity as an autonomous group and to negotiate the terms of its political relationship with the given nation-state. Identity-power is perhaps the single most important dynamic of this relationship. Thus, one must carefully ascertain when epistemic injustice operates to suppress an indigenous group's ability to define its own identity. According to Fricker, this can occur in the form of "testimonial" or "hermeneutical" injustice. [FN134] As the following discussion demonstrates, testimonial injustice arises when someone is wronged in his or her capacity as a giver of knowledge, while hermeneutical injustice arises when someone is wronged in his or her capacity as a subject of social understanding. [FN135]

B. Testimonial Injustice

Of the two forms of epistemic injustice, testimonial injustice is ***1155** perhaps more basic to legal theory and practice. After all, lawyers commonly invoke testimony as "proof" that something did or did not take place. However, it is necessary to examine why we qualify some persons as "capable" of giving testimony while we exclude others from this privilege. It is also necessary to understand that we may accord this privilege as a matter of institutional practice, or it may become part of less formal social interactions. In either case, these epistemic practices can impair indigenous peoples' rights and interests. According to Fricker, testimonial injustice commonly arises from a dysfunction in a testimonial practice that is related to identity. [FN136] For example, listeners may evaluate some speakers as more credible due to the speaker's gender, age, class, income, accent, or appearance. Conversely, others will experience a "credibility deficit" due to the same factors. [FN137]

Many of these practices exist at the level of informal social interaction, but others are formalized into our legal, social or political structures, which leads to "systemic testimonial injustice." [FN138] An accepted practice within the American legal system is to qualify a witness before they may give "expert testimony." [FN139] The implications of this can be significant for

indigenous peoples. For example, an indigenous group petitioning for political recognition through the "federal acknowledgement process" must obtain credible testimony that the group is, in fact, an "Indian tribe" that merits political recognition. [FN140] Similarly, if an indigenous group claims that a particular sacred place should be protected as a "Traditional Cultural Property" (TCP) pursuant to the National Historic Preservation Act, it must secure expert testimony sufficient to prove this status. [FN141] In either case, a successful outcome will likely depend upon the "expert" testimony of a trained academic who has studied the group and can determine whether the group constitutes "an Indian tribe" or whether the place constitutes a TCP under the particular statutory or regulatory criteria. [FN142]

***1156** Courts are unlikely to recognize tribal members as having the same credibility as an "expert witness," although certain tribal cultural practitioners, including tribal historians and traditional healers, may have recognized cultural expertise in specific areas. Tribal language, oral tradition, and ceremonial practice are all areas that may contain esoteric knowledge beyond the comprehension of even the most experienced academics. The categories of knowledge that cultural practitioners hold are often invisible within the U.S. legal system. This is because most of these individuals do not possess formal academic credentials to "prove" that they possess relevant knowledge for purposes of giving "expert testimony" in legal proceedings. [FN143]

Some might argue that we can overcome testimonial injustice by increasing our awareness of how the court system treats Native witnesses or by committing to modify our legal structures to minimize the unfairness that might result from differential power relations. For example, the legislative branches can specifically authorize Native cultural testimony as a form of "expert" testimony, or courts can interpret evidentiary rules to sustain this practice. However, even when the law explicitly allows such testimony, the courts must still be willing to consider this testimony as probative of a specific claim. For example, the Indian Claims Commission Act of 1946 authorized tribal claimants to give testimony on traditional patterns of land use to sustain their claims against the United States for the appropriation of tribal property without consent of the tribe. [FN144] Under the statute, such testimony could be admitted under a variety of theories in order to sustain, for example, a claim against the government's taking of a group's aboriginal title or its treaty-guaranteed lands. [FN145] However, a common threshold issue might be whether the group merits compensation as a matter of constitutional right under the Fifth Amendment Takings Clause, or whether it is merely entitled to a lesser form of statutory payment designed to extinguish the ***1157** legal claim. Only the constitutional claim would offer parity with the legal treatment extended to non-Native claimants when the government takes their property interests. [FN146]

In Tee-Hit-Ton Indians v. United States, [FN147] the tribe brought a Fifth Amendment takings claim against the United States in connection with the government's decision to authorize timber harvesting from the tribe's traditional lands in Alaska. [FN148] The United States acquired Alaska through a treaty with Russia, which, unlike Great Britain, had not colonized its American territories, casting doubt on whether it had effectively settled the lands for purposes of claiming title under the Doctrine of Discovery. [FN149] The Tee-Hit-Ton Indians maintained that they were the rightful owners of these lands and thus had a property interest in the timber that sustained their takings claim. [FN150] The Supreme Court disagreed, noting that the testimony offered by the tribal member selected to be the group's expert witness merely proved the tribe's "group" claim to the area in accordance with the tribe's "hunting and fishing stage of civilization." [FN151] The Court saw this "primitive" form of land use as merely establishing the group's claim to "aboriginal title" on the same level as other Indians but not establishing a true "property interest" within the meaning of the U.S. Constitution. [FN152] Instead, the Court employed the Doctrine of Discovery to find that the taking of "Indian title" does not require "just compensation" under the U.S. Constitution because:

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conqueror's will that deprived them of their land. [FN153]

The Supreme Court's interpretation of the testimony provided by the tribal witness was based on a shared social experience of "property rights" informed by Western thought, and it had no resonance with the ***1158** experience of the Native claimants. [FN154] In that respect, Tee-Hit-Ton raises Fricker's second category of epistemic injustice, namely "hermeneutical injustice." As the following discussion demonstrates, the dynamic of hermeneutical injustice is more subtle than testimonial injustice because it engages the interpretation of social experience. While this may seem tangential to the law, it is actually quite important for indigenous peoples because the law reflects the dominant society's interpretation of relevant social experience. Not surprisingly, the dominant society's interpretive norms routinely exclude indigenous categories of experience.

C. Hermeneutical Injustice

According to Fricker, hermeneutical injustice is "the injustice of having some significant area of one's social experience obscured from collective understanding" because the group is structurally prejudiced and cannot participate on an equal basis in creating a shared meaning for the social experience. [FN155] Hermeneutical injustice raises difficult questions because prevailing relations of power can destroy or constrain the ability of a group to understand its own experience. [FN156] Fricker draws on the work of feminist scholars to show how the concept of "sexual harassment" that now constitutes a claim under federal and state antidiscrimination laws was, for many years, not a visible category of social experience, let alone a legal cause of action. [FN157] Women lacked equal power in the workplace, and in that sense, they were "hermeneutically marginalized" from creating a shared experience of social meaning. [FN158] Thus, female subordinates had no way to make a claim for harm based on their experience of "discomfort" at being patted, kissed, groped, or propositioned by male superiors. [FN159] The harm simply was not seen or understood by others outside this experience. [FN160]

Hermeneutical injustice is what occurs with many Native American claims to protect aspects of their cultural identity from harms that are not recognized standard categories of law. In particular, there is currently not a recognized category within American law to redress cultural harm, ***1159** as the following cases demonstrate. [FN161]

Following the Exxon Valdez oil spill, several Native Alaskan communities sued Exxon for the destruction of their traditional subsistence ways of life caused by the massive oil spill because the spill decimated the fish and wildlife upon which they depended. [FN162] The Ninth Circuit declined to find a cause of action, distinguishing the tangible harms to natural resources, which were actionable, from the "intangible" harms to culture, which were not. [FN163] The Ninth Circuit perceived culture as merely an "internal" state of mind, positing that "one's culture--a person's way of life--is deeply embedded in the mind and heart. . . . [C]atastrophic cultural impacts cannot change what is in the mind or in the heart unless we lose the will to pursue a given way of life." [FN164] Of course, it is unclear how a group can preserve a cultural "way of life" when the essential components are destroyed.

Similarly, the Ninth Circuit, sitting en banc, refused to halt a National Forest Service development plan authorizing a ski facility to pump treated sewage effluent from Flagstaff to generate artificial snow on a mountain held sacred by the Navajo Nation, Hopi Tribe, and several other tribes in the Southwest. [FN165] The Tribes had filed their claim under the Federal Religious Freedom Restoration Act (RFRA), [FN166] which purports to restore the compelling interest test for any federal action that places a substantial burden upon religion. [FN167] However, the court found that the standard under RFRA in-

corporates existing Supreme Court case law defining what constitutes a "substantial burden." [FN168] Consequently, the court drew on the Supreme Court's decision in Lyng v. Northwest Indian Cemetery Protective Association, [FN169] which held that the destruction of indigenous religion arising from a road construction ***1160** project through a tribal sacred site was not actionable under the First Amendment because the tribes were free to "believe" as they wanted. [FN170] Thus the court ruled that the Native peoples had no right to condition the Forest Service in the management of federal public lands. [FN171] The Ninth Circuit held that the standard to be applied in a RFRA case was the same as that in a First Amendment case and further found that the road-building project in Lyng could not be distinguished in any meaningful way from the use of reclaimed wastewater on the San Francisco Peaks. [FN172] Following the reasoning of the U.S. Supreme Court in Lyng, the Ninth Circuit also found that the federal agency was simply managing its own land to maximize its value for the public benefit. [FN173] The two analyses evoke the sort of utilitarian calculus that justified strip mining on Navajo lands.

Another example of hermeneutical injustice arose when a Native Hawaiian group, the Hui Malama, filed a claim against the U.S. Department of Navy and the Bishop Museum to protect ancestral human remains from desecration in connection with the scientific study of the remains authorized for purposes of preparing an inventory under the Native American Graves Protection and Repatriation Act. [FN174] Hui Malama asserted that the federal defendants had violated federal law by undertaking scientific research on the remains, and they feared that the study record would be disclosed to third parties pursuant to requests under the federal Freedom of Information Act (FOIA). [FN175] The Native claimants argued that the public release of this data, including photographs of the remains, would cause a profound and serious harm to the ancestral remains, which maintained an essence as living beings, and to their descendants. [FN176]

The court declined to recognize this claim, finding that although the ancestral remains were "living" entities within the indigenous belief system, they were merely de-identified human skeletal remains for purposes of the privacy exemption within FOIA. [FN177] The Hawaiian case exemplifies a form of testimonial injustice because the court failed to see the relevance of the Native claimants' testimony to establishing an ***1161** actionable claim. The case also demonstrates a form of hermeneutical injustice because the Native Hawaiian claimants were structurally excluded from creating a shared meaning for the doctrine of privacy, which would operate to protect a living person's body from being photographed and put on public display without the individual's consent.

A final example of hermeneutical injustice can be seen in a very current event. The Native Village of Kivilina is losing its entire land base as a result of global climate change and sea level rise. [FN178] Thus far, the Native Village of Kivilina has not prevailed in its attempt to sue several oil companies for the harm of public nuisance. [FN179] This is because the courts have been unable to find any particular liability given the multiple interactions that are responsible for rising levels of greenhouse gas emissions. [FN180] Indeed, no cause of action currently exists for the loss of an entire nation, as many island nations in the South Pacific, such as Tuvalu, are discovering. [FN181] It is simply outside the realm of our current understanding, as a global community, to fathom the loss of a sovereign nation's entire land base by a "natural" phenomenon like flooding, as opposed to military conquest. [FN182]

All of these cases raise issues of hermeneutical injustice because the harms asserted include cultural and spiritual claims that do not fall within an available category of experience or thought within the Western legal system. However, the harms are felt by indigenous peoples. This is their experience, and it is shared among many different indigenous groups because they possess a different understanding of the world. Each of these indigenous claimants has faced structural prejudice because they are forced to bring their cause of action under standard categories of American law that do not reflect a shared understanding of

their social experience, including the asserted harms or benefits of particular types of conduct. In each of these cases, science has been utilized to prove the "truth" of a claim for harm. So, for example, science can measure and quantify the level of a toxic emission that poisons water or kills fish or wildlife. However, science cannot measure ***1162** the value of "culture" to a people, and consequently, there is no scientific method to establish "cultural harm." Thus, the destruction of a culture or a religion is not legally actionable. Similarly, science can "prove" that Class I-treated effluent is "safe" for a recreational skier on the San Francisco Peaks, although science cannot prove the "spiritual contamination" that will result from the discharge of mortuary fluids into the reclaimed municipal water source used to create artificial snow. Nor can science prove that the San Francisco Peaks themselves have a sacred essence and identity as a living spiritual being or that ancestral human remains have such qualities. In each case, Western science's limited framework is used to justify the exclusion of Native experience for purposes of establishing a legal cause of action.

D. Structural Forms of Epistemic Injustice Impair Equal Citizenship

Why should American society care about these structural deficiencies within its pluralistic democracy? Fricker argues that the capacity to give knowledge is a fundamental capacity of human beings. [FN183] When a society treats some groups as incapable of giving knowledge on an equal basis, it treats those groups as less than fully human, an intrinsic harm. [FN184] Society also hinders the groups' further development by discounting their intellectual abilities, an epistemic harm. [FN185] As illustrated by the Doctrine of Discovery and its incorporation into U.S. law, American legal and educational institutions have historically treated Western knowledge as a privileged form of knowledge, discounting the ability of indigenous peoples to generate knowledge or convey it in process of public policy discourse. [FN186] In the process, American society has prevented indigenous peoples from articulating their own social experience, including the harms they have experienced as a result of the dominant society's public policies.

Fricker also encourages societies to care about epistemic justice as an intellectual or moral virtue. [FN187] Intellectual virtues generally have truth as their ultimate end, which may be one reason why contemporary scientists claim a value in studying indigenous knowledge. For example, some scientists contend that traditional knowledge is of potential utility to understand biodiversity and its management through adaptation plans, ***1163** as well as to obtain knowledge about medicinal plants that might be used to develop pharmaceutical products. [FN188] The utility of indigenous peoples' traditional knowledge will be "proven" when it accords with Western science, which is why scientists are now pushing to undertake research studies on traditional knowledge. [FN189]

While intellectual virtue is important, the dominant society must be aware that its desire to use indigenous knowledge as a means to achieve a broad public benefit has often resulted in the exploitation of indigenous peoples. For example, the pharmaceutical company typically profits from its ability to patent products derived from indigenous peoples' knowledge of plants. [FN190] However, intellectual property laws do not protect indigenous knowledge, [FN191] which means that indigenous peoples have no way to protect against misuse or misappropriation of their traditional knowledge. This is largely because U.S. intellectual property laws protect only new "innovations" and "discoveries," and they do not protect the longstanding knowledge held by cultural communities. [FN192]

Fricker compares intellectual virtue with the virtue of compassion, which is a moral virtue designed to alleviate the suffering of others and motivate their well-being. [FN193] An ethic of compassion suggests that we utilize a human rights framework to improve the position of indigenous peoples within society. [FN194] This would ideally move them out of a

position of disadvantage and powerlessness while honoring the U.S. Constitution's stated commitment to protect human dignity and equality. [FN195] Presumably, indigenous peoples would then be able to enjoy ***1164** the equal citizenship espoused by American democracy.

III. CONTEMPORARY CASE STUDIES INVOLVING INDIGENOUS PEOPLES AND SCIENCE POLICY

Advances in science and technology hold a great deal of promise for resolving some of the most difficult challenges that confront us in the contemporary era. However, they also pose significant ethical issues, particularly in view of the considerable disparities between populations and nations in their overall capacity to experience the benefits of technology. In the United States, Native peoples are implicated in public policy as U.S. citizens and as citizens of sovereign nations. [FN196] Individual Indians enjoy "equal citizenship" in common with all other United States citizens, [FN197] and yet they also have a "differentiated" citizenship because of their membership within tribal Nations that possess a trust relationship with the United States government. [FN198]

These different status relationships are the basis for different rights claims. In their capacity as U.S. citizens, individual Indians have the right to enjoy the same liberties as other citizens, including state services. [FN199] The rights that derive from the federal trust relationship, however, are different in character. These are political rights that are expressed collectively through the government-to-government relationship between the Native Nations and the United States. [FN200] Such rights may be reflected in treaties or other constitutive agreements, and they often manifest in a reservation land base, generally held in trust for the benefit of the tribe and its members. [FN201] They may also be reflected in the tribes' associated interests in water, timber, and wildlife resources. [FN202]

This section of the Article will discuss the ways in which the sovereign rights of Native Nations are impacted by U.S. public policy. In ***1165** particular, the Article identifies three areas where science policy continues to heavily impact the rights and interests of indigenous peoples. While the doctrines governing the specific areas differ, there is consistency in the themes that have driven national policy over the years as well as their impact on Native peoples. The three areas are environmental policy, health policy, and repatriation policy. These are vast areas of public policy, and this Article does not attempt to give a comprehensive account of any one area. Nor does the Article purport to make the broad argument that the Doctrine of Discovery has perpetuated a dominant colonial attitude in every aspect of U.S. public policy to the detriment of Indian tribes, although other commentators have persuasively made this case. [FN203] Rather, this Article selectively discusses aspects of these policies within their historical context in order to illustrate the ways in which these policies intersect and impact Native peoples. In all three areas, the policymakers have excluded or disregarded the unique interests of Native peoples, causing structural forms of epistemic harm to tribal governments and Native communities.

A. Environmental Policy

Within the United States, domestic policy has traditionally employed a utilitarian calculus to determine the respective rights of Native peoples and the United States to the lands and resources that were at one time wholly governed by indigenous law. [FN204] This is demonstrated in nineteenth century public land policy and in the twentieth century policies governing environmental regulation and energy development.

1. The Legacy of Nineteenth Century Land Policy

Nineteenth century federal Indian policy supported the notion that the manifest destiny of the United States was to settle western lands. This settlement occurred by facilitating homesteading rights out of the expansive "public domain." [FN205] As detailed above, U.S. public land policy ***1166** was an outgrowth of the Doctrine of Discovery, which accorded paramount title to the European sovereigns and their successors in interest while relegating tribal property interests to the status of a right of occupancy that the United States could extinguish by purchase or conquest. [FN206] The United States engaged in a treaty process with Native peoples until Congress ended this practice in 1871. [FN207] The United States effectuated land cessions after that time by negotiating agreements with Indian nations, which were then formalized by congressional statutes. [FN208] However, the idea of consensual political bargain gave way to political force after the Supreme Court's 1903 decision in Lone Wolf v. Hitchcock. [FN209] In this opinion, the Supreme Court held that the United States had the power to unilaterally abrogate an Indian treaty and open tribal lands to non-Indian settlement, and the Court denied the tribal claimants any relief, finding that this was a "political question" not amenable to judicial review. [FN210] The Supreme Court ultimately modified this ruling in 1980, when it decided a case that raised a similar issue in the context of a federal statute that appropriated land from the Lakota Nation. [FN211] In United States v. Sioux Nation of Indians, [FN212] the Supreme Court upheld congressional power to abrogate Indian treaties and to control the disposition of tribal property in its role as trustee, so long as it provided the Nations with "equivalent value." [FN213] However, the Court held that Congress's power as a trustee should not be conflated with its power of eminent domain. [FN214] Therefore, government "takings" of federally protected tribal land for a "public use" were subject to payment of "just compensation" under the Fifth Amendment. [FN215]

The Lone Wolf decision is the judicial equivalent of many nineteenth century federal policies that placed tribal governments under the domination of the U.S. government. In 1830, Congress enacted ***1167** legislation authorizing the removal of many Indian nations from their traditional lands and placing the tribes on small federal "reservations" under the control of federal superintendents. [FN216] The Dawes Allotment Act of 1887 [FN217] went a step further, authorizing Congress to allot tribal reservations to individual tribal members and then release the "surplus" lands for non-Indian settlement. [FN218] Like the Removal Act of 1830, the Dawes Allotment Act of 1887 contemplated specific agreements with each affected tribe. [FN219] However, the 1903 Lone Wolf opinion disregarded the need for tribal consent, authorizing Congress to unilaterally override existing treaties to force the allotment of reservations and release "surplus" lands. [FN220] Not surprisingly, the combined effect of the Dawes Act and the Supreme Court's authorization of unilateral treaty abrogation resulted in a staggering loss of two-thirds of the tribal land base from 1887 to 1934, when Congress ended the allotment policy. [FN221]

The Bureau of Indian Affairs (BIA) was the federal administrative entity responsible for implementing the allotment policy. [FN222] The BIA started out in the Department of War and then was transferred to the Interior Department in 1849. [FN223] In the nineteenth century, the BIA promulgated federal administrative regulations to "civilize" and "Christianize" the Indian people. [FN224] These orders disrupted every aspect of tribal self-government, including the tribes' ability to educate their children or engage in traditional cultural practices, including religious and healing practices. [FN225] Although these policies would clearly violate ***1168** the Bill of Rights if applied to American citizens, Indian people were officially considered wards of the U.S. government and were not admitted to citizenship status until 1924. [FN226] This meant that the federal policies banning Native religion or forcibly removing Indian children to federal military-style boarding schools were permissible as secular policies of "civilization" applied to "wards" of the federal government. [FN227] If applied to U.S. citizens, these laws would have been held unconstitutional under the First Amendment or the Due Process Clause of the Fifth Amendment. [FN228]

2. Twentieth Century Policies Governing Environmental Regulation and Energy Development Emerge from Nineteenth Century Federal Land Policy

In terms of environmental policy, the BIA administered tribal lands through many of the same policies that pertained to federal public lands, including leasing lands for mineral and timber exploitation at below-market rates. [FN229] Unlike the treatment of federal public lands, however, the tribal governments were the designated legal beneficiaries of these lands, [FN230] and tribal members actually resided on the lands that were opened for timber harvesting and mineral exploitation. [FN231] For many years, tribal lands were treated as resource colonies for the benefit of the United States. [FN232] This policy was exploitive but entirely consistent with ***1169** the "wardship" status of Indian nations. [FN233] The environmental and health consequences of these policies, which lasted until the 1970s, devastated many tribal communities. [FN234]

The best example of the ways in which national policies governing energy development on public lands combined to impact the Native peoples' health and environment comes from the U.S. policies promoting uranium production on federal and tribal lands in the nineteenth and twentieth centuries. [FN235] In the late nineteenth century, the U.S. began uranium exploration and found rich deposits throughout the Southwest. [FN236] In 1939, the U.S. government began active exploration of uranium on the Navajo reservation and began a classified survey of the Colorado Plateau in 1942, including covert mining. [FN237] After World War II, the U.S. Congress enacted the 1946 Atomic Energy Act, which established the Atomic Energy Commission (AEC). [FN238] AEC controlled the uranium industry, and all uranium mined within the U.S. had to be sold to the AEC. [FN239] In the 1950s, the BIA approved leases of Navajo land to select companies, authorizing them to mine uranium within the Navajo Nation. [FN240] The BIA instructed the tribal council that this was a beneficial industry that would employ many Navajo workers. [FN241]

The U.S. Public Health Service conducted the first studies of uranium mining on the Navajo Nation in 1949. [FN242] Although scientists already knew the health impacts of radioactive exposure, and precautionary measures were available, [FN243] these protections were not made available to Navajo workers. [FN244] Furthermore, the Navajo workers were not informed ***1170** about the hazards of their jobs, including the need to change clothing before they returned home to their families. [FN245] Navajo miners breathed the air and drank the water contaminated by the radioactive ore. [FN246] None of this was disclosed to the Navajo Nation, and the U.S. government continued to approve contracts with mining companies, touting uranium production as tribal economic development and jobs creation. [FN247]

The health studies continued without the knowledge of the tribe or tribal members. [FN248] In 1952, another health study documented the high mortality rate among uranium miners from lung cancer. [FN249] Again, this was not disclosed for fear that the Navajo workers would quit their jobs if they knew. [FN250] The AEC monitored the economics of uranium exploitation for the benefit of the U.S. military, and it took the position that it had no responsibility for worker health or safety. [FN251]

In 1971, federal law shifted to favor the use of nuclear energy by commercial operators. [FN252] Because commercial operators were now the purchasers of uranium, the health impacts were of direct relevance to laborers. [FN253] Thus, the impacts of uranium mining on Native workers and their families became the subject of multiple Congressional hearings. [FN254] Congress ultimately enacted the 1990 Radiation Exposure Compensation Act, which was amended in 2000. [FN255] This Act provided limited compensation to miners or to their widows if they met a stringent set of requirements intended to document the direct causal relationship between the mining practices and the death or disease that caused them harm. [FN256] The legislation only compensated individuals who could meet the tort standard for liability. [FN257] It thus did not compensate

the Navajo Nation for the harm and injury caused to its land and to many Navajo ***1171** people, including the future generations who would suffer from radioactive exposure. [FN258]

Federal policy shifted again in the latter part of the 1970s in the wake of nuclear spills and public outcry. [FN259] Federal policy began to both minimize the role of nuclear power as an energy source and amplify the role of coal, oil, and gas exploration. [FN260] These industries have also caused environmental impacts for the Navajo Nation and other energy resource tribes, [FN261] but they are often supported by tribal leaders as one of the sole mechanisms for tribal economic development. [FN262]

This case study of energy development on the Navajo Nation highlights the way in which the U.S. government used science policy to enhance its capacity to mine uranium at the lowest price possible in order to serve the "greater good," namely, the "national security" interest of the U.S. Although the harms to human health and to the environment were well-documented by existing science, the U.S. government did not disclose this to the Navajo Nation in a way that would enable that government to protect its lands and members.

U.S. public health officials instead conducted a covert "medical experiment" on the Navajo people, reminiscent of the infamous Tuskegee Experiment, [FN263] to document the effects of uranium exposure on human beings. [FN264] In addition, the U.S. government failed to take an ***1172** active role in remediating the harm after the uranium mining companies pulled out of active operation, leaving huge piles of uranium tailings and holding ponds of radioactive waste. [FN265]

In 1979, one of the mud dams that contained a holding pond near Church Rock, New Mexico, burst, spilling 1100 tons of uranium tailings and an estimated 100 million gallons of radioactive wastewater into the Rio Puerco River. [FN266] Experts have cited this spill as the largest nuclear spill in U.S. history, and it caused extensive damage to local Navajo families, including the loss of their livestock, which were poisoned by drinking the radioactive water. [FN267] The Navajo plaintiffs attempted to sue United Nuclear Corporation in tribal court, but the U.S. Supreme Court held that the Navajo plaintiffs were preempted from doing so by the Price-Anderson Act. [FN268] The Price-Anderson Act is a federal statute that limits the liability of any company engaged in nuclear energy production for the harm or damage caused by its activity. [FN269] It is a complicated statute that creates a high burden for plaintiffs to prove causation and establishes a cap on the damages they can receive upon meeting that burden. [FN270] Furthermore, the Supreme Court ruled that a federal court must decide cases under this statute using the "neutral laws" and "scientific evidence" promoted by federal policy. [FN271] In short, the Navajo Nation and its members are divested of any authority to redress the harms they have suffered from uranium mining, other than the very narrow set of claims that Congress has authorized.

This profound legacy of federally-authorized radioactive contamination inspired the Navajo Nation to enact its own law, the Diné Natural Resources Protection Act of 2005. [FN272] This law, among other things, prohibits all uranium mining within the Navajo Indian Country. [FN273] The Navajo Indian Country is defined to extend to lands within the "checkerboard" area, an area in the state of New Mexico that ***1173** is comprised of fee lands and tribally owned lands that is populated virtually exclusively by Navajo people. [FN274] The checkerboard area exemplifies the mixed land titles within the exterior boundaries of many Indian reservations caused by nineteenth century federal land grants to the railroad companies intended to promote westward expansion. Today, the checkerboard area claimed by the Navajo Nation is the focus of jurisdictional disputes caused by private companies seeking permits to drill for uranium on parcels of non-Indian owned fee land within the area. [FN275] In accordance with the jurisdictional rules of federal Indian law, if the land in this area is "Indian Country," then the EPA main-

tains primary permitting authority in cooperation with the Navajo Nation. [FN276] If the land is not "Indian Country," then the State of New Mexico may authorize drilling for uranium on privately-owned or state-owned lands in the area but not on any lands still held in "Indian title." [FN277]

The jurisdictional issues are currently being litigated in the federal courts. [FN278] In Hydro Resources, Inc. v. EPA, [FN279] the Tenth Circuit, sitting en banc, held that a parcel of fee land owned by Hydro Resources, Inc. within Section 8 of the checkerboard area was not a "dependent Indian community" for purposes of 18 U.S.C. § 1151(b). [FN280] This holding reversed the EPA's land status determination and overruled an earlier Tenth Circuit panel opinion in the same case holding that the area was a "dependent Indian community" within the meaning of the federal statute defining "Indian country." [FN281] Section 8 falls within the Church Rock Chapter of the Navajo Nation, an area comprised of over seventy-five percent trust land, both tribal and allotted, with a population that is ninety-eight percent Navajo. [FN282] These demographics supported the ***1174** EPA's finding that any permits to mine uranium in the area would require the approval of the Navajo Nation and EPA. [FN283] The Tenth Circuit's en banc opinion found, however, that the U.S. Supreme Court's decision in Alaska v. Native Village of Venetie Tribal Government [FN284] should be interpreted as negating the "community of reference" test, which includes an analysis of population demographics. [FN285] The circuit court thus ruled that the parcel of land should be considered in isolation from the remainder of the land within the Church Rock Chapter of the Navajo Nation. [FN286]

The finding that non-Indian ownership of a parcel of fee land justifies state jurisdiction obviously constrains the jurisdiction of the Navajo Nation to protect its lands and members. In addition, the controlling politics is based on the same utilitarian calculus that was responsible for the initial harms of uranium mining on the Navajo Nation. In this case, many policymakers now assert that nuclear energy is "green energy" and uranium production should be expanded in order to minimize the greenhouse gas emissions. [FN287] Assuming that the argument is defensible, the costs of uranium mining will fall disproportionately upon the people who live on or near the lands that will be mined. Unlike state- or federal-public lands, reservation lands are the home of many Native peoples. Companies such as Hydro Resources, Inc. tout new methods of drilling for uranium as "safe" technologies, [FN288] but there is insufficient information to substantiate this claim. [FN289]

Because the Navajo Nation possesses an estimated twenty-five percent of the recoverable uranium in this country, the Nation will bear the brunt of a national energy development policy that promotes uranium mining. [FN290] For example, in another recent Tenth Circuit decision, Morris v. United States Nuclear Regulatory Commission, [FN291] the court upheld the Nuclear Regulatory Commission's decision to grant Hydro Resources, ***1175** Inc. a source-materials license for its uranium mining operation on Section 17 within the Church Rock Chapter. [FN292] In Section 17, the existing radiation levels already exceed the maximum exposure limits, and it is unclear whether groundwater contamination can be remediated. [FN293] The Navajo residents of the Church Rock Chapter rely upon the groundwater to supply drinking water for themselves and their livestock. [FN294] Thus, the risk of harm posed by uranium mining within the checkerboard area falls disproportionately upon the Navajo people, while the primary jurisdictional authority resides with the state and federal governments.

In short, national energy and environmental policies continue to dominate the future of Indian nations and tribal lands under a Western policy model that combines economics and science to determine what is best for "American society." What about the health impacts on tribal members? Again, it is science that measures risk and tells us what is "beneficial" and what is "harmful" as a matter of social policy. The science of "risk assessment" is often based upon assumptions of how the "average" U.S. citizen lives and works, rather than the lifestyles of Native peoples who live on reservations and may consume fish on a daily basis or drink water from wells adjacent to lands contaminated by mining waste. [FN295] With that reality in mind, this

Article will now turn to the issue of national health policy and its impact on indigenous peoples.

B. U.S. Health Policy

U.S. public health policy and the policies that drive health research and facilitate biotechnology rely heavily upon scientific data. In this area of public policy, new scientific discoveries are seen as a social good and are often rewarded by patents for new medicines and technologies. Admittedly, there is not a direct linkage between the patenting of new discoveries in the area of health technology and the nineteenth century Discovery Doctrine that appropriated Native lands for public use. However, as this section of the Article will demonstrate, U.S. health policy, like U.S. public land policy, has significantly affected Native peoples since the earliest days of this country's history, and its use of ***1176** science and economics similarly continues to affect tribal interests in ways that are often invisible to the dominant society.

1. U.S. Public Health Policy and Native Peoples

Because tribal governments enjoy a distinctive political status under federal law, the Indian Health Service and its policies heavily govern tribal access to health care. [FN296] In this sense, U.S. health policy affects Native peoples more than other Americans, just as U.S. public land policy disproportionately impacts Native peoples. Today, U.S. health policy also recognizes Native Americans as "minority populations" who suffer from significant health disparities, as do many other minority groups. [FN297] The cause of these disparities is the topic of many articles and theories, but it is clear that the nineteenth century federal policies, which appropriated Native lands and resources for public use and forced tribes to transition from their traditional land-based economies to dependency upon federal commodities, provided the initial cause of the Native people's health care disparities. [FN298] This connection between U.S. public land policy and U.S. health policy would be invisible to most Americans, but it continues to play an important role in the Native peoples' quality of life.

Today, the overwhelming poverty within many reservation communities and the prevalence of alcohol and tobacco use exacerbates the health disparities faced by tribal members. [FN299] Reservation communities tend to be rural and isolated, and therefore residents lack access to the healthy foods and fitness facilities that suburban American citizens enjoy. [FN300] In addition, poor road conditions and marginal access to hospitals and trauma facilities contribute to higher than average mortality rates attributable to accidents and injuries on the reservations. [FN301]

***1177** According to a 1988 Report of the Institute of Medicine, public health policy reflects "what we, as a society, do collectively to assure the conditions in which people can be healthy." [FN302] Contemporary public health policy is understood to include environmental health, disease and injury control, involuntary testing for disease, contact tracing of disease, immunizations and mandatory treatment, and quarantine policies for persons with infectious diseases. [FN303] The powers of the state and federal governments to regulate public health are generally understood to derive from their respective constitutional authorities [FN304] and from the inherent-police powers of state governments to regulate public health, safety, and welfare. [FN305]

Tribal governments also possess police powers as an aspect of their inherent sovereignty. [FN306] However, their unique political status under federal law results in a different legal framework for tribal health policy and sometimes in disparate rights. For example, the decision of the U.S. Public Health Service to covertly study the effects of radioactive exposure on Navajo mine workers in the 1950s indicates that Native American people have sometimes been treated as involuntary subjects of U.S.

public health research experiments. [FN307] Of course, by the 1950s, Indians were full citizens, [FN308] demonstrating that even this status could not insulate them from the harms of U.S. policy. Rather, the Navajo uranium mining case evokes the past understanding of policymakers that Native Nations were to be treated as "wards" and political subjects of the U.S. Until the mid-nineteenth century, Native peoples were under the jurisdiction of the Department of War, which administered their health needs in the wake of disease epidemics, such as smallpox, measles, and influenza, that decimated many Native villages. [FN309] In fact, the very first ***1178** federal law governing Native health was an 1819 statute designed to protect U.S. servicemen from contracting smallpox from Indians. [FN310] When the BIA was transferred to the Department of Interior (DOI), the DOI assumed the function of providing medical care to Indians for two purposes: to control disease epidemics that could jeopardize American citizens and to meet treaty obligations to provide physicians to tribal governments. [FN311]

What about the sovereign right of tribal governments to regulate public health? This function of tribal self-governance was overtly repudiated by federal policymakers until the 1970s. [FN312] In the latter part of the nineteenth century, the BIA actually outlawed traditional indigenous healing practices on the reservation, thereby forcing the Western model of medicine upon tribal governments. [FN313] The federal government formalized the federal appropriation for Indian health care in the 1921 Snyder Act, [FN314] causing concern about the cost of this service to federal taxpayers. In 1954, the Indian Health Service was transferred to the Department of Health and Human Services as a branch of federal public health policy. [FN315] The transfer's asserted purpose was to "improve health services to Indian people, to avoid duplication of public health services, and to further the long-range objective of integrating Indian people into American common life." [FN316]

It was not until the 1970s that federal policy formally recognized any distinctive role for tribal governments. The Indian Self-Determination and Education Assistance Act of 1975 [FN317] effectuated the new federal policy of self-determination for tribal governments. [FN318] This Act allowed tribes to assume control over services that the federal government previously provided and develop new services for tribal members. [FN319] In ***1179** the 1990s, the federal "self-governance" policy enhanced the ability of tribal governments to administer their own health care systems. [FN320] However, many tribes lack the necessary financial resources to assume direct control of their health care system. [FN321] The Indian Health Service continues to provide a basic level of health care to tribal members, although the extent of this care is somewhat dependent upon congressional funding cycles. [FN322] Some tribal governments have successfully harnessed the revenues from gaming to assist them in delivering outstanding health care to tribal members within tribally-operated reservation clinics and hospitals. [FN323]

Despite these modern policy innovations, a 2009 study on national health care disparities documents that American Indians and Alaska Natives rank the lowest of any population with respect to the quality of care they receive and the quality of their actual health outcomes. [FN324] Given these disparities, one would hope that the advances in health care that biotechnology makes possible would be utilized for the overall improvement of Native health. In fact, however, the historical context of exploitation and differential rights documented above continues to impact the tribes' ability to receive benefits from contemporary health care innovations, including genomic research and personalized medicine.

2. Native Peoples and Health Care Innovation

Scientists and policymakers often tout the technological advances represented by biotechnology as holding great public benefit, [FN325] and yet they also may represent a distinctive set of harms to indigenous peoples. In fact, the issue of **genetic** research on indigenous peoples raises ethical issues for several different scientific disciplines, including biomedical research, physical anthropology, and bio-archeology. [FN326] This became apparent in 2004, when the Havasupai Tribe, indigenous to

the Grand Canyon in Northern Arizona, filed a lawsuit against Arizona State University for its misuse of blood samples taken from tribal members ***1180** pursuant to a diabetes study. [FN327] While the Havasupai Tribe consented to the diabetes study, it did not consent to the use of the samples for other purposes. [FN328] The Tribe filed this lawsuit after inadvertently learning that the researchers had also used the samples for studies relating to schizophrenia and human origins. [FN329]

Several Havasupai tribal members whose blood had been sampled in the study also filed a claim, alleging lack of informed consent and various tort harms, including emotional distress. [FN330] Although the two cases were later settled out of court, the Havasupai case study raises important issues that continue to be unresolved, including whether a cause of action exists to redress the various cultural harms that tribal members expressed for the misuse of their blood samples, whether the Tribe itself could be the holder of rights to tribal-**genetic** resources, and how informed consent applies to groups as compared to individuals.

Population genomics is vitally important to the future of biomedical research, as demonstrated by current innovations in bioengineering, personalized medicine, and pharmacogenomics. [FN331] Thus, the issue will continue to be important in defining the trajectory of U.S. health policy. However, population genomics also supports theories about human origins that implicate the political status of indigenous peoples as the "first peoples" of specific lands. In that sense, scientific researchers seek to use physical samples from tribal members to prove the "truth" about who the tribe really is and where it originated. [FN332] The use of tribal **genetic** material to prove the "truth" about its cultural identity is another example of how science is used to foster a dominant cultural view--in this case, about human habitation in the Americas. [FN333] For the Havasupai Tribe and other tribes whose physical samples have been used in similar research, the scientific voyage of "discovery" continues unabated, only this time the tour is through the alleged "genome commons" instead of uncharted lands. [FN334] In the process, indigenous understandings about their ***1181** identity continue to be disregarded as "cultural" or "religious" views, [FN335] causing structural forms of epistemic injustice.

In the Havasupai case, for example, scientists claimed that discovering the "truth" of human origins justified the use of indigenous peoples' blood and tissue to prove who they really were and where they really came from. [FN336] This case primarily concerned the legal issue of who can "own" biomedical samples removed from living human beings. [FN337] However, the researchers' argument in favor of using the samples for other purposes also undergirds the effort of many physical anthropologists and bio-archeologists to preserve "culturally unidentifiable" Native American human remains for scientific use, rather than "repatriating" them to contemporary indigenous peoples as "ancestral" human remains. Thus, as the next section of this Article demonstrates, genomic research ties directly into the nineteenth century trope of "discovery" that was used to justify the collection of Native American human remains for scientific study, again, in service of the "greater good" for American society.

C. Repatriation Policy

Unlike the U.S. public land and public health policies, federal repatriation policy is quite specific to Native American people. [FN338] Repatriation is intended to redress the harms of a traumatic past in which Native human bodies and burial sites were desecrated with impunity by citizens and government officials alike in complete disregard of Native ***1182** human rights. [FN339] The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) is significant because Congress actually took responsibility for the historic injustice to Native peoples caused by federal policies. [FN340] The government's nineteenth century policies treated Native Americans as objects of scientific inquiry rather than human beings entitled to bury

their dead with dignity and possess cultural property as a matter of right. [FN341] However, these human rights abuses also extended into American citizens' everyday practices. Before the enactment of NAGPRA, citizens commonly looted Native American burials for the remains and objects, which were sold and transferred as commodities on the antiquities market. [FN342] Although the federal government made sporadic attempts to regulate despoliation of federal lands by imposing criminal sanctions on persons who excavated public land without a permit, it did not attempt to regulate the commercial sale of Native American remains and cultural objects until NAGPRA was enacted in 1990. [FN343]

1. Overview of NAGPRA

NAGPRA protects the rights of Native American people to four categories of cultural items: Native American human remains, funerary objects, objects of cultural patrimony, and sacred objects. [FN344] While "human remains" and "funerary objects" have their standard meanings, what constitutes an "object of cultural patrimony" or a "sacred object" is dependent upon tribal law, which governs the permissible possession, use, or disposition of an object as "individual" or "tribal" property. [FN345] In this sense, the statute can be understood as an effort to deal with epistemic injustice, promoting a tribal definition of protected cultural items instead of insisting upon categories from Anglo-American law, which would be unable to address the Native peoples' social and cultural ***1183** experience.

NAGPRA has three primary goals. First, the statute increases the protections for Native American graves located on federal and tribal lands, providing for Native control over cultural items excavated from such lands after 1990. [FN346] Second, the statute outlaws commercial trafficking in Native American cultural items. [FN347] And finally, the statute requires all federal agencies and federally-funded museums to compile inventories of the Native American human remains and funerary objects in their possession, as well as summaries of all other cultural items. [FN348] These documents are then sent to all federally recognized tribes, which are eligible to make claims for repatriation of any of the covered items that are "culturally affiliated" to the tribe. [FN349]

The statute has worked well for many tribes, enabling them to repatriate culturally affiliated human remains and cultural items. [FN350] However, the Ninth Circuit has narrowed the test of "cultural affiliation" in relation to ancient human remains that cannot be scientifically linked to a contemporary Native American group, for example, through **genetic** testing. [FN351] Federal agencies, such as the Bureau of Land Management, have used this narrow definition to deny Native groups the right to repatriate "culturally unidentifiable" Native American human remains that are in the custody of museums or agencies. [FN352] This category includes many boxes of Indian crania and other body parts that were housed in museum collections without any data to attribute the body parts to a particular individual or tribe. [FN353] It also includes the remains of tribes that were exterminated by military conduct or disease epidemics, [FN354] as well as remains of tribes that the federal government has not recognized under the federal acknowledgment process, even if the identity of the ***1184** remains has a known cultural affiliation to that group. [FN355] And, finally, it includes ancient remains, which are "Native American" but allegedly too old to affiliate to any contemporary federally-recognized tribal government. [FN356]

2. Ancient Human Remains and Contemporary Injustice

Although NAGPRA specifically authorizes many categories of evidence in order to determine cultural affiliation, including the use of oral tradition, the standard for cultural affiliation was conflated with scientific analysis of "**genetic**" identity in the 2004 Ninth Circuit decision in Bonnichsen v. United States. [FN357] That case involved a set of human re-

mains--designated by the Press as "Kennewick Man"--that washed ashore on the Columbia River, which is under the jurisdiction of the Army Corps of Engineers. [FN358] Upon first analysis, the remains seemed notable because they allegedly had a "Caucasian" appearance and yet radiocarbon dating techniques estimated them to be between 8000 and 9000 years old. [FN359] The five tribes that held aboriginal title claims to these lands made a joint claim under NAGPRA for ownership of the remains. [FN360] The tribes alleged that the remains were their common ancestor and asserted that all five tribes shared similar cultural origins and understandings, despite their modern division into five separate governments. [FN361] A group of scientists, including Douglas Owsley at the Smithsonian Museum, filed a challenge to this claim. [FN362] The scientists asserted that NAGPRA should not apply to this case and that instead the court should consider the remains to be "federal property" for purposes of the federal Archaeological Resources Protection Act, which would make the remains available for scientific analysis and research on human origins. [FN363]

***1185** The Ninth Circuit overturned the finding of the Department of Interior that the remains predated European contact and should be considered "Native American," as well as the Secretary's decision to transfer the remains to the Tribal claimants. [FN364] The Tribal claimants had proven that they were the only indigenous peoples documented to have aboriginal title to these lands and had also produced evidence of their cultural affiliation to the remains based on statutorily permitted categories including oral history and traditional knowledge. [FN365] However, the court reasoned that without proof of "**genetic**" similarity between the modern tribes and the set of remains, no "cultural" affiliation could exist to prove common ancestry. [FN366]

Significantly, the court began its opinion by alluding to the set of remains as an important "scientific discovery" in the modern era because the Kennewick Man was an ancient human that predated "recorded history" on these lands. [FN367] As such, this ancient individual belongs to "science," which is the body of knowledge that can tell us the truth as a matter of **genetic** identity about who Kennewick Man really was and cast some light on the contentious issue of the "peopling of the Americas." In that sense, the Bonnichsen case represents an example of epistemic injustice for the five claimant tribes in the Pacific Northwest that is quite similar to that suffered by the Havasupai Tribe. In both cases, the courts are reluctant to see or understand the harms suffered by the tribal claimants, while they are all too ready to generate an understanding of the law that will further scientific discovery. The testimony of the tribal claimants is entirely disregarded as "mythology" and "religious ideology," while the scientific data represented by **genetic** testing is understood to have the capacity to tell us the "truth" about human origins and identity.

Furthermore, the Bonnichsen and Havasupai cases also intersect to some extent with the theme of discovery, as represented by the Lewis and Clark Expedition. Some archaeologists continue to dispute that contemporary Native Americans are the "First Peoples" of the lands now claimed by the United States. [FN368] Today, bio-archaeologists seek to use physical samples to prove the truth of their theories, requiring them to gather DNA samples from the remains and from the current Native ***1186** American people who claim to descend from these ancient individuals. [FN369] This indicates a continuation of the nineteenth century policies that promoted the Lewis and Clark Expedition of "Discovery" and divested Native peoples of much of their land and cultural identity. In both the past and present, the scientific analysis of Native peoples is used to support the goals of the dominant society. The only difference is that the current process of scientific discovery relies on the biological samples of the study population, rather than on the data that Lewis and Clark gathered about the tribes' "moral character" and capacity to be friends or enemies of the United States.

3. The Contemporary Policy Debate over Culturally Unidentifiable Human Remains

The debate over who "owns" ancient human remains continues to affect the policies of the United States Department of Interior (DOI), which oversees the federal statutory process dictating the appropriate treatment and disposition of the vast stores of Native American human remains in the custody of federal agencies and federally-funded museums. [FN370] In 2010, the National Park Service (NPS) within the DOI released a new rule providing for the respectful disposition of "culturally unidentifiable" Native American human remains to indigenous communities based on geographical and other non-**genetic** markers of "cultural" affiliation. [FN371] The DOI issued the final rule after many failed prior attempts, and nearly twenty years after NAGPRA's passage. Although the vast majority of Native American human remains (over 118,000) are labeled "culturally unidentifiable," some researchers have vehemently opposed the 2010 Rule, arguing that repatriation of these remains would foreclose human origins research that serves a broader public benefit. [FN372]

Recently, a group of archaeologists filed a claim in a California state superior court seeking to enjoin the University of California from transferring sets of human remains estimated to be nearly 10,000 years old to the La Posta Band of Mission Indians, which has claimed cultural affiliation to the remains. [FN373] The remains, designated as the "La Jolla ***1187** Skeletons," were excavated on University property near San Diego and housed at the San Diego Archaeological Center on the University's behalf. [FN374] The La Posta Band of Mission Indians is a federally-recognized tribe and one of the twelve associated bands of Kumeyaay Indians who are indigenous to the area and claim these remains as their common ancestors. [FN375] However, all twelve bands agree that La Posta is the appropriate tribal claimant. [FN376]

The University of California transferred the case to federal district court because the complaint directly implicated the Native American Graves Protection and Repatriation Act, and specifically challenged the federal regulation on culturally unidentifiable Native American remains now codified at 43 C.F.R. pt. 10.11. [FN377] Specifically, the claimant scientists alleged that the University has a duty "to determine whether or not NAGPRA and its accompanying regulations actually apply to the La Jolla Skeletons before Respondents dispose of them to the Kumeyaay." [FN378] They further argued that a "disposition without such a formal determination would arbitrarily and illegally destroy the La Jolla Skeletons' incalculable scientific value to Petitioners, and to the public at large, and would violate NAGPRA." [FN379]

The California lawsuit reflects a growing sentiment among scientists that the federal regulations on culturally unidentifiable Native American human remains "allow tribes to claim even those remains whose affiliation cannot be established scientifically, as long as they were found on or near the tribes' aboriginal lands," thus privileging the cultural interests of tribes at the expense of scientific knowledge. [FN380]

This position is reflected in a recent editorial in Scientific American, which argues that the 2010 regulation privileges "faith over fact" and urges the federal government to repeal or revise the regulation. [FN381] In the opinion of Scientific American's Board of Editors, the La Jolla remains are unique because of their age and "[t]he excellent preservation of the ***1188** specimens," and they "might contain DNA suitable for analysis" using new techniques that could "yield crucial insights into where early Americans came from." [FN382] In a statement that evokes the same nineteenth century trope of "discovery" that justified European colonization of "the New World," the editors conclude that:

> The colonization of the New World was a watershed in the odyssey that carried Homo sapiens from its African birthplace to the entire globe. The stories of the trailblazers who accomplished that feat deserve to be told. Their remains are the shared patrimony of all Americans and, indeed, all peoples everywhere. [FN383]

Dr. Duane Champagne, a leading sociologist at the University of California and member of the Turtle Mountain Chippewa

Tribe, criticized the Scientific American editorial, claiming that it:

> [S]hows little understanding of the forms and strength of indigenous relations to ancestors and to the requirements of maintaining the spiritual stewardship of the land. From all appearances, Scientific American isn't making much effort to understand indigenous cultures' interpretations of reality, meaning, and life. Instead the publication gives credence to scientific, professional, and nonspiritual understandings of the value and meaning of human ancestors and sacred funerary objects. As far as the editors are concerned, American Indian perspectives are irrelevant. They're even irresponsible because they don't protect human history and knowledge. [FN384]

Dr. Champagne further notes that at the heart of the dispute is the Kumeyaay Tribes' claim that they have lived in this area for over 12,000 years according to their own stories and understandings. [FN385] The scientists claim that this is pure "folklore" and that no physical evidence exists that the modern Kumeyaay Tribe is culturally affiliated to these ancient remains or that they have been in the area more than "a few thousand years." [FN386]

Champagne argues for a "more multicultural, government-to-government" approach to repatriation that incorporates "both scientific ***1189** and indigenous values." [FN387] He also argues that collaboration between scientists and Indigenous peoples would result in much greater benefit than the current approach, which balances the "interests" of science against those of Native peoples. [FN388] Under this balancing approach, the "public interest" in obtaining the maximum amount of knowledge will nearly always outweigh the cultural interests of a small group of Native Americans.

The California case, like the Bonnichsen and Havasupai cases, exemplifies the continuing occurrence of epistemic injustice for Native peoples. In all three cases, the scientists argue that the larger social interest in human origins research ought to outweigh any asserted "cultural" harm expressed by indigenous groups. This argument effectively reduces the indigenous peoples to the status of religious zealots, who are free to "believe" anything that they desire pursuant to the First Amendment of the U.S. Constitution, so long as they do not make demands that would contravene an important public interest.

Building on Dr. Champagne's call for a new approach that better respects the unique interests and rights of Native peoples, the final section of this Article argues that contemporary human rights constructs can offer a more principled basis for adjudicating the disputes that continue to evoke "epistemic injustice" for indigenous peoples.

IV. SCIENCE, ETHICS, AND HUMAN RIGHTS

As demonstrated above, American science has had a profound impact on the legal and political rights of indigenous peoples on this continent, and it continues to have this effect. Presumably, however, most scientists would agree that the ideal future is one that respects the basic human rights of all peoples, including indigenous peoples. Science is a valuable tool in crafting social policy, and it can be used to further Native self-determination or, alternately, to reinforce the unjust structures that have operated to suppress indigenous self-determination. This section of the Article will discuss U.S. policy in light of international human rights norms in order to demonstrate those two different uses and encourage more conscious choices in the future.

The Article first discusses the basic argument for applying international human rights norms to the domestic legislative, administrative, and judicial structures that determine Native rights. The Article then indicates how application of human rights norms could alter ***1190** public policy in the areas of environmental, health, and repatriation policy, and could potentially

promote a new model for science policy that is more inclusive of indigenous peoples' distinctive interests and rights.

A. The Argument for Integrating International Human Rights Norms into Domestic Law

Under principles of U.S. federal Indian law, Native peoples are recognized as separate sovereign governments, and they have the same capacity and need as other governments to build their economic base, protect the health of tribal members, and regulate their lands and resources for the benefit of future generations. [FN389] As separate governments, federally-recognized tribes in the United States have certain legal and political rights that are unique and vital to their ability to govern their lands and members. For example, tribal governments have the right to lease their lands for mineral exploitation or other energy development, [FN390] to regulate air and water quality, [FN391] and to participate in regional adaptation plans designed to manage land and water resources that transcend the jurisdictional boundaries of local or state governments. [FN392] They may also regulate the conduct of non-Indians who enter their lands to engage in activities, including research, that have the potential to impact the tribe or its members. [FN393]

In their capacity as sovereigns, tribal governments have the capacity to enter partnerships with scientists for mutual benefit. [FN394] Furthermore, these agreements can, for the most part, be regulated by principles of contract, tort, and property law, subject to the jurisdictional rules of federal Indian law. [FN395] However, as the Havasupai case demonstrates, the ***1191** capacity of tribal governments to enter consensual agreements with researchers cannot solve the structural forms of epistemic injustice that exist within our national policies. In this area, indigenous peoples' human rights under international law become quite important. In addition, human rights principles are vital to understanding indigenous rights in cases where tribal governments no longer possess jurisdiction over lands or other resources based on prevailing notions of property law.

The domestic framework of federal Indian law actually supports incorporation of human rights norms. The status of Native Nations as separate peoples predates the political existence of the United States, and a host of Supreme Court cases from the nineteenth century until the present day have recognized this. [FN396] The status of being a separate people has both a political and a cultural component. The political component is now understood to comprise the jurisdictional authority of tribes as sovereign governments. [FN397] However, Native peoples also continue to exist as distinctive cultural groups within a dominant society committed to "multiculturalism" and pluralism in a secular democracy. As distinctive cultural groups, Native peoples often have divergent interests from the dominant society which may find expression in their need to protect sacred sites on lands no longer within their jurisdiction, speak their languages, preserve their access to traditional food sources and medicines, repatriate sacred objects, and prevent the misappropriation of their ceremonies, songs, and other resources. [FN398] All of these interests are vital to the preservation of Native American cultural integrity and are therefore pivotal to tribal self-determination. [FN399] Consequently, Native American human rights should be factored into U.S. public policy.

Of course, it is possible that the primary obstacle to reforming domestic law to accord with human rights norms is America's collective blindspot when it comes to questions of "injustice." American courts generally fail to see the limitations of domestic law as a form of ***1192** "injustice," claiming instead that the Native claimants in Bonnichsen failed to "meet their burden of proof" to show cultural affiliation, or claiming that American property law simply cannot encompass a notion of "group" ownership of tribal **genetic** material. [FN400] Similarly, the courts find that American tort law simply cannot extend to cover the cultural harm that inappropriate use of a blood or tissue samples causes, or that privacy law cannot extend to the public disclosure of photos of ancestral remains. [FN401] How do we navigate these controversies? More specifically, how do we even approach the resolution of these debates, as a matter of law or of ethics? International human rights law provides some

insights into these difficult questions.

B. International Human Rights Law as a Tool of Public Policy

International human rights law provides a relevant set of norms to address shortcomings in domestic legal frameworks. Of course, this can only occur if our domestic courts and legislatures are willing to apply those norms. Some state legislatures have attempted to ban the use of international doctrines by their judicial systems. [FN402] Even without such drastic action, however, domestic courts have generally declined to apply human rights norms, instead holding to the view that rights, if any, must be embedded in domestic constitutional law, common law, or statutory law. [FN403] This is not true in many other countries, such as Canada and Australia, where the domestic courts have readily applied human rights norms to extend or recognize specific rights. [FN404]

While American courts tend to assume that the dominant society's appraisal of legal rights is the only relevant social experience, international human rights law is in the process of documenting another category of social experience: that of indigenous peoples throughout the ***1193** world. This work, which has been ongoing for several decades, validates the fact that indigenous peoples throughout the world share a common set of cultural and political attributes in relation to the dominant societies that now encompass them.

Ideally, nation-states will consult this record of human rights law as they work to retool their domestic legal systems to minimize structural injustice. That is the message of James Anaya, the U.N. Special Rapporteur on the Rights of Indigenous Peoples, who recently held a series of consultations with tribal leaders and advocates in the United States to document instances of injustice and prepare a "country report" for the United States indicating whether the country is in compliance with human rights norms and where the country should focus its efforts to remediate existing injustice. [FN405] This consultation follows from the historic consensus of global nation-states that emerged in the context of developing the U.N. Declaration on the Rights of Indigenous Peoples. [FN406]

In 2007, the U.N. General Assembly adopted the Declaration on the Rights of Indigenous Peoples, which recognizes that indigenous peoples possess the right to self-determination as a matter of international policy. [FN407] The right to self-determination secures the basic right of indigenous peoples to autonomous self-governance within the nation-states that now encompass them. [FN408] The Declaration envisions that the indigenous peoples' right to self-determination will be exercised within the nation-state's basic structure, and the document advocates consultation between indigenous peoples and the nation-states on policies that will impact them. [FN409] Specifically, the Declaration requires states to "consult and cooperate in good faith with the Indigenous peoples concerned" and "to obtain their free, prior and informed consent" before undertaking administrative or legislative actions that will affect them. [FN410]

The Declaration's many provisions attest to the unique interests of indigenous peoples, which are often cultural, spiritual, and religious in ***1194** nature. [FN411] It is precisely because of these unique interests that indigenous peoples merit special consideration within domestic policymaking. As demonstrated above, domestic policymaking is dependent upon a model of secular pluralism. Secular pluralism privileges science, economics, and technology as appropriate constructs for domestic public policy, whereas "cultural" concerns are generally conflated with "religion" and marginalized as matters of private conscience rather than public policy. Human rights norms offer a more inclusive account of the multiple and diverse interests that ought to be considered by policymakers in the furtherance of indigenous self-determination.

It is significant that the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples after over twenty-five years of negotiations, hearings, and intensive dialogues between representatives of the nation-states and indigenous peoples. [FN412] The consultative process that led to the adoption of the U.N. Declaration represented an effort to include indigenous peoples in the formation of the norms that will govern them. Although the Declaration is purely prescriptive at this point, it may eventually result in the adoption of an international convention. [FN413] Even without this action, however, the Declaration has served a useful purpose, promoting a dialogue about indigenous rights within the United States and many other global nations. [FN414]

The United States, New Zealand, Australia, and Canada originally dissented from adopting the Declaration because the document recognized indigenous peoples as "peoples" with the same right to self-determination as other peoples. [FN415] The United States and other countries feared that this would foster claims by indigenous peoples to secede from the nation-states. [FN416] Importantly, however, the Declaration expressly provides that nothing in its text justifies the impairment of national boundaries, [FN417] thereby indicating that the remedy of secession is not available under international law for indigenous peoples, although it ***1195** might be available for other peoples when the right to self-determination is suppressed under conditions of extreme injustice. President Barack Obama formally announced his support for the Declaration in 2010, and the U.S. State Department subsequently issued a position paper alleging that the rights of federally-recognized tribes under federal Indian law reflect the premise of the Declaration by favoring a policy of self-determination. [FN418]

It is clear that indigenous self-determination is the key norm to be effectuated within U.S. policy. The norm of indigenous self-determination, in turn, prescribes recognition of indigenous rights of autonomy, cultural integrity, and protection of lands and resources. The Declaration envisions a relationship between indigenous peoples and nation-states that operates as a consensual partnership. Thus, indigenous peoples must agree to the terms of their relationship with the nation-states. [FN419] Their right to autonomy may be secured through a self-governance model, such as that which applies to federally-recognized tribal governments in the U.S. With respect to shared resources, Native autonomy may also express through models of shared governance, such as self-administration of federal programs and co-management of shared resources. Finally, Native autonomy is served by a model of participatory governance, which supports the efforts of tribal governments to ensure that their members enjoy equal access to important civil liberties, such as voting rights. [FN420]

The Declaration calls for a standard of "free, prior and informed consent" before national governments take actions that would impair Native rights. [FN421] This standard is intended to ensure that the negotiations between indigenous peoples and national governments are premised on a foundation of respect, rather than coercion. [FN422] In addition, the Declaration alludes to important concepts, such as spiritual rights, that are unique to indigenous peoples and should inform the policy dialogue ***1196** about their rights to land, natural resources, and cultural resources. [FN423] Finally, the document maintains a commitment to reparative justice, directing national governments to acknowledge the historical wrongs that continue to disadvantage indigenous peoples from the enjoyment of their human and civil rights, and requiring the governments to remediate those inequities. [FN424] In all of these respects, international human rights law offers an alternative set of norms that can address the epistemic forms of injustice that indigenous peoples continue to suffer in this country.

C. Human Rights Law and the Public Policy Arena: Envisioning a Different Future

The discussion of injustice and human rights can seem theoretical and abstract, so it is useful to examine specific human

rights norms that might inform U.S. public policy in the areas of the U.S. national environmental, health, and repatriation policies.

1. National Environmental Policy and Indigenous Rights

The Declaration offers a great deal of guidance for domestic policymakers with respect to environmental and land management issues. Most importantly, the Declaration specifically recognizes that the essence of indigenous identity is represented in the group's longstanding connection to a particular land base and territory. [FN425] Thus, harms to the land can also constitute harms to indigenous identity. In addition, the document recognizes that the relationship of the indigenous people to their traditional lands is often a core feature of their cultural survival and that the land may be fundamentally important to the continuance of specific cultural and religious practices. [FN426] Consequently, under the declaration, the U.S. government would not only have to ensure the ***1197** tribal government's ability to regulate its reservation land base to promote the health and cultural needs of its members, but it would also have to ensure that its decisionmaking on public lands does not jeopardize Native American cultural practices, for example, those associated with sacred sites, such as the San Francisco Peaks.

The Declaration contains many provisions relevant to indigenous land rights, but four seem particularly relevant to the discussion above. First, the Declaration provides that "indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship" with their traditionally owned lands and waters and to "uphold their responsibilities to future generations in this regard." [FN427] The document's recognition of "spiritual rights" specifically incorporates indigenous understandings of the universe and the metaphysics that governs human interactions with the natural world. [FN428] Second, the Declaration emphasizes that indigenous peoples' rights to their lands and territories merit legal protection by the domestic government. [FN429] This suggests that the pervasive tendency of the United States to generate prescriptive statements of law that are non-enforceable, such as the American Indian Religious Freedom Act, would not constitute effective legal protection of indigenous rights under the Declaration. Third, Article 27 of the Declaration requires states to establish and implement fair and transparent processes to adjudicate indigenous land rights. [FN430] Finally, Article 28 provides that indigenous peoples should have the right to "redress" for takings of their lands and resources that take place without their "free, prior and informed consent." [FN431]

Land use management is intimately tied to environmental and energy policy, so the rights described above form the basis for many other specific rights recognized by the Declaration. For example, Article 29 specifies that "[i] ndigenous peoples have the right to the conservation and protection of the environment," as well as the right to enjoy the "productive capacity of their lands or territories and resources." [FN432] States are counseled to take appropriate measures to guard against environmental degradation that might be caused, for example, by storing or disposing of hazardous materials on indigenous lands "without their ***1198** free, prior and informed consent." [FN433] In the U.S. this provision would apply to any national policies that promoted forms of economic development that are hazardous to the environment and to human health, such as uranium mining on the reservation or storage of nuclear waste or hazardous waste on tribal lands.

Article 20 of the Declaration provides that "[i]ndigenous peoples have the right to maintain and develop their political, economic and social systems or institutions," and that they should be "secure in the enjoyment" of their own traditional economies. [FN434] This provision specifically recognizes that indigenous peoples are likely to have land-based subsistence economies that are vulnerable to destruction by national government policies, such as off-shore oil drilling. Article 20 specifically provides that "[i]ndigenous peoples deprived of their means of subsistence and development are entitled to just and fair

redress." [FN435] In the years ahead, this provision is likely to receive significant attention, given the politics of energy development. Off-shore oil drilling is often understood as a means to ensure American energy "independence." The costs of this development, of course, are localized on indigenous communities that practice subsistence ways of life.

2. National Health Policy and Indigenous Rights

With respect to health policy, the Declaration provides at a general level that "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals" of all human rights guaranteed under international law. [FN436] Thus, to the extent that there is a recognized human right to health, indigenous peoples are entitled to enjoy that right, in common with all other citizens. They also have the right to be free from discrimination in the exercise of that right. [FN437] Article 24 specifically provides that "Indigenous peoples have the right to their traditional medicines and to maintain their health practices," as well as "the right to ***1199** access, without any discrimination, all social and health services." [FN438] In addition, "[i]ndigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health," and states are required to take the steps necessary to ensure "full realization of this right." [FN439] This provision would counsel the United States to engage in a consultative process with tribal communities about how to address health disparities and reconfigure existing programs more fairly. This would also enable Native peoples within the Indian Health Care Service system to take advantage of the advances in health care technology that are available to more affluent American citizens. Currently, federal funding constraints applicable to the Indian Health Service tend to limit the availability of costly forms of diagnosis and treatment for many serious diseases, such as cancer. Moreover, individuals who become sick during the latter part of the fiscal year may be denied services altogether because the available funds have already been exhausted.

The Declaration discusses **genetic** resources as a category of cultural heritage, providing that "[i]ndigenous peoples have the right to maintain, control, protect and develop their cultural heritage," and the "manifestations of their sciences, technologies and cultures, including human and **genetic** resources." [FN440] States "shall take effective measures to recognize and protect the exercise of these rights." [FN441] These provisions would counsel the United States to adopt effective protections to ensure that tribal **genetic** resources are not lumped into the "genome commons" that will provide the raw material for future scientific innovations in health care, such as personalized medicine. Existing research standards, for example, those applicable to Genome Wide Association Studies, draw on multiple sources and permit inclusion of all samples that are "deidentified" from the actual donor in order to meet privacy concerns. [FN442] This restriction is not sufficient to address the tribal interests identified in the Havasupai litigation and analogous international cases. [FN443]

***1200** 3. Indigenous Peoples and U.S. Repatriation Policy

The Declaration discusses the right of indigenous peoples to repatriate their ancestral human remains in Articles 11 and 12. Article 11 recognizes that indigenous peoples have a "right to maintain, protect and develop the past, present and future manifestations of their cultures," including "archaeological and historical sites." [FN444] States must provide effective redress, including restitution, for any "cultural, intellectual, religious and spiritual property" taken from indigenous peoples "without their free, prior and informed consent or in violation of their laws, traditions and customs." [FN445] This provision would suggest that the effort of archaeologists to claim ownership of Native American burials, including ancestral remains and funerary objects, is completely antithetical to indigenous peoples' human rights. In fact, the 2010 regulation on disposition of culturally unidentifiable human remains that scientists attack as "too favorable" to Native cultural interests, does not provide for the mandatory return of funerary objects associated with the human remains. [FN446] Whether or not this omission violates

NAGPRA, it clearly constitutes a violation of international human rights law.

Article 12 specifically provides that indigenous peoples have "the right to the repatriation of their human remains" and requires States to enable access to and repatriation of any ancestral human remains and ceremonial objects within their possession "through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned." [FN447] The upshot of these provisions is to place the ownership and control of indigenous human remains, funerary objects, and ceremonial objects with Indigenous peoples. There is nothing within international human rights law that supports the notion currently alleged by many scientists that indigenous human remains are the "shared patrimony of all Americans" or of "all peoples elsewhere." [FN448] The United States has an obligation to ensure that indigenous peoples' human rights are realized within its domestic legal system, and the Declaration provides an appropriate normative basis to achieve its vision of a consultative process of policymaking.

Human rights standards and principles can serve an important function in reformulating public policy. To the extent that public policy ***1201** incorporates science policy, human rights standards can contribute to developing an equitable legal framework that can represent the experience of indigenous peoples in defining the benefits and harms of our public policies.

CONCLUSION

This Article has explored how science policy impacts indigenous peoples, and it has advocated a shift from treating indigenous peoples as objects of "scientific discovery" to working respectfully with indigenous governments as equal participants in the creation of public policy. While many people acknowledge the overt racism and cultural superiority of nineteenth century science policy, few understand that those nineteenth century themes continue to impact indigenous rights within the United States in areas such as environmental policy, health policy, and repatriation policy. These areas of public policy have had tremendous impact on Native peoples in the United States, demonstrating the pervasive "epistemic injustice" caused by the uncritical application of Western values, categories, and standards to the very different social experience of Native peoples.

American society has harmed indigenous peoples within domestic social, political, and legal structures both in their capacity as "givers of knowledge" and in their capacity as "subjects of social understanding." By incorporating human rights standards and honoring indigenous self-determination as both a legal right and a moral consideration, domestic public policy can more equitably respond to indigenous peoples' distinctive experience. Similarly, scientists and scientific organizations can incorporate human rights standards into their disciplinary methods and professional codes of ethics in order to explore the ethical and legal implications of their work on indigenous peoples.

The United Nations Declaration on the Rights of Indigenous Peoples calls for nation-states to engage indigenous peoples in a set of processes designed to effectuate a more just framework for the realization of basic rights and fundamental freedoms. This international human rights framework supports the ability of indigenous peoples to claim their sovereign right to live according to their own norms and values within the nation-states that now encompass them, and to fully participate within the domestic structures that determine whether "justice" will truly be for all.

[FNa1]. Willard H. Pedrick Distinguished Research Scholar and Professor of Law, Arizona State University. This article is based on a keynote lecture given by Professor Tsosie at the 2012 AAAS Science and Human Rights Coalition meeting held in Washington, D.C. Professor Tsosie benefitted from the lively discussion that emerged at that meeting among conference par-

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[FN1]. See Rebecca Tsosie, Cultural Challenges to Biotechnology: Native American **Genetic** Resources and the Concept of Cultural Harm, 35 J. L. Med. & Ethics 396 (2007) (discussing biomedical research).

[FN2]. See Rebecca Tsosie, Climate Change, Sustainability and Globalization: Charting the Future of Indigenous Environmental Self-Determination, 4 Envtl. & Energy L. & Pol'y J. 188 (2009) (discussing energy development and adaptation planning).

[FN3]. U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, P 3, U.N. Doc. A/RES/61/295 (Oct. 2, 2007) [hereinafter Declaration].

[FN4]. Montana v. United States, 450 U.S. 544, 564 (1981); United States v. Wheeler, 435 U.S. 313, 322-23 (1978).

[FN5]. Id. at 564-66.

[FN6]. See infra Part III.

[FN7]. Miranda Fricker, Epistemic Injustice: Power and the Ethics of Knowing 7 (2007).

[FN8]. See, e.g., Editorial, Who Owns the Past?, Sci. Am., (Mar. 27, 2012), available at http://www.scientificamerican.com/article.cfm?id=who-owns-the-past (arguing that repatriation rules are too favorable to American Indian communities and jeopardize the interests of science).

[FN9]. Professor Daniel Wildcat describes this separation as a "schizophrenic" approach to metaphysics, comparing the holistic frameworks of Native epistemologies. See Vine Deloria, Jr. & Daniel R. Wildcat, Power and Place: Indian Education in America 47-55 (2001).

[FN10]. See generally Thomas A. Mappes & David DeGrazia, Biomedical Ethics 1-2 (6th ed. 2005) (discussing ethics as a philosophical discipline devoted to the study of morality).

[FN11]. See id.

[FN12]. See generally Karl Popper, The Logic of Scientic Discovery (2d ed. 1968) (characterizing effective scientific method as disproving hypotheses through inductive processes: each time a prediction based upon a theory is correct, the theory sur-

vives).

[FN13]. See Frederick Suppe, The Search for Philosophic Understanding of Scientific Theories, in The Structure of Scientific Theories 3-8 (Frederick Suppe ed., 2d ed. 1977).

[FN14]. William Wishart, That Certain and Unchangeable Difference Betwixt Moral Good and Evil: A Sermon Preach'd Before the Societies for the Reformation of Manners, at Salters-Hall; on Monday the 3d of July, 1732, 33-34 (1732).

[FN15]. See Letter from Thomas Jefferson to Nehemia Dodge, Ephraim Robbins & Stephen S. Nelson, Comm. Members, Danbury Baptist Ass'n (Jan. 1, 1802), in Jefferson: Writings 510 (Merril D. Peterson ed., (1984)) ("[T]he whole American people [have] declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State.").

[FN16]. Of course, religion continues to have a significant "informal" impact on public policy, as the recent controversy over women's reproductive rights demonstrates. See Rachael N. Pine & Silvia A. Law, Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real, 27 Harv. C.R.-C.L. L. Rev. 407, 432 (1992).

[FN17]. See generally Donald L. Fixico, The American Indian Mind in a Linear World (2003).

[FN18]. See Sarah B. Gordon, Note, Indian Religious Freedom and Governmental Development of Public Lands, 94 Yale L.J. 1447, 1449 (1985).

[FN19]. See generally Duane Champagne, American Indian Societies: Strategies and Conditions of Political and Cultural Survival (1985).

[FN20]. See Carole E. Goldberg et al., American Indian Law: Native Nations and the Federal System 383 (6th ed. 2010).

[FN21]. See Champagne, supra note 19, at 51

[FN22]. Rebecca Tsosie, Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge, 21 Vt. L. Rev. 225, 282-85 (1996).

[FN23]. See generally Gregory Cajete, Native Science: Natural Laws of Interdependence (1999).

[FN24]. See Tsosie, supra note 22.

[FN25]. James A. Lichatowich, Salmon Without Rivers: A History of the Pacific Salmon Crisis 37 (2001).

[FN26]. Vine Deloria, Jr., God is Red: A Native View of Religion 90 (2d ed. 1994).

[FN27]. See Tsosie, supra note 22, at 286-87.

[FN28]. See id.

[FN29]. See id.

[FN30]. See id.

[FN31]. See id.

[FN32]. See generally Deloria & Wildcat, supra note 9 (discussing the differences between Western and indigenous metaphysics).

[FN33]. Id. at 1-6.

[FN34]. Id.

[FN35]. Leroy Little Bear, Foreword to Gregory Cajete, Native Science: Natural Laws of Interdependence, at ix (1999).

[FN36]. Id.

[FN37]. Id. at ix.

[FN38]. Id. at ix-x.

[FN39]. Id. at xi.

[FN40]. Id.

[FN41]. For example, there is an active international effort underway to gather indigenous environmental knowledge for use in adaptation planning. The thought is that traditional knowledge can be "tested" under Western scientific standards to determine whether it is "accurate," and if it is, it can be incorporated into adaptation plans to deal with the problem of climate change. Panels on Indigenous and Local Knowledge for Adaption, at the Climate Adaptation Futures: Second International Climate Change Adaptation Conference (May 29, 2012). See also Intergovernmental Panel on Climate Change Report (forthcoming 2013) (this report will contain a chapter on this subject).

[FN42]. I will intentionally differentiate "information" from "knowledge." There are many ways to access information. However, systems of knowledge are necessary to assemble and categorize that information in ways that are useful to human societies.

[FN43]. See infra Part III.

[FN44]. See infra Part III.

[FN45]. James V. Fenelon & Mary Louise Defender-Wilson, Voyage of Domination, "Purchase" as Conquest, Sakakawea for Savagery: Distorted Icons from Misrepresentations of the Lewis and Clark Expedition, 19 Wicazo Sa Rev. 85, 87 (2004).

[FN46]. See Rebecca Tsosie, Who Controls Native Cultural Heritage? Art, Artifacts, and the Right to Cultural Survival, in Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce 3, 11 (James A.R. Nafziger & Ann M. Nicgorski eds., 2009).

[FN47]. U.S. Const. art I, § 8, cl. 8.

[FN48]. Tsosie, supra note 46, at 11.

[FN49]. Confidential Message from Thomas Jefferson to Congress Recommending a Western Exploring Expedition (Jan. 18, 1803), in Race and Races: Cases and Resources for a Multiracial America 184, 184 (Juan F. Perea et al. eds., 2000); see also Rebecca Tsosie, How the Land was Taken: The Legacy of the Lewis and Clark Expedition for Native Nations, in American Indian Nations: Yesterday, Today, and Tomorrow 247 (George Horse Capture et al. eds., 2007).

[FN50]. Id.

[FN51]. Tsosie, supra note 49, at 247.

[FN52]. See Hope M. Babcock, A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-Envisioned, Reinvigorated, and Re-Empowered, 2005 Utah L. Rev. 443, 536-38 (2005); Robert J. Miller, The Doctrine of Discovery in American Indian Law, 42 Idaho L. Rev. 1, 79 (2005) (noting Jefferson granted 3000 land patents in his two years as governor).

[FN53]. Jefferson, supra note 49, at 190.

[FN54]. Id.

[FN55]. Tsosie, supra note 49, at 247.

[FN56]. Id.

[FN57]. David P. Currie, The Constitution in Congress: Jefferson and the West, 1801-1809, 39 Wm. & Mary L. Rev. 1441, 1462 (1998). See Act of Feb. 28, 1803, ch. 11, §3, 2 Stat. 206.

[FN58]. Colin Elman, Extending Offensive Realism: The Louisiana Purchase and America's Rise to Regional Hegemony, 98 Am. Pol. Sci. Rev. 563, 568 (2004).

[FN59]. Lewis and Clark, Inside the Corps, Circa 1803, PBS, http:// www.pbs.org/lewisandclark/inside/idx_cir.html (last visited July 12, 2012) [[hereinafter Lewis and Clark, Inside the Corps].

[FN60]. Michael Mooney, Foreword to Stephen Dow Beckham, The Literature of the Lewis and Clark Expedition: A Bibliography and Essays 7 (2003).

[FN61]. Lewis and Clark, Inside the Corps, supra note 59.

[FN62]. President Thomas Jefferson's Instructions to Captain Meriwether Lewis (June 20, 1803), available at http:// www.library.csi.cuny.edu/dept/history/lavender/jefflett.html (last visited Aug. 10, 2012).

[FN63]. Id.

[FN64]. See id.

[FN65]. Robert J. Miller, Native America, Discovered And Conquered: Thomas Jefferson, Lewis & Clark, And Manifest Destiny 71-73 (2006).

[FN66]. Id. at 10.

[FN67]. The Doctrine of Discovery was applied to dispossess Native peoples of their lands in the U.S., Canada, New Zealand, and Australia, albeit with some key distinctions. Aboriginal people in Australia, for example, were not recognized as having any right to occupy their lands until the historic Mabo decision in 1992. Mabo v. Queensland (No. 2) (1992), 175 CLR 1 (Austl.).

[FN68]. See Robert A. Williams, Jr., The American Indian in Western Legal Thought: The Discourses of Conquest (1990).

[FN69]. 21 U.S. (8 Wheat.) 543 (1823).

[FN70]. Id. at 587.

[FN71]. See, e.g., William Nichols, Lewis and Clark Probe the Heart of Darkness, 49 Am. Scholar 94, 94, 96 (1979-1980). Professor Nichols quotes Jefferson's instructions to Lewis and Clark to gather from the Indians:

> the names of the nations & their numbers;
> the extent & limits of their possessions;
> their relations with other tribes or nations;
> their language, traditions, monuments;
> their ordinary occupations in agriculture, fishing, hunting, war, arts & the implements for these;

their food, clothing, & domestic accommodations;
the diseases prevalent among them, & the remedies they use;
moral & physical circumstances which distinguish them from the tribes we know;
peculiarities in their laws, customs & dispositions;
and articles of commerce they may need or furnish & to what extent.

Id at 96. In addition, Jefferson urged Lewis and Clark "to learn what they could of 'the state of morality, religion & information among them' so that those who set out to 'civilize & instruct them' would be able to adapt their methods to the customs of the societies they proposed to change." Id.

[FN72]. See Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924).

[FN73]. See generally Keith H. Basso, Wisdom Sits in Places: Landscape and Language Among the Western Apache (1996); Rodney Frey, Stories That Make the World: Oral Literature of the Indian Peoples of the Inland Northwest (1995).

[FN74]. The theme of "remapping" was the subject of the recent Federal Bar Association's annual Indian law conference. Mapping Indian Law and Policy, Panel at the Federal Bar Association Thirty-Seventh Annual Indian Law Conference (Apr. 19-20, 2012).

[FN75]. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

[FN76]. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation, 30 U.S. (5 Pet.) 1.

[FN77]. Worcester, 31 U.S. at 557.

[FN78]. Id. at 553, 556.

[FN79]. See Eric Kades, The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands, 148 U. Pa. L. Rev. 1065 (2000).

[FN80]. The Native Americans, PBS, http://www.pbs.org/lewisandclark/native (last visited July 12, 2012).

[FN81]. Id.

[FN82]. Id.

[FN83]. See id.

[FN84]. Nichols, supra note 71, at 96.

[FN85]. Tsosie, supra note 46, at 15.

[FN86]. Id.

[FN87]. See Notes of Thomas Jefferson on the State of Virginia, Query XIV (1787), in Race and Races: Cases and Resources for a Multiracial America 100, supra note 49, at 100-02 (excerpting notes written by Jefferson in 1787 offering his perception of the fundamental moral attributes of black slaves and Indians). Jefferson's line of thinking was ultimately incorporated into the Supreme Court's infamous Dred Scott v. Sandford case, 60 U.S. (19 How.) 393 (1856), which found that Native peoples could be "naturalized" to citizenship if they gave up their tribal relations and became civilized, while African-Americans lacked the fundamental capacity to ever become "citizens." Id. at 403-06 (distinguishing Indians as a "free and independent people," despite their "uncivilized" nature, who could be naturalized to U.S. citizenship if Congress took the requisite steps to do so).

[FN88]. See Tsosie, supra note 46, at 16.

[FN89]. Donald Fixico, Federal and State Policies and American Indians, in A Companion to American History 379, 382-83 (Philip J. Deloria & Neal Salisbury eds., 2004).

[FN90]. See generally Debra Harry, Indigenous Peoples and Gene Disputes, 84 Chi.-Kent L. Rev. 147 (2009) (discussing legal battle of the Havasupai Tribe for improper usage of medical data and Oxford University's failure to gain informed consent of the Nuu-cha-nulth Tribe to utilize blood samples for research).

[FN91]. Elazar Barkan, The Retreat of Scientific Racism: Changing Concepts of Race in Britain and the United States Between the World Wars 2-3 (1993).

[FN92]. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967) (holding that state statutes banning miscegenation between the races were unconstitutional, but observing that states justified such statutes on a perceived need to prevent the "corruption" of the white race through interbreeding with "inferior" races).

[FN93]. 163 U.S. 537 (1986) (holding that the Fourteenth Amendment ensures "legal" equality between the races, not social equality, and upholding a Louisiana law that required separate railway carriages for "white and colored races").

[FN94]. See Robert L. Hayman, Jr. & Nancy Levitt, The Constitutional Ghetto, 1993 Wis. L. Rev. 627, 635-66 (1993).

[FN95]. See, e.g., Miller v. Oregon, 208 U.S. 412 (1908) (upholding an Oregon law that imposed a maximum hours limit upon women employees and finding that the physical and emotional differences of men and women, which were medically substantiated, justified the restriction upon women in their individual capacity to contract for employment).

[FN96]. See Rebecca Tsosie, The Challenge of "Differentiated Citizenship": Can State Constitutions Protect Tribal Rights?, 64 Mont. L. Rev. 199 (2003).

[FN97]. Dr. Kristin Shrader-Frechette, Lecture at Arizona State University (Jan. 20, 2012) (citing Sharon Beder, Global Spin: The Corporate Assault on Environmentalism (1998); Kristin Shrader-Frechette, Taking Action, Saving Lives: Our Duties to

Protect Environmental and Public Health (2007)).

[FN98]. Id.

[FN99]. Jessica Wang, American Science in an Age of Anxiety: Scientists, Anticommunism, and the Cold War 125 (1999).

[FN100]. Wittmer v. Peters, 87 F.3d 916, 920 (7th Cir. 1996) ("If academic research is required to validate any departure from strict racial neutrality, social experimentation in the area of race will be impossible despite its urgency.").

[FN101]. Studies of the impact of nuclear power plants are a good case in point.

[FN102]. See Jack F. Trope & Walter R. Echo-Hawk, The Native American Graves Protection and Repatriation Act: Background and Legislative History, 24 Ariz. St. L.J. 35, 40 (1992).

[FN103]. Walter Echo-Hawk, In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided 258 (2010) (documenting the number of culturally unidentifiable human remains in the custody of federal agencies and museums as 118,833 as of 2008).

[FN104]. Id.

[FN105]. Id.

[FN106]. Id.

[FN107]. Id.

[FN108]. See, e.g., Who Owns the Past?, supra note 8 (arguing that culturally unidentifiable human remains are the "shared patrimony of all Americans and, indeed, all peoples everywhere").

[FN109]. Reginald Horsman, Scientific Racism and the American Indian in the Mid-Nineteenth Century, 27 Am. Q. 152, 159 (1975).

[FN110]. See, e.g., Michael J. Sandel, Justice: What's the Right Thing to Do? (2009).

[FN111]. Rebecca Tsosie, Indigenous Peoples and Environmental Justice: The Impact of Climate Change, 78 U. Colo. L. Rev. 1625, 1630 (2007).

[FN112]. History, Navajo Nation, http://www.navajo-nsn.gov/history.htm (last visited July 12, 2012).

[FN113]. See, e.g., Susan E. Dawson, Navajo Uranium Workers and the Effects of Occupational Illnesses: A Case Study, 51

Hum. Org. 389 (1992).

[FN114]. See Tsosie, supra note 2.

[FN115]. Alice Kaswan, Environmental Justice: Bridging The Gap Between Environmental Laws And "Justice," 47 Am. U. L. Rev. 221, 225-27 (1997).

[FN116]. See id. at 223.

[FN117]. See Kathryn Mutz et al., Justice and Natural Resources (2002).

[FN118]. The federal policy uses "environmental justice," and not "environmental racism," indicating that this is the preferred term in policymaking. See Environmental Justice, EPA, http:// www.epa.gov/environmentaljustice (last visited July 12, 2012).

[FN119]. Id.

[FN120]. John Rawls, A Theory of Justice 4 (1971).

[FN121]. Fricker, supra note 7.

[FN122]. I discuss secular pluralism in relation to environmental policy in Tsosie, supra note 22, at 255-68.

[FN123]. Id.

[FN124]. Id.

[FN125]. Id.

[FN126]. I discuss this in relation to public lands management in Rebecca Tsosie, The Conflict Between the Public Trust and the Indian Trust Doctrines: Public Land Policy and Native Nations, 39 Tulsa L. Rev. 271 (2003).

[FN127]. Fricker, supra note 7, at 1.

[FN128]. Id.

[FN129]. Id. at 2.

[FN130]. Id. at 14.

[FN131]. Id.

[FN132]. Id.

[FN133]. Id.

[FN134]. Id. at 4, 7.

[FN135]. Id. at 7.

[FN136]. Id. at 4, 14-16.

[FN137]. Id. at 17.

[FN138]. Id. at 28.

[FN139]. See, e.g., Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

[FN140]. 25 C.F.R. § 83 (2012).

[FN141]. See, e.g., Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995) (describing process for identifying traditional cultural properties under the National Historic Preservation Act).

[FN142]. Id. at 860-61 (describing affidavits of anthropologists who documented the existence of TCPs). Also, the required criteria to be acknowledged as a "federally-recognized Indian tribe" are listed at 25 C.F.R. § 83.7. The National Historic Preservation Act is codified at 16 U.S.C. § 470 (2006) and was amended to include "traditional cultural properties," in addition to the more conventional historic buildings and monuments that were originally associated with that statute. Pub. L. No. 102-575, 106 Stat. 4600 (1992).

[FN143]. See, e.g., Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 277-78 (1955) (dismissing the testimony of a traditional leader about the property claim of the Tee-Hit-Ton Indians).

[FN144]. The Indian Claims Commission Act of 1946 authorized tribes to bring five categories of claims against the United States to redress historic wrongs, including treaty violations and takings of land, so long as they did so within the statutory time period. Tsosie, supra note 49, at 256-58. The claims were first processed by the Indian Claims Commission, and then appeals could be taken to the United States Court of Claims. See id. The statute also authorized tribal claimants for the first time to use the Court of Claims to obtain relief for wrongs that occurred after the effective date of the statute, as did the taking of timber in the Tee-Hit-Ton case. See Goldberg et al., supra note 20, at 1022-24.

[FN145]. Id.

[FN146]. U.S. Const. amend. V.

[FN147]. 348 U.S. 272.

[FN148]. Id. at 314.

[FN149]. See generally Tee-Hit-Ton Indians, 348 U.S. at 316, 320-21 (describing evidence as Russia not "settling" the lands in Alaska, but merely engaging in sporadic trading with the Native peoples).

[FN150]. Id.

[FN151]. Id. at 287.

[FN152]. Id. at 284.

[FN153]. Id. at 289-90.

[FN154]. Id. at 284.

[FN155]. Fricker, supra note 7, at 7, 153-54.

[FN156]. See id. at 7.

[FN157]. Id. at 148-52.

[FN158]. Id.

[FN159]. Id.

[FN160]. Id.

[FN161]. I have written in more detail about cultural harm in other work. See generally Tsosie, supra note 1.

[FN162]. In re Exxon Valdez, 104 F.3d 1196 (9th Cir. 1997).

[FN163]. Id. at 1197-98.

[FN164]. In re Exxon Valdez, No. A89-0095-CV (HRH), 1994 WL 182856, at *4 (D. Alaska Mar. 23, 1994), aff'd, 104 F.3d 1196 (9th Cir. 1997).

[FN165]. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008) (en banc). The plaintiffs in this case consisted of several Indian tribes throughout the Southwest as well as individual Indian practitioners and activist organizations. Id. at 1063.

[FN166]. Id. at 1066.

[FN167]. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§2000bb-2000bb-4 (2006); see also City of Boerne v. Flores, 521 U.S. 507 (1997) (finding that RFRA is unconstitutional as applied to the actions of state governments).

[FN168]. Navajo Nation, 535 F.3d at 1074.

[FN169]. 485 U.S. 439 (1988).

[FN170]. Id. at 447-51.

[FN171]. Id.

[FN172]. Navajo Nation, 535 F.3d at 1072.

[FN173]. Id. at 1073.

[FN174]. Na Iwi O Na Kupuna O Mokapu v. Dalton, 894 F. Supp. 1397 (D. Haw. 1995).

[FN175]. Id. at 1402-04.

[FN176]. Id. at 1409.

[FN177]. Id. at 1413.

[FN178]. Native Vill. of Kivilina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), aff'd, 696 F.3d 849 (9th Cir. 2012).

[FN179]. Kivilina, 696 F.3d at 853.

[FN180]. Id. at 854-58.

[FN181]. See Tsosie, supra note 111 (discussing potential human rights claims that might be developed by Island nations in the South Pacific and by indigenous nations in the Arctic who are in jeopardy of losing their land base and their subsistence ways of life).

[FN182]. See Kivilina, 663 F. Supp. 2d at 880-82 (discussing the difficulty of establishing causation for the purpose of Article III standing when global warming is attributed to numerous entities over centuries).

[FN183]. Fricker, supra note 7, at 44.

[FN184]. Id. at 44-45.

[FN185]. Id. at 44.

[FN186]. See supra notes 46-91 and accompanying text.

[FN187]. Fricker, supra note 7, at 120-21.

[FN188]. See generally John Reid, Comment, Biopiracy: The Struggle for Traditional Knowledge Rights, 34 Am. Indian L. Rev. 77 (2010).

[FN189]. Several policymakes explicitly made this point at a recent international conference on climate adaptation attended by this author. See, e.g., Panels at Climate Adaptation Futures: Second International Climate Change Adaptation Conference (May 29-31, 2012).

[FN190]. Reid, supra note 188, at 90.

[FN191]. Tsosie, supra note 1, at 398-99.

[FN192]. Id. at 399.

[FN193]. See Fricker, supra note 7, at 126 (distinguishing intellectual virtues from ethical virtues and observing that the latter set of virtues are oriented toward the well-being of others).

[FN194]. Human rights law, after all, is premised upon a Kantian notion of equal respect for persons. See generally Jeremy Waldron, How Law Protects Dignity (N.Y. Univ. Sch. of Law, Pub. Law & Theory Research Paper Series, Working Paper No. 11-83, 2011), available at http:// papers.ssrn.com/sol3/papers.cfm?abstract_id=1973341. To the extent that public policies overtly disadvantage minority groups and cause suffering, human rights law counsels nation-states to act affirmatively to remedy this discrimination.

[FN195]. I use the terms “disadvantage” and “powerless” in their political sense. Although there is a popular belief that Native peoples now enjoy economic power, the benefits of Indian gaming are concentrated on relatively few tribes, and the structural inequities that I am discussing in this article are pervasive and cannot be remedied by wealth transfers.

[FN196]. See Tsosie, supra note 96, at 201.

[FN197]. See Indian Citizenship Act of 1924, 8 U.S.C. § 1401(b) (2006) (granting citizenship to all Indians born in the United States).

[FN198]. See Tsosie, supra note 96, at 202.

[FN199]. U.S. Const. amend. V, XIV, § 1.

[FN200]. United States v. Navajo Nation, 537 U.S. 488, 506 (2003); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

[FN201]. See United States v. Dion, 476 U.S. 734, 738 (1986) ("As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them....").

[FN202]. See generally Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); see also United States v. Mitchell, 463 U.S. 206, 224 (1983).

[FN203]. See, e.g., Robert A. Williams, Jr., Columbus's Legacy: The Rehnquist Court's Perpetuation of European Cultural Racism Against American Indian Tribes, 39 Fed. B. News & J. 358, 363-65 (1992) (arguing that even the modern application of U.S. law to Indian tribes is influenced by the law's racist roots); 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, 222 (1986) (arguing from a historical perspective that the Euro-centric legal system subjugates American Indian culture and traditions).

[FN204]. See Tsosie, supra note 22, at 262-64 (discussing utilitarian framework that has governed resources development in U.S.).

[FN205]. See George Cameron Coggins et al., Federal Public Land and Resources Law 44 (3d ed. 1993).

[FN206]. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

[FN207]. Goldberg et al., supra note 20, at 25 (discussing The Appropriations Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (1871) (codified at 25 U.S.C. § 81 (2006)), which provided that Indian nations would no longer be treated as independent nations through treaties).

[FN208]. Id.

[FN209]. 187 U.S. 553 (1903).

[FN210]. Id. at 568.

[FN211]. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980).

[FN212]. Id.

[FN213]. Id. at 416.

[FN214]. Id. at 408.

[FN215]. Id. at 422.

[FN216]. The Removal Act of 1830 generally authorized the removal of Indian tribes from their lands. Because these removals were anticipated to be "consensual," they were effectuated through treaties with the specific tribes slated for removal and then codified in statutes that implemented the treaties. See, e.g., Act of May 28, 1830, ch. 148, 4 Stat. 411 (1830); Treaty with the Cherokee, U.S.-Cherokee, Dec. 29, 1835, 7 Stat. 478.

[FN217]. Dawes General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-333 (2000)) (repealed 2000).

[FN218]. Id.

[FN219]. Id.

[FN220]. Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66 (1903).

[FN221]. Tribal landholdings dropped from 138 million acres in 1887 to 24 million acres in 1934 when the Indian Reorganization Act formally ended the federal allotment policy. Goldberg et al., supra note 20, at 30.

[FN222]. Dawes General Allotment Act ch. 119, 24 Stat. 388.

[FN223]. Alyce Adams, The Road Not Taken: How Tribes Choose Between Tribal and Indian Health Service Management of Health Care Resources, 24 Am. Indian Culture & Res. J. 21, 22 (2000).

[FN224]. See, e.g., Rules for Courts of Indian Offenses (1892), reprinted in Robert T. Anderson et al., American Indian Law: Cases and Commentary 103, 103-05 (2d ed. 2010); see also Goldberg et al., supra note 20, at 579.

[FN225]. Anderson et al., supra note 224, at 101-02.

[FN226]. The Indian Citizenship Act of 1924 conferred citizenship on all non-citizen American Indians born within the territorial limits of the United States. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b) (2006)). Prior to this time, some Indians were naturalized to U.S. citizenship by specific laws, such as those admitting

veterans of the U.S. armed services to citizenship and those allowing Indian women who married non-Indian citizens to take the status of their husbands. However, most remained non-citizens until the enactment of the 1924 statute.

[FN227]. See Goldberg et al., supra note 20.

[FN228]. The First Amendment protects individual rights to free speech, freedom of association, and religious freedom. The Fifth Amendment Due Process Clause provides that no one shall be "deprived of life, liberty, or property, without due process of law," and contains procedural and substantive protections.

[FN229]. Tsosie, supra note 22, at 300-01.

[FN230]. Cohen's Handbook of Federal Indian Law §17.01, at 1074-75 (Nell Jessup Newton et al. eds., 2005) [hereinafter Cohen].

[FN231]. See Coggins et al., supra note 205, at 55 (observing that trial trust lands are not "public lands" because they must be managed on behalf of the Indian tribes and individuals as beneficiaries, but also noting that tribal lands cannot be disassociated from public land policy because both are administered under the authority of the Department of Interior (DOI) and DOI leasing and land management policies are consistent in many respects).

[FN232]. Tsosie, supra note 22.

[FN233]. Id.

[FN234]. Id. at 302-03.

[FN235]. See Indians and Energy: Exploitation and Opportunity in the American Southwest 15 (Sherry L. Smith & Brian Frehner eds., 2010) [hereinafter Indians and Energy].

[FN236]. Tsosie, supra note 2, at 218 n.208 (citing Barbara Rose Johnston & Susan Dawson, Resource Use and Abuse on Native American Land: Uranium Mining in the American Southwest, in Who Pays the Price: The Sociocultural Context of Environmental Crisis 142, 144 (Barbara Rose Johnston ed., 1994)).

[FN237]. Id.

[FN238]. Barbara Rose Johnston, Susan Dawson & Gary Madsen, Uranium Mining and Milling: Navajo Experiences in the American Southwest, in Indians and Energy, supra note 235, at 111, 115.

[FN239]. Id. at 117.

[FN240]. Id.

[FN241]. Id.

[FN242]. Id. at 116.

[FN243]. Id. at 118-20.

[FN244]. Id. at 120.

[FN245]. Id.

[FN246]. Tsosie, supra note 2, at 219.

[FN247]. Id.

[FN248]. Id.

[FN249]. Id.

[FN250]. See id. (noting that the mining companies would not provide employee lists until the United States Public Health Service (USPHS) agreed that its doctors would not divulge the potential health hazards to the workers, nor would they inform those who became ill that their illnesses were radiation related).

[FN251]. Id. at 117.

[FN252]. Johnston, Dawson, & Madsen, supra note 238, at 111, 120.

[FN253]. Id. at 120.

[FN254]. Id.

[FN255]. Id. at 111-12.

[FN256]. Id.

[FN257]. Id.

[FN258]. See id. at 112, 125-27 (discussing long term effects of uranium mining in the context of the "Millworkers Study").

[FN259]. See id. at 122 (discussing the impact of the 1979 United Nuclear Corporation dam failure near Church Rock, New Mexico, among other mining-related crises).

[FN260]. Id.

[FN261]. Andrew Needham, "A Piece of the Action:" Navajo Nationalism, Energy Development, and Metropolitan Inequality, in Indians and Energy, supra note 235, at 111, 115.

[FN262]. For example, the Hopi Tribal government and the Navajo Nation endorse continued production of coal on their respective reservations and the operation of the coal-fired power plants that employ many tribal members, despite the pollution that naturally results from these industries, because there are very few options for employment in this rural area of the Southwest.

[FN263]. In 1932, the USPHS commenced the Tuskegee Syphilis study to document the nature of syphilis, including its progression in human beings. The subjects of the study were 399 black sharecroppers in Alabama who had latent syphilis and 201 men without the disease, who constituted the control group. The physicians who conducted the study did not inform the men about their disease or provide treatment. They did provide meals, medical exams, and burial insurance to ensure that the men did not seek treatment elsewhere. The study operated covertly until news sources revealed the story in 1972. After significant national embarrassment, the federal government ended the study and initiated policy changes to provide protection for human subjects of medical research. Myrtle Adams et al., Final Report of the Tuskegee Syphilis Study Legacy Committee--May 20, 1996, Univ. of Va. Claude Moore Health Sci. Libr., http://www.hsl.virginia.edu/historical/medical_history/bad_blood/report.cfm (last visited July 12, 2012).

[FN264]. See id. (discussing the radiation experiments funded by the U.S. government from 1944 to 1974 to study the effects of radiation exposure on human populations, and noting that these studies were typically conducted without the patient's awareness or consent to participate). Uranium miners were among the human subjects tested in the radiation experiments.

[FN265]. Johnston, Dawson & Madsen, supra note 238, at 122.

[FN266]. Tsosie, supra note 2, at 220 (citing Bradford D. Cooley, The Navajo Uranium Ban: Tribal Sovereignty v. National Energy Demands, 26 J. Land Resources & Envtl. L. 393 (2006)).

[FN267]. Id.

[FN268]. See El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 485-86 (1999).

[FN269]. Price-Anderson Nuclear Industries Indemnity Act, 42 U.S.C. §§ 2011-2297h (2006).

[FN270]. 42 U.S.C. § 2210.

[FN271]. See El Paso Natural Gas Co., 526 U.S. at 485-86.

[FN272]. Navajo Nation Code Ann. tit. 18, § 1303 (2005).

[FN273]. Id.

[FN274]. Navajo Nation Code Ann. tit. 7, §254.

[FN275]. See generally HRI, Inc. v. EPA, 198 F.3d 1224 (10th Cir. 2000) (holding private company was subject to federal permitting on fee land within Navajo Nation).

[FN276]. See, e.g., Wash. Dep't of Ecology v. EPA, 752 F.2d 1465, 1469-72 (9th Cir. 1985) (explaining the intersection of federal Indian law with environmental law in the context of the respective regulatory authority of the states, the EPA, and tribal governments); see also 18 U.S.C. §1151 (2006) (defining "Indian Country" for jurisdictional purposes).

[FN277]. Cf. Wash. Dep't of Ecology, 752 F.2d at 1472 (holding that the EPA appropriately refused to allow the State of Washington to apply its hazardous waste regulations to Indian lands).

[FN278]. For an excellent analysis of the current litigation within its historical context, see Claire R. Newman, Creating an Environmental No-Man's Land: The Tenth Circuit's Departure from Environmental and Indian Law Protecting a Tribal Community's Health and Environment, 1 Wash. J. Envtl. L. & Pol'y 352, 356-401 (2011).

[FN279]. 608 F.3d 1131 (10th Cir. 2010) (en banc).

[FN280]. Id. at 1166.

[FN281]. Id.

[FN282]. Id. at 1168-69 (Ebel, J., dissenting).

[FN283]. See id. at 1139.

[FN284]. 522 U.S. 520, 532-34 (1998).

[FN285]. See Hydro Res., 608 F.3d at 1135, 1141.

[FN286]. Id. at 1166.

[FN287]. See Patrick Moore, Going Nuclear, Wash. Post, Apr. 16, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/04/14/AR2006041401209.html (portraying nuclear energy as the wave of the future and the dangers of uranium mining remedied).

[FN288]. Tsosie, supra note 2, at 224.

[FN289]. I think it is safe to say that we don't "know" that this is a safe technology. There are no studies on this in relation to human health, and we don't want to resurrect the "radiation experiments" of the 1950s.

[FN290]. Tsosie, supra note 2, at 218 n.206.

[FN291]. 598 F.3d 677 (10th Cir. 2010).

[FN292]. Id. at 684-705.

[FN293]. Id. at 684, 695.

[FN294]. Tsosie, supra note 2, at 224; see also Morris, 598 F.3d at 682.

[FN295]. Richard A. Du Bey & James M. Grijalva, Closing the Circle: Tribal Implementation of the Superfund Program in the Reservation Environment, 9 J. Nat. Resources & Envtl. L. 279, 288-89 (1993-1994).

[FN296]. See Indian Health Care Improvement Act, Pub. L. No. 94-437, § 2(a), 90 Stat. 1400, 1400 (codified as amended at 25 U.S.C. § 1601 (2006)).

[FN297]. Agency for Healthcare Research & Quality, U.S. Dep't of Health & Human Servs., National Healthcare Disparities Report, 2009 180-233 (2010) [[hereinafter National Healthcare Disparities Report].

[FN298]. See Stephen J. Kunitz, The History and Politics of U.S. Health Care Policy for American Indians and Alaskan Natives, 86 Am. J. Pub. Health 1464, 1465, 1473 (1996).

[FN299]. See generally American Indian Health: Innovations in Health Care, Promotion, and Policy (Everett R. Rhoades ed., 2000) [hereinafter American Indian Health].

[FN300]. Yvette Roubideaux, Beyond Red Lake--The Persistent Crisis in American Indian Health Care, 353 N. Eng. J. Med. 1881, 1882 (Nov. 3, 2005), available at http://www.nejm.org/doi/full/10.1056/NEJMp058095.

[FN301]. See generally id.; Thomas Stewart, Philip May & Anita Muneta, A Navajo Health Consumer Survey, 18 Med. Care 1183 (1980).

[FN302]. Comm. for the Study of the Future of Pub. Health, Inst. of Med., The Future of Public Health 1 (1st ed. 1988).

[FN303]. See generally F. Douglas Scutchfield & C. William Keck, Concepts and Definitions of Public Health Practice, in

Principles of Public Health Practice 3, 3-9 (Stephen J. Williams ed., 1997).

[FN304]. U.S. Const. amend. X; see generally Jacobson v. Massachusetts, 197 U.S. 11 (1905) (finding that state authority to require compulsory vaccination is acceptable under state police power).

[FN305]. U.S. Const. amend. X; Lochner v. New York, 198 U.S. 45, 53 (1905).

[FN306]. See generally Cohen, supra note 230, § 4.01, at 204-20.

[FN307]. See discussion supra Part III.A.2.

[FN308]. Indian Citizenship Act of 1924, 8 U.S.C. § 1401(b) (2006).

[FN309]. Rose L. Pfefferbaum et al., Providing for the Health Care Needs of Native Americans: Policy, Programs, Procedures, and Practices, 21 Am. Indian L. Rev. 211, 214 (1997).

[FN310]. Lloyd B. Miller, The Contemporary Statutory Framework for Native Healthcare, Lecture at the New Directions in Native Healthcare CLE Conference (Nov. 5, 2010).

[FN311]. See generally Kunitz, supra note 298, at 1464; American Indian Health, supra note 299.

[FN312]. See Pfefferbaum et al., supra note 309, at 216 (describing enactment of Indian Self-Determination and Education Act of 1975, which provided a mechanism to transfer administrative authority to Tribes); see also Sharon O'Brien, Tribes and Indians: With Whom Does the United States Maintain a Relationship?, 66 Notre Dame L. Rev. 1461, 1467 (1991).

[FN313]. See Rules for Courts of Indian Offenses (1892), supra note 224, at 103, 104.

[FN314]. 25 U.S.C. § 13 (2006).

[FN315]. Transfer Act of Aug. 5, 1954, Pub. L. No. 83-568, 68 Stat. 674 (codified as amended at 42 U.S.C. § 2004 (2006)).

[FN316]. Id. at § 102.

[FN317]. 25 U.S.C. § 450.

[FN318]. Id.

[FN319]. Id; see generally Adams, supra note 223.

[FN320]. See Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (codified as amended

in scattered sections of 25 U.S.C. (2006)).

[FN321]. See American Indian Health, supra note 299, at 79.

[FN322]. See Pfefferbaum et al., supra note 309, at 215.

[FN323]. In Arizona, the Gila River Indian Community exemplifies this capacity, and the tribal government has set a very high standard for health care on the reservation.

[FN324]. National Healthcare Disparities Report, supra note 297.

[FN325]. See Tsosie, supra note 2.

[FN326]. Id.

[FN327]. Id. at 396.

[FN328]. Id.

[FN329]. Havasupai Tribe of the Havasupai Reservation v. Ariz. Bd. of Regents, 204 P.3d 1063, 1067 (Ariz. Ct. App. 2008).

[FN330]. Id. at 1071.

[FN331]. See generally L.B. Jorde, W.S. Watkins & M.J. Bamshad, Population Genomics: A Bridge from Evolutionary History to **Genetic** Medicine, 10 Hum. Molecular **Genetics** 2199 (2001); J.R. Stinchcombe & H.E. Hoekstra, Combining Population Genomics and Quantitative **Genetics**: Finding the Genes Underlying Ecologically Important Traits, Heredity 158 (2008).

[FN332]. See Tsosie, supra note 2.

[FN333]. Id.

[FN334]. This is the language used to justify the Human Genome Project in which scientists competed to “map” the human genome.

[FN335]. For example, the Havasupai Tribe considers its place of origin to be in the Grand Canyon, while the scientific researchers are interested in proving the Tribe's history of migrations from another place to the Grand Canyon. The scientific claim is presented as a search for the “truth,” while the Havasupai Tribe's claim is represented as a “myth” substantiating the Tribe's identity as the Original People of the Grand Canyon, which is a form of epistemic injustice at the level of an identity claim.

[FN336]. See Tsosie, supra note 1, at 396.

[FN337]. In this sense, "ownership" stands for the right to use and control the disposition of human tissue and biological samples. See Moore v. Regents of Univ. of Cal., 793 P.2d 479, 488-93 (Cal. 1990) (holding that an individual who agreed to give blood and tissue samples in the course of treatment did not retain an interest in the samples sufficient to claim a share of the proceeds from a cell line developed by University of California researchers and patented under federal law for commercial use).

[FN338]. For example, the Native American Graves Protection and Repatriation Act specifies that it "reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government." 25 U.S.C. § 3010 (2006).

[FN339]. See Rebecca Tsosie, Native American Graves Protection and Repatriation Act and the Problem of Culturally Unidentifiable Remains: The Argument for a Human Rights Framework, 44 Ariz. St. L.J. 809 (2012).

[FN340]. 18 U.S.C. § 1170 (2006); 25 U.S.C. §§ 3001-3013.

[FN341]. Id.

[FN342]. See Jack F. Trope & Walter R. Echo-Hawk, The Native American Graves Protection and Repatriation Act: Background and Legislative History, 24 Ariz. St. L.J. 35, 39-43 (1992).

[FN343]. See Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (2006); Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470aa-mm (2006) (regulating excavations on public lands on the theory that the federal government owns the lands and also owns all objects or remains found on or under those lands).

[FN344]. 25 U.S.C. § 3001(3).

[FN345]. Tsosie, supra note 339, at 816.

[FN346]. 25 U.S.C. § 3002.

[FN347]. 18 U.S.C. § 1170 (2006).

[FN348]. 25 U.S.C. § 3003.

[FN349]. Id. § 3005.

[FN350]. See Cecily Harms, NAGPRA in Colorado: A Success Story, 83 U. Colo. L. Rev. 593, 615 (2012) ("[O]ver 700 human remains and over 2,000 associated funerary objects [have been repatriated]."); Jeffrey Kluger, The Legal Battle: Archeology: Who Should Own the Bones?, Time, Mar. 5, 2006, http://www.time.com/time/magazine/article/0,9171,1169901,00.html

("[T]o date, about 30,000 human remains and half a million funerary objects have been returned to tribes.").

[FN351]. See Bonnichsen v. United States, 367 F.3d 864, 879-82 (9th Cir. 2004).

[FN352]. See Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt., 455 F. Supp. 2d 1207, 1216 (D. Nev. 2006).

[FN353]. See Tsosie, supra note 339, at 818.

[FN354]. Id.

[FN355]. Id.

[FN356]. Id.

[FN357]. 367 F.3d 864 (9th Cir. 2004).

[FN358]. See Rebecca Tsosie, Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values, 31 Ariz. St. L.J. 583, 587-89 (1999).

[FN359]. Id. at 587.

[FN360]. Id. at 588.

[FN361]. Id. at 601-03.

[FN362]. Id. at 589, 589 n.19.

[FN363]. See generally Jeff Benedict, No Bone Unturned: Inside the World of a Top Forensic Scientist and His Work on America's Most Notorious Crimes and Disasters (2004); David Hurst Thomas, Skull Wars: Kennewick Man, Archeology, and the Battle for Native American Identity (2000).

[FN364]. Bonnichsen v. United States, 367 F.3d 864, 882 (9th Cir. 2004).

[FN365]. Id. at 881.

[FN366]. Id. at 879.

[FN367]. Id. at 868.

[FN368]. See Tsosie, supra note 358, at 596 (detailing the theories presented in the Bonnichsen case about the origins of human

populations in the Americas).

[FN369]. See Tsosie, supra note 1, at 396 (documenting that the scientific analysis of Havasupai blood samples was directed, in part, to human origins research).

[FN370]. Tsosie, supra note 339, at 821.

[FN371]. Disposition of Culturally Unidentifiable Native American Human Remains, 43 C.F.R. §10.11 (2012).

[FN372]. See Who Owns the Past?, supra note 8.

[FN373]. See White v. Univ. of Cal., No. C12-01978RS, at 2, 5 (N.D. Cal. Oct. 9, 2012) (order granting Kumeyaay Cultural Repatriation Committee's motion to dismiss and granting Regents of the University of California's motion to dismiss).

[FN374]. Id. at 1.

[FN375]. Id. at 1-2.

[FN376]. Id. at 16.

[FN377]. Id. at 5-6; see also 43 C.F.R. § 10.11 (2012).

[FN378]. Petition for Writ of Mandamus at 13, White v. Univ. of Cal., No. 12625891 (Super. Ct. of Cal. Apr. 16, 2012).

[FN379]. Id.

[FN380]. Who Owns the Past?, supra note 8.

[FN381]. Id.

[FN382]. Id.

[FN383]. Id.

[FN384]. Duane Champagne, A New Attack on Repatriation, Indian Country Today Media Network (Apr. 9, 2012), http://indiancountrytodaymedianetwork.com/2012/04/09/a-new-attack-on-repatriation-107181.

[FN385]. Id.

[FN386]. Id.

[FN387]. Id.

[FN388]. Id.

[FN389]. See generally Goldberg et al., supra note 20.

[FN390]. Cohen, supra note 230, § 17.01, at 1074-75.

[FN391]. Id., §§ 10.01-.03, at 774-95.

[FN392]. Id.

[FN393]. See Montana v. United States, 450 U.S. 544, 565 (1981) ("A tribe may regulate, through taxation, licensing, or other means, activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.").

[FN394]. For example, the Salt River Pima-Maricopa Indian Community has entered a partnership agreement with T-Gen Corporation. See Collaborations with **Genetics** Researchers, Am. Indian & Alaska Native **Genetics** Resource Center, http://genetics.ncai.org/case-study/collaborations.cfm (last visited Nov. 18, 2012).

[FN395]. See, e.g., Montana, 450 U.S. at 565 (confirming tribal power to regulate the activities of nonmembers who enter consensual relationships with the tribe or its members, for example, through a contract or lease agreement).

[FN396]. See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 10 (1831).

[FN397]. See Wallace Coffey & Rebecca Tsosie, Rethinking The Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations, 12 Stan. L. & Pol'y Rev. 191 (2001).

[FN398]. See generally Cohen, supra note 230.

[FN399]. See S. James Anaya, Indigenous Peoples in International Law 131-41 (2d ed. 2004) (explaining that cultural integrity is a key norm encompassed within the concept of self-determination).

[FN400]. Bonnichsen v. United States, 367 F.3d 864, 881-82 (9th Cir. 2004).

[FN401]. See Tsosie, supra note 1, at 405-07.

[FN402]. On November 2, 2010, Oklahoma voters approved a proposed constitutional amendment that would prevent Okla-

homa state courts from considering or using Sharia law. Awad v. Ziriax, 670 F.3d 1111, 1116 (10th Cir. 2012). After a federal district court granted a preliminary injunction to prevent the Oklahoma State Election Board from certifying this election result, and thereby making the amendment effective, the Board sought review, but the Tenth Circuit found no abuse of discretion by the lower court and affirmed the preliminary injunction. Id. at 1116-17.

[FN403]. See, e.g., Crow v. Gullet, 541 F.Supp. 785, 794 (D.S.D.1982) (failing to find any authority for the proposition that a right or cause of action is created by international human rights law).

[FN404]. See, e.g., Mabo v. Queensland (No.2) (1992) 175 CLR 1, 5 (Austl.). In this case, the High Court of Australia held for the first time that the indigenous peoples of Australia possessed aboriginal land rights and that the earlier nineteenth century doctrines that failed to recognize these rights violated human rights law.

[FN405]. S. James Anaya is also a Professor of Law at the University of Arizona and widely acclaimed scholar of international human rights law and indigenous rights. See, e.g., Anaya, supra note 399.

[FN406]. S. James Anaya, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, U.N. Doc. A/HRC/12/34 (July 15, 2009).

[FN407]. Declaration, supra note 3.

[FN408]. See id. arts. 3-4.

[FN409]. See id. arts. 3-4, 19; Rebecca Tsosie, Reconceptualizing Tribal Rights: Can Self-Determination Be Actualized Within the U.S. Constitutional Structure?, 15 Lewis & Clark L. Rev. 923, 930-35 (2011).

[FN410]. Declaration, supra note 3, art. 19.

[FN411]. Tsosie, supra note 409, at 927.

[FN412]. E.S.C. Res. 1982/34, U.N. Doc. E/RES/1982/82 (May 7, 1982).

[FN413]. Tsosie, supra note 409, at 925.

[FN414]. Id. at 928.

[FN415]. U.N. GAOR, 61st Sess., 107th plen. mtg. at 18-19, U.N. Doc. A/61/PV.107 (Sept. 13, 2007).

[FN416]. Christopher J. Fromherz, Indigenous Peoples' Courts: Egalitarian Juridical Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples, 156 U. Pa. L. Rev. 1341, 1346 (2008).

[FN417]. Declaration, supra note 3, art. 46.

[FN418]. See President Barack Obama, Remarks at the White House Tribal Nations Conference (Dec. 16, 2010), in 2010 Daily Comp. Pres. Doc. 1076, at 1-5; Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples, U.S. Dept. of State 1-2 (Jan. 12, 2011), http:// www.state.gov/documents/organization/154782.pdf [hereinafter Announcement of U.S. Support].

[FN419]. Announcement of U.S. Support, supra note 418.

[FN420]. See Tsosie, supra note 409, at 933.

[FN421]. Declaration, supra note 3, art. 19.

[FN422]. See id. ("States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.").

[FN423]. "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard." Id. art. 25.

[FN424]. See id. Preamble (expressing concern over historic injustices that have been suffered by indigenous peoples and calling upon nation-states to acknowledge their inherent rights and respect their rights under treaties and political accords).

[FN425]. Id. ("Convinced that control by indigenous peoples over development affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.").

[FN426]. Id.

[FN427]. Id. art. 25.

[FN428]. See id.

[FN429]. Id. art. 26.

[FN430]. Id. art. 27.

[FN431]. Id. art. 28.

[FN432]. Id. art. 29.

[FN433]. Id.

[FN434]. Id. art. 20.

[FN435]. Id.

[FN436]. Id. art. 1.

[FN437]. Although there are international documents recognizing a human right to health, the United States continues to deny that the government has any obligation to ensure realization of this right. Thus, national health care is primarily conceived of as an economic system to improve the delivery of health care and protect consumers against wrongful conduct by insurance companies or employers. See also id. art. 2 (providing that indigenous peoples and individuals are "free and equal to all other peoples and individuals" for purposes of exercising their rights and being free from discrimination in the exercise of those rights).

[FN438]. Id. art. 24.

[FN439]. Id.

[FN440]. Id. art.31.

[FN441]. Id.

[FN442]. See, e.g., Genome-Wide Association Studies, U.S. Dep't of Health & Hum. Servs, http://gwas.nih.gov (last visited Nov. 18, 2012).

[FN443]. See Donald J. Willison, Trends in Collection, Use and Disclosure of Personal Information in Contemporary Health Research: Challenges for Research Governance, 13 Health L. Rev. 107, 110 (2005) (detailing the misuse of blood samples taken from members of the Nuu-Chah-Nulth First Nation of British Columbia, Canada).

[FN444]. Declaration, supra note 3, art. 11.

[FN445]. Id.

[FN446]. 43 C.F.R. § 10.11 (2012).

[FN447]. Declaration, supra note 3, art. 12.

[FN448]. Who Owns the Past?, supra note 8.

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Indigenous Peoples' Right Of Free Prior Informed Consent With Respect To Indigenous Lands, Territories and Resources

The purpose of this paper is to clarify what is meant by "free, prior and informed consent" as it is referred to in the UN Declaration on the Rights of Indigenous Peoples. Free, prior and informed consent is an important principle deriving from indigenous peoples' collective rights to self-determination and their lands and resources. It is not a substantive right in and of itself, as are the rights to property or self-determination. As used in the Declaration, it does not give indigenous peoples a right of veto. Rather, free, prior and informed consent refers to a certain process that states must follow before taking action that would otherwise constitute an infringement of a right or a taking of property.

The United Nations Declaration on the Rights of Indigenous Peoples references "free, prior and informed consent" in six separate articles,[1] most of which focus on free, prior and informed consent as the desired goal arising from the consultation and cooperation process with indigenous peoples regarding issues that may affect them. The most important provisions dealing with free, prior and informed consent are Articles 19 and 32.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

[1] These are Articles 10, 11, 19, 28, 29, and 32, UN Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295 (2007).

These articles mandate a process of consultation and cooperation in good faith, with the end goal being the free, prior and informed consent of the affected indigenous peoples. Stated differently, the obligation incurred by these articles is the process (namely the consultation and cooperation), not an obligation to achieve a particular result. This interpretation is in accord with that of Luis Enrique Chavez, Chairperson of the Working Group on the UN Declaration on the Rights of Indigenous Peoples from 1999-2006. "[Article 19] therefore established only an obligation regarding the means (consultation and cooperation in good faith with a view to obtaining consent) but not, in any way, an obligation regarding the result, which would mean having to obtain that consent."[2] Chavez's interpretation of these articles is entirely in keeping with the intentions and understandings expressed by states during the negotiations of the Working Group.

The obligation to consult for the purpose of obtaining free, prior and informed consent is also reflected in the ILO Convention 169. Article 6 of the ILO Convention 169 states:

> (1) In applying the provisions of this Convention, governments shall:
> (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
> (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
> (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
>
> (2) The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Although the ILO Convention does not specifically refer to "free, prior and informed consent," it refers to the free participation of indigenous peoples. Further, it is clear that consultations require early participation by indigenous groups.[3] Numerous interpretative opinions offered by the committees in response to individual complaints state that in order for a consultation process to be consistent with the obligations of the Convention, the consultation process must occur

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[2] Chavez, Luis Enrique, *The Declaration on the Rights of Indigenous Peoples Breaking the Impass: The Middle Ground*, 103-104, Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples, eds. Claire Charters and Rodolfo Stavenhagen, 2009, available online at http://www.iwgia.org/graphics/Synkron-Library/Documents/publications/Downloadpublications/Books/Making%20the%20Declaration%20Work.pdf .

[3] Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), at para. 38, ILO Doc. 162000ECU169 (2001).

before any final decisions are made.[4] Finally, such consultations must be informed. The ILO committee reviewing one complaint recognized this, stating: "The adoption of rapid decisions should not be to the detriment of effective consultations for which sufficient time must be given to allow the country's indigenous peoples to engage their own decision-making processes and participate effectively in decisions taken in a manner consistent with their cultural and social traditions."[5] The ILO Convention, like the UN Declaration, does not require that consultations end in agreement or consent, only good faith negotiations to that end.[6]

This interpretation of free, prior and informed consent as a right of process, does not create right of veto by indigenous peoples in relation to proposed state actions that may affect them. "... [I]n principle, the declaration could not recognise indigenous peoples [sic] preferential or greater rights than those granted to other members of society, as would be the case with a right of veto."[7]

The concepts of consultation and cooperation, as well as the goal of obtaining free, prior, and informed consent of indigenous peoples, are in accord with the federal tribal consultation policy in established under President Clinton's Executive Order 13175 in 1994. These concepts were reinforced by President Obama's Executive Memorandum issued last November.

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[4] Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Union of Workers of the Autonomous University of Mexico (STUNAM) and the Independent Union of Workers of La Jornada (SITRAJOR), at paras. 95, 106, ILO Doc. 162004MEX169A (2004). The complainants' proposals are recited principally in paras. 37-43.

[5] Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT), at para. 79, ILO Doc. 161999COL169A (2001).

[6] Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT), at paras. 57, 59, 61-63, ILO Doc. 161999COL169B (2001).

[7] Chavez, Luis Enrique, *The Declaration on the Rights of Indigenous Peoples Breaking the Impass: The Middle Ground*, 103, Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples, eds. Claire Charters and Rodolfo Stavenhagen, 2009.