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Joshua Fershee

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FROM SELF-DETERMINATION TO SELF-DOMINATION: NATIVE AMERICANS, WESTERN CULTURE, AND THE PROMISE OF CONSTITUTIONAL-BASED REFORM

Joshua Fershee*

I. INTRODUCTION

The “Indian Problem” or “Aboriginal Problem” is a deeply ingrained part of American culture.¹ It is worth noting what should be obvious: “Indian Problem” is itself a loaded phrase. Written from a Canadian perspective, this reality is aptly explained as follows:

Identifying [the problem] as an Aboriginal problem inevitably places the onus on Aboriginal people to desist from “troublesome behaviour.” It is an assimilationist approach, the kind that has been attempted repeatedly in the past, seeking to eradicate Aboriginal language, culture and political institutions from the face of Canada and to absorb Aboriginal people into the body politic –

* Associate, Davis Polk & Wardwell, New York, NY. J.D. 2003, Tulane Law School; B.A. 1995, Michigan State University. Editor in Chief, *Tulane Law Review*, Volume 77 (2002-03). This Article expresses only my opinions, and I am solely responsible for the contents. This Article would not have been possible without the encouragement, love, and support of my wonderful wife, Kendra Jean Huard Fershee, who has shown me anything is possible. I love you more each and every day. Special thanks also to the editors of the *Valparaiso University Law Review*, whose time and effort have made this Article the best it could be.

¹ The terms “Indian,” “Native American,” “Aboriginal,” and “Indigenous” are used throughout this Article and the attempt has been made to use them appropriately. Recognizing the significant cultural sensitivities related to defining any culture, but especially in this context, the author apologizes in advance for causing any offense.

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so that there are no discernible Aboriginal people and thus, no Aboriginal problem.²

It appears that the problem is such a part of our culture that we are as reluctant as we are unable to see it solved. The U.S. government recognized that there was a problem from the earliest moments of the country's founding. The issue continued through the Civil War, where Native Americans were recognized as requiring specific delineation in the drafting of the Fourteenth Amendment.³ Additionally, since 1824, the United States has had an agency dedicated specifically to dealing with Native American issues—the Bureau of Indian Affairs (“BIA”). Furthermore, Native Americans are owed millions of dollars, but the money sits, somewhere, doing nothing to promote the welfare of its rightful owners. Native Americans today continue to be among the poorest, most unhealthy, and least educated people in the United States.⁴ They are probably the least respected as well.

Despite repeated pleas for change, Native Americans still see purported names, symbols, and images of their cultures co-opted for the profit and exploitation of the white majority.⁵ Chief Wahoo,⁶ the Washington Redskins, and the Jeep Grand Cherokee provide just a few examples. The American public has seen fit to provide little, if any, disincentive to cease the exploitation of Native Americans.

By comparison, consider the same issues as they relate to African-Americans. Race issues continue to be a major problem in the United

² ROYAL COMMISSION ON ABORIGINAL PEOPLES: INTERPRETING THE MANDATE, available at <http://www.ubcic.bc.ca/RCAP.htm> (last visited July 6, 2004).

³ See U.S. CONST. amend. XIV. Native Americans are mentioned twice in the Fourteenth Amendment. *Id.* The first such mention is a tacit reference: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” *Id.* § 1 (emphasis added). The second reference excluded “Indians not taxed” when apportioning representatives. *Id.* § 2.

⁴ See, e.g., Nancy A. Denton, *Racial Identity and Census Categories: Can Incorrect Categories Yield Correct Information?*, 15 LAW & INEQ. 83, 86 n.17 (1997) (stating that Native Americans have three times the unemployment rate of white people, earn less than white men at all education levels, and have “the highest poverty rate for individuals and families of any group, and their child poverty rate is second only to that of African-Americans”); Scott R. Rosner, *Legal Approaches to the Use of Native American Logos and Symbols in Sports*, 1 VA. SPORTS & ENT. L.J. 258, 261 (2002) (“Pervasive problems in the Native American community include poverty, education, housing, and health care, as well as numerous other related social ills.”).

⁵ See Ward Churchill, *Let's Spread the “Fun” Around*, in WARD CHURCHILL, INDIANS ARE US?: CULTURE AND GENOCIDE IN NATIVE NORTH AMERICA 65-66 (Ward Churchill ed., 1994).

⁶ Chief Wahoo is the mascot of the Cleveland Indians baseball team.

States, but significant strides have been made in the past forty years. It is easy for some to forget that less than four decades ago it was legal to refuse public accommodations to a person because of his skin color.⁷ Before the Civil Rights Act of 1964, it was legal, and common practice, to restrict access to restaurants, jobs, and medical care.⁸ This progress does not indicate the completion of the task, but merely a step in the right direction. "Equality" is still far from the norm, but real changes have been made for minorities in the United States, especially African-Americans. These changes have not just been legal, but also cultural.

As it should be, it is no longer acceptable (and there are consequences) for a professional sports executive to say publicly that African-Americans are not Major League managers because they are inherently unable to do the job.⁹ Implying that things would have been better in America had a racist regime taken control of the White House cost a U.S. Senator his job as Senate Majority Leader.¹⁰ And "putting on blackface," once a common practice for actors and comedians,¹¹ is almost completely taboo, even, apparently, with the blessing of an African-American.¹² But when Native Americans request a change,¹³ there is

⁷ See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 261 (1964) (upholding the constitutionality of the public accommodations provision of Title II of the Civil Rights Act of 1964).

⁸ See Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimel*, 110 YALE L.J. 441, 447 (2000) (describing the Civil Rights Act of 1964 as a "momentous event" in the history of federal antidiscrimination law).

⁹ See Diane Pucin, *Umpire Should Get the Thumb*, L.A. TIMES, Feb. 5, 2003, pt. 4, at 1, available at 2003 WL 2383022 (recounting that "[w]hen former Dodger general manager Al Campanis said on national television in 1987 that blacks lacked 'the necessities' to be baseball managers and executives, he almost immediately lost his job" despite the fact that, "he was largely responsible for finding and signing minority players . . . and had, by all accounts, treated men and women of all races fairly").

¹⁰ Sheryl Gay Stolberg, *For Lott, Uneasy Role as One of 100 in Senate*, N.Y. TIMES, Mar. 1, 2003, at A1 (reporting that Senator Lott lost his job as Senate Majority leader over the controversy from his "comments that the nation would have been better off had Mr. [Strom] Thurmond, who ran for president in 1948 as a segregationist, been elected").

¹¹ See David Nicholson, *Getting Beneath Blackface*, WASH. POST, Mar. 17, 1998, at D2, available at 1998 WL 2473540.

¹² See Kenneth Turan, *"Get Bruce": Story Behind the Fine Lines*, NEWSDAY (N.Y.), Sept. 17, 1999, at B7, available at 1999 WL 8190710 (stating that Whoopi Goldberg requested that Bruce Vilanch write then-boyfriend Ted Danson's now infamous blackface appearance at the Friar's Club).

¹³ See Jeff Dolley, *The Four R's: Use of Indian Mascots in Educational Facilities*, 32 J.L. & EDUC. 21, 21-23 (2003). Dolley states:

Native Americans and others have sought to terminate the use of Indian mascots in a number of ways. They have sought remedies against Indian-mascoted schools and sports teams in courts of law;

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little public outcry. Chief Wahoo is probably the most racist caricature still used as a major promotional image. The functional equivalent to “Sambo” for African-Americans, the image is still often claimed somehow to honor Indians.¹⁴ The Washington Redskins continue to be called the Redskins, though it is painfully obvious how absurd and offensive a similar team called the “Darkies” or the “Blackskins” would be.¹⁵ The most distressing part of all of this is that many people seem to understand that these things are offensive, yet their use continues.¹⁶

In seeking to address the legal and cultural issues facing Native Americans, there are several sources from which to draw potential solutions. There is much to be learned from the experiences of other countries that have dealt with, and are dealing with, similar issues. This Article will consider three separate experiences and attempt to synthesize their teachings for application in the United States. The second Part of the Article will provide a synopsis of the problems and issues facing Native Americans.¹⁷ Part III of this Article will consider Canada, which has already made some reforms and policy shifts with respect to indigenous peoples.¹⁸ This Part will provide an overview of the recommendations of Canada’s Royal Commission on Aboriginal People.¹⁹ More specifically, it will review six “conditions for successful constitutional reform” and will argue that these conditions apply equally to any similar U.S. initiative.²⁰ Part IV of the Article will look to Scotland, which recently made reforms to deal with historical multiethnic governance problems.²¹ Though not specifically dealing

they have demonstrated against the use of such mascots; and they have petitioned teams to stop misappropriating their names through inaccurate logos and mascot décor and behavior.

Id. at 22-23 (footnotes omitted).

¹⁴ See Churchill, *supra* note 5, at 66-68 (stating that to “honor” African-Americans in the same way Native Americans have been honored, a baseball team called the “Sambos” should be created).

¹⁵ See *id.* at 67-68.

¹⁶ It would be hard not to know that Native Americans find them offensive. There have been several demonstrations and requests for change, such as the clash between protesters and supporters at a November 15, 1992, football game between the Washington Redskins and the Kansas City Chiefs. *Id.* at 66. Furthermore, several athletics teams, primarily in the college ranks, have changed their names. For instance, the St. John’s College sports teams were the “Redmen” and are now the “Red Storm,” and the Miami University of Ohio “Redskins” are now the “RedHawks.”

¹⁷ See *infra* Part II.

¹⁸ See *infra* Part III.

¹⁹ See *infra* Part III.

²⁰ See *infra* Part III.

²¹ See *infra* Part IV.

with indigenous peoples, the Scottish experience provides some interesting options for consideration. Australia will be the focus of Part V; Australia has been considering a redrafting of its constitution for some time.²² One of the major issues, though, has been how to address the rights of and obligations to the aboriginal tribes. Finally, Part VI will attempt to combine that which has been learned from past U.S. policies with the experiences of Canada, Scotland, and Australia to propose a change in the legal landscape as it applies to Native Americans.²³ Such a change will require a change in the collective legislative and judicial mindset. To have even a chance to resolve some of the current issues facing Native Americans, proposed solutions should be based on a concept of self-domination, instead of self-determination. Self-domination is a concept designed to override and move beyond the Self-Determination Era, an era that has failed in its most fundamental, if well-meaning, goals.

II. THE INDIAN PROBLEM

*We did not ask you white men to come here. The Great Spirit gave us this country as a home. You had yours. We did not interfere with you. The Great Spirit gave us plenty of land to live on, and buffalo, deer, antelope and other game. But you have come here; you are taking my land from me; you are killing off our game, so it is hard for us to live.*²⁴

-Crazy Horse (Lakota)

Since the earliest days of the white man's arrival in North America, the native peoples have been struggling to retain what is rightfully theirs. Whether it is their land, their resources, or their culture, Native Americans have had to fight for just about everything.

A. *Native American Legal History: Whose Version?*

Native American legal history is often divided into "eras," which underscore the government's Indian policy of the time. The primary eras are the Removal Era, the Reservation Era, the Allotment and Assimilation Era, the Reorganization Era, the Termination Era, and the

²² See *infra* Part V.

²³ See *infra* Part VI.

²⁴ PETER MATTHIESSEN, *IN THE SPIRIT OF CRAZY HORSE* (Penguin Books 1992) (1983) (quoting Crazy Horse).

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Self-Determination Era.²⁵ Traditional scholars of Indian Law often analyze these eras as “good” or “bad” periods when describing the evolution of Native American legal rights.²⁶ Professor Robert A. Williams, Jr., argues that this view of Native American legal history is lacking because “there are never any Indians in the story of Indian rights [that] traditional scholars tell.”²⁷ Professor Williams calls this “the White Man’s Indian Law,” which he says is problematic because it teaches that Indian struggles that ultimately led to United States Supreme Court decisions or congressional legislation were fought only by non-Indians.²⁸ He is undoubtedly correct when looking at the historical implications of how Indian Law has evolved. However, the traditional scholarly view of Indian Law still provides a helpful starting point from which to analyze the issues facing Native Americans today because the problem was largely created by the white majority and, at least to some degree, must be solved within the framework still controlled by the same.

From the early Supreme Court cases that defined Native American rights, the *Cherokee Cases*, Indians have been treated as wards of the state, with the U.S. government serving as the “guardians.”²⁹ Chief Justice John Marshall also established early on that Congress, through the Constitution, has plenary power to regulate Indian affairs.³⁰ This plenary power, apparently granted through the Indian Commerce Clause,³¹ provides Congress the power “to regulate Commerce . . . with the Indian Tribes.”³² It is this lurking power, regardless of what policy towards Native Americans is in vogue, that necessitates the development of solutions from within the framework of the traditional system and possibly changes to the Constitution itself.

²⁵ See DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW*, at xv (4th ed. 1998).

²⁶ See Robert A. Williams, Jr., “*The People of the States Where They Are found Are Often Their Deadliest Enemies*”: *The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981, 983-84 (1996).

²⁷ *Id.* at 984 (recounting the comments of Vine Deloria, Jr.).

²⁸ *Id.* at 985.

²⁹ See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); Williams, *supra* note 26, at 981 (“[N]o theme recurs with more urgency or consistency in the history of Federal Indian Law than the federal government’s legal duty to protect Indians from the white racial power and hostility organized by states in our federal system of government.”).

³⁰ See *Cherokee Nation*, 30 U.S. (5 Pet.) at 18.

³¹ See *id.*

³² U.S. CONST. art. I, § 8, cl. 3.

The problems of this lurking power can be seen in eras such as the Allotment and Assimilation Era.³³ By passing the Allotment Act of 1887,³⁴ Congress created a way to provide white people easier access to Indian lands, particularly in the western states.³⁵ The Act provided that the President of the United States could, “[i]n all cases where any tribe or band of Indians has been or shall be located upon any reservation,” order the land “to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians” and allotted to “each Indian located thereon . . . for [his] best interest.”³⁶ This allotment, placing ownership of the reservation in the hands of individuals instead of the group, paved the way for white people to take over large parcels of Indian-held land.³⁷ Furthermore, it created “surplus lands” that remained after allotment.³⁸ These surplus lands were naturally made available to white settlers.³⁹ Congress was thus able to override, or at a minimum modify, reservations created by treaty, law, or executive order, without any regard for the opinions of those affected the most.⁴⁰

Other eras have seen equally appalling results. For instance, in the Removal Era, the President was granted the power to move Native Americans to lands west of the Mississippi River.⁴¹ In 1836, against their will, thousands of Creek Indians were moved from Alabama to Oklahoma and left with virtually nothing.⁴² In the Termination Era, governmental policy moved toward total integration of Native Americans.⁴³ This era saw the termination of 109 tribes and bands.⁴⁴

³³ See GETCHES, *supra* note 25, at 141 (listing the Allotment & Assimilation Era as running from 1871-1928).

³⁴ Indian General Allotment Act, ch. 119, § 1, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. § 331 (1994)) (*repealed* 2000).

³⁵ See Williams, *supra* note 26, at 984.

³⁶ 25 U.S.C. § 331 (2000).

³⁷ See Yuanchung Lee, *Rediscovering the Constitutional Lineage of Federal Indian Law*, 27 N.M. L. REV. 273, 282 n.46 (1997) (stating that there was widespread sentiment “that individual ownership of property was a prerequisite to the . . . civilizing [of] the Indians”).

³⁸ See Adrian N. Hansen, Note, *The Endangered Species Act and the Extinction of Reserved Indian Water Rights on the San Juan River*, 37 ARIZ. L. REV. 1305, 1317 n.91 (1995) (“The Dawes Act termed lands not allotted to individual Indians as ‘surplus’ and therefore open for homesteading and purchase.”).

³⁹ Williams, *supra* note 26, at 984.

⁴⁰ See 25 U.S.C. § 331 (1994).

⁴¹ See Act of May 28, 1830, ch. 148, 4 Stat. 411, 411.

⁴² ANGIE DEBO, *A HISTORY OF THE INDIANS OF THE UNITED STATES* 103 (1970).

⁴³ See GETCHES, *supra* note 25, at 204.

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These examples provide just a minuscule snapshot of the U.S. government's well-chronicled maltreatment of Native Americans.⁴⁵

B. *The Self-Determination Era: History Repeats Itself*

The current era, Self-Determination, has been in place since 1961.⁴⁶ The concept behind self-determination has been described as comprising a collection of norms that "include rights to cultural integrity, use of lands and natural resources, social welfare and development, self-government, and freedom from discrimination."⁴⁷ While this era is more "pro-Indian" than others, especially the Termination or Relocation Eras, case law and government practices indicate limited movement toward any true policy of self-determination. In fact, "[t]he Supreme Court has become more hostile to Native American interests in its resolution of issues of tribal self-determination, highlighting the dearth of secure footholds in judicial doctrine for Native American law."⁴⁸ The current judicial doctrines that courts apply in cases where tribal sovereignty is at issue do not take the Native American perspective into account.⁴⁹

Indicative of policy failures in this area is the current state of affairs related to the individual Indian money trust accounts ("IIM trust" or "trust"). The U.S. government, through the BIA, owes Native Americans millions of dollars that it is holding as the guardian of the trust.⁵⁰ The trust has been managed so poorly that millions of dollars are missing.⁵¹

⁴⁴ See Kevin J. Worthen, *Sword or Shield: The Past and Future Impact of Western Legal Thought on American Indian Sovereignty*, 104 HARV. L. REV. 1372, 1381 n.40 (1991) (reviewing ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT*).

⁴⁵ See, e.g., CHURCHILL, *supra* note 5; JOHN G. NEIHARDT, *BLACK ELK SPEAKS* (University of Nebraska Press 1995) (1932).

⁴⁶ See GETCHES, *supra* note 25, at xv.

⁴⁷ Note, *International Law as an Interpretive Force in Federal Indian Law*, 116 HARV. L. REV. 1751, 1757-58 (2003).

⁴⁸ Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 HARV. L. REV. 922, 922 (1999); cf. Note, *supra* note 47 ("Although the political branches have recently adopted policies that favor Indian tribal self-determination, the judicial doctrines defining the extent of inherent tribal sovereignty and the federal government's power over tribes remain severe obstacles for tribes seeking to govern themselves and maintain their cultural integrity.") (footnotes omitted).

⁴⁹ See *id.* (citing, inter alia, 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, 258-89).

⁵⁰ See *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 28 (D.D.C. 1998) (stating that there are as many as three hundred thousand individual IIM accounts totaling as much as four hundred fifty million dollars).

⁵¹ Douglas R. Nash & Christopher P. Graham, *Cobell v. Norton—Indian Trust Fund Management Litigation Takes Center Stage*, *ADVOCATE*, Mar. 2003, at 15 (stating that the IIM

To force a better accounting, a number of Native Americans filed class action lawsuits against the United States.⁵² The failures of the U.S. government have been shown throughout these cases. The government has proven completely ineffective even under the watch of the courts. Secretary of the Interior Bruce Babbitt was even held in contempt for his role in the continued inadequacy.⁵³ These repeated failures make clear the need for a new plan and a new way of thinking if Native Americans are to have the tools to reverse the centuries-long cycle of poverty and despair.

III. NORTH OF THE BORDER: THE CANADIAN EXPERIENCE

In 1992, the Canadian government set forth the Royal Commission on Aboriginal Peoples (“Commission”) to analyze and explore options regarding constitutional reform proposals “as they related to Aboriginal self-government.”⁵⁴ The goals of the Commission were to avoid an impasse in the process and to provide a basis for common understanding of the issues involved in any constitutional reforms.⁵⁵ While the Canadian Constitution in 1992 already had some provisions that make the debate different from that in the United States,⁵⁶ there are significant

trust law suits were initiated “on behalf of all present and past individual trust beneficiaries against the United States for failure to properly manage trust assets”).

⁵² See, e.g., *Cobell*, 30 F. Supp. 2d at 28.

⁵³ *Cobell v. Babbitt*, 37 F. Supp. 2d 6, 39 (D.D.C. 1999). During the contempt trial, it became clear that 162 boxes of relevant documents had been destroyed by the Treasury Department. Nash & Graham, *supra* note 51. The Departments of Interior and Treasury had to pay six hundred thousand dollars in penalties. *Id.* The Treasury Department continued its inadequacy, reporting in 2000 that more Indian trust documents had been destroyed. *Id.*

⁵⁴ ROYAL COMMISSION ON ABORIGINAL PEOPLES, THE RIGHT OF ABORIGINAL SELF-GOVERNMENT AND THE CONSTITUTION: A COMMENTARY preface (1992), available at http://www.ubcic.bc.ca/docs/Aboriginal_Self-Government.doc (last visited July 6, 2004). In the terms of reference, the Commission’s mandate described:

The Commission of Inquiry should investigate the evolution of the relationship among aboriginal peoples (Indian, Inuit and Metis), the Canadian government, and Canadian society as a whole. It should propose specific solutions, rooted in domestic and international experience, to the problems which have plagued those relationships and which confront aboriginal peoples today. The Commission should examine all issues which it deems to be relevant to any or all of the aboriginal peoples of Canada, and in particular, should investigate and make concrete recommendations

Id. at app., Sched. I.

⁵⁵ *Id.* at Introduction.

⁵⁶ See CAN. CONST. (Constitution Act, 1982) §§ 25, 35, 37; ROYAL COMMISSION ON ABORIGINAL PEOPLES, *supra* note 54, at Introduction, pt. 1.

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overlaps between Canadian and American experiences with native peoples. The Commission promoted six “conditions for successful constitutional reform” that provide a solid foundation upon which to build.⁵⁷

First, the Commission stated, “it is essential that the right of self-government be explicitly identified in the Constitution as inherent in nature.”⁵⁸ This principle is at the core of Aboriginal rights, and it is necessary to identify the source and the nature of those rights. The Commission recognized the competing view that “Aboriginal people have no rights of government except those that the Federal and Provincial governments are prepared to bestow upon them.”⁵⁹ This view is consistent with many U.S. cases, which followed the traditional discovery doctrine view that all rights flow from the government (originally the King).⁶⁰ Yet the Commission determined that the preferable view was that indigenous peoples are the “heirs to ancient and enduring powers of government that they brought with them into the Confederation and still retain today.”⁶¹

In particular, the Commission believed that the identification of the right to self-government as inherent would provide significant benefits as applied by the courts. The Commission argued that there were “important practical implications” found in the term “inherent”: “By clearly identifying the source and nature of the right, it gives courts and other interested parties a strong mandate to implement the right and significant guidance how to interpret it.”⁶² This identification of rights would limit the role of governmental intent in interpretation and instead return the focus to the traditional and contemporary views of the native peoples themselves.⁶³ The added benefit, recognizing the great diversity

⁵⁷ ROYAL COMMISSION ON ABORIGINAL PEOPLES, *supra* note 54, at Introduction, pt. 2.C.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See, e.g., *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543, 573 (1823) (“This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.”). But see Steven T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, Johnson v. McIntosh, and Plenary Power*, 20 N.Y.U. REV. L. & SOC. CHANGE 303, 325 (1993) (arguing that plenary power and the United States’ “absolute property rights” over Native American lands are religiously based concepts).

⁶¹ See ROYAL COMMISSION ON ABORIGINAL PEOPLES, *supra* note 54, at Introduction, pt. 2.C. Under this view, inherent rights are recognized in written documents like treaties and constitutions, but the source of the rights is the Aboriginal nation itself. *Id.*

⁶² *Id.*

⁶³ See *id.*

among native peoples, is that “the right may well assume different shapes in the various Aboriginal nations.”⁶⁴ Such a benefit should not be overlooked. Indigenous peoples have been treated consistently as though their worldviews and histories are one and the same; this could not be further from the truth.⁶⁵ Providing a mechanism for courts and other entities to apply nation-specific rights would be a tremendous step forward in the treatment of indigenous peoples.⁶⁶

Next, the Commission advocated the recognition of the scope of the inherent right as “circumscribed rather than uncircumscribed.”⁶⁷ This recognition would allow Aboriginal governments to coexist under the Constitution with the federal and local governments, all of which hold limited powers as defined by the Constitution.⁶⁸ Otherwise, the Commission recognized, Aboriginal governments would hold unlimited powers in all areas, including international relations and defense.⁶⁹ While failing to provide complete autonomy, describing the inherent rights as circumscribed provides a political and practical solution to the reality of the situation.

Third, the Commission advocated clear, though limited, sovereignty, allowing certain Aboriginal laws to take precedent over the laws of other governmental entities.⁷⁰ In some situations, Aboriginal laws would hold exclusive province; in other areas, federal or provincial laws would share overlapping jurisdiction.⁷¹ This is not a new concept for Canadians or Americans because of their federal systems of government.⁷²

Fourth, and perhaps most important, the Commission stated that any constitutional reform related to Aboriginal peoples must have “the full involvement and consent of the Aboriginal peoples.”⁷³ The

⁶⁴ *Id.*

⁶⁵ See Ward Churchill, *Naming our Destiny*, in CHURCHILL, *supra* note 5, at 291, 299-306 (describing Indian nations as having distinct and separate identities).

⁶⁶ In the United States, of course, there would likely be an Equal Protection Clause limitation on those “different rights” that could be recognized.

⁶⁷ ROYAL COMMISSION ON ABORIGINAL PEOPLES, *supra* note 54, at Introduction, pt. 2.C.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* This is a laudable goal, though perhaps a bit unrealistic. Getting consensus from any group of people is rare, and, as recognized earlier, the diverse set of beliefs and goals of the various native groups would likely make consensus impossible. Nonetheless, the underlying motivation behind this recommendation is right on point.

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Commission recognized “many regrettable instances” relating to changes in the rights and powers of Aboriginal peoples that proceeded without their consent or participation and often directly contrary to their expressed desires.⁷⁴ “This high-handed, unilateral approach is out of keeping with the basic constitutional relationship between Aboriginal nations and the Crown and departs from the consensual approach reflected, however imperfectly, in the numerous treaties concluded between Aboriginal nations and the Crown.”⁷⁵

Fifth, the Commission advocated that any explicit recognition of the inherent right of self-government should not diminish any already existing rights.⁷⁶ That is, any such new constitutional provision “should serve to enhance the rights already recognized.”⁷⁷ The Canadian Supreme Court has supported a view of an Aboriginal right of self-government,⁷⁸ and section 35 of the Constitution Act of 1982 may already recognize and affirm such a right.⁷⁹ The Commission thus recommended that any new initiative clearly support, and not undermine, this interpretation.⁸⁰

Lastly, the Commission stated that any new provision must be “justiciable as soon as it is passed, without a ‘transition period.’”⁸¹ This requirement necessarily follows from any constitutional recognition of an inherent right of self-government.⁸² Any “inherent” right should be available immediately.⁸³ Furthermore, any delay in justiciability may provide less than what is already provided by section 35 of the Canada Constitution.⁸⁴ Any delay would imply that such a right did not already

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See CAN. CONST. (Constitution Act, 1982) § 25; ROYAL COMMISSION ON ABORIGINAL PEOPLES, *supra* note 54, at Introduction, pt. 2.C.

⁸⁰ ROYAL COMMISSION ON ABORIGINAL PEOPLES, *supra* note 54, at Introduction, pt. 2.C.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* (“If the right of self-government is identified in the Constitution as inherent in its nature and origins, it is hard to see how its recognition in the courts can be delayed.”).

⁸⁴ See CAN. CONST. (Constitution Act, 1982) § 35; ROYAL COMMISSION ON ABORIGINAL PEOPLES, *supra* note 54, at Introduction, pt. 2.C.

exist, thus conflicting with criterion five of the Commission's conditions for successful reform.⁸⁵

The Commission's criteria provide a powerful starting point for any consideration of constitutional reform, especially in the United States. The recommendations are even more applicable because Canada's federal system provides several similarities to the U.S. federal system as it relates to native peoples. In Canada, the Commission's recommendations have led to continued discourse on the issue but have not led to any changes to Canada's constitution. The Commission appears to represent a more dedicated governmental response to the issue and has provided clear, forward-looking recommendations,⁸⁶ though to date they have led to little progress. However, the recommendations still provide a good place to start.⁸⁷

IV. FEDERALISM & DEVOLUTION: THE SCOTTISH SOLUTION

A new kind of federalism is now in place in Great Britain, a significant portion of which involves Scottish devolution and the creation of a new Scottish Parliament.⁸⁸ This new federalism, which Professor Colin Picker calls "graduated federalism,"⁸⁹ provides an intriguing possibility for determining how to provide increased sovereignty for Native Americans, while working within the federal system created through the U.S. Constitution. Furthermore, this Scottish solution provides an interesting perspective because of Britain's lack of a written constitution,⁹⁰ thus making such devolution an even more creative and unique approach.⁹¹

⁸⁵ See *supra* notes 75-79 and accompanying text; see also ROYAL COMMISSION ON ABORIGINAL PEOPLES, *supra* note 54, at Introduction, pt. 2.C (stating that "[t]his criterion follows directly from points already made").

⁸⁶ See ROYAL COMMISSION ON ABORIGINAL PEOPLES, *supra* note 54, at Introduction, pt. 2.D (providing four options designed to clear some of "the obstacles to fruitful constitutional negotiations . . . [and] to smooth the path to further exchanges between the parties, not to usurp their rightful place at the negotiating table").

⁸⁷ See *id.*

⁸⁸ Colin B. Picker, "A Light unto the Nations" – *The New British Federalism, the Scottish Parliament, and Constitutional Lessons for Multiethnic States*, 77 TUL. L. REV. 1, 7 (2002).

⁸⁹ *Id.* (stating that while Britain does not have any single document that acts as its constitution, there is still, in some sense, a constitution).

⁹⁰ *Id.*

⁹¹ VERNON BOGANDOR, DEVOLUTION IN THE UNITED KINGDOM 1 (Christopher Butler et al. eds., 1999) (calling Scottish devolution the "most radical constitutional change" in Great Britain since 1832).

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Beyond this, as a federal system, Britain, like Canada, offers structural parallels that can assist in the development of a plan for the United States. One of the primary purposes of federalism is to balance the interests of majority and minority populations.⁹² Clearly, this goal has not always led to the protection of minority rights in the United States.⁹³ But over time it has provided a framework within which to work. Though certainly not a panacea, the potential benefits of federalism apply to Native Americans as much as they apply to the Scottish or, for that matter, to African-Americans. As Professor Picker explains:

The idea of balancing [majority and minority interests], as opposed to fully resolving, the desires of people through devices of federalism may be better thought of as “conflict management” as opposed to “conflict resolution.” Though it should be noted that the “management” may serve only to postpone the inevitable escalation of the conflict, and may sometimes exacerbate the problem by encouraging other groups to agitate and, or in the alternative, seek separation. Federalism, as conflict management, has been used to deal with such conflict issues as, among others, religion, language, race, and culture. By allowing greater local control, these disparate interests can be accommodated, yet still maintain the state, even while encouraging or allowing diversity.⁹⁴

For these reasons, the new Scottish system offers some useful options that should be considered when looking for solutions in the United States.

Scottish devolution returned “Scottish representative democracy *in part* to where it stood almost three hundred years ago.”⁹⁵ The British

⁹² Picker, *supra* note 88, at 73.

⁹³ See, e.g., U.S. CONST. art. I, § 2, cl. 3 (providing the embodiment of the three-fifths compromise, which apportioned representatives and direct taxes based on the “whole Number of free Persons . . . [and] three-fifths of all other Persons [e.g., slaves]”); *Plessy v. Ferguson*, 163 U.S. 537, 548-49 (1896) (establishing the “separate-but-equal rule”), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1959); JOSEPH J. ELLIS, *FOUNDING BROTHERS* 17 (2000) (stating that although slavery was “clearly incompatible with the principles of the American Revolution,” slavery was removed from the agenda at the Constitutional Convention because it “threatened to disrupt the fragile union just as it was congealing”).

⁹⁴ Picker, *supra* note 88, at 73-74 (footnotes omitted).

⁹⁵ *Id.* at 33.

Parliament still holds significant powers, but the new Scottish Parliament “harkens back” three hundred years “in spirit if not in effect.”⁹⁶ This attempt to restore some form of self-control is what makes it such an intriguing example when considered as an option for Native Americans. It is unquestionable that three hundred years ago Scotland was a sovereign in the Anglo-Saxon tradition; Native Americans of the same time had drastically different forms of government. To some people this might indicate that the Scottish experience is inapposite in its application to Native Americans. But what the system provides—a way of returning a level of sovereignty to an underrepresented people—is exactly what is needed for Native Americans in the United States.

In 1997, after Tony Blair was elected British Prime Minister, devolution became an alternative for the Scots as an option via two referenda.⁹⁷ The referenda garnered strong support among the Scottish people.⁹⁸ This support led to the British Parliament’s passage of the Scotland Act of 1998 (“Scotland Act”), which created the Scottish Parliament.⁹⁹

One of the more significant powers the new Scottish Parliament enjoys is the power to tax.¹⁰⁰ This taxing power provides a significant “measure of freedom for the Scottish Parliament” and was viewed as a critical part of the early devolution process.¹⁰¹ The revenue-generating power, while providing an additional freedom, also required that the Scottish voters agree to pay for some of their newly found freedom.¹⁰² This is not to imply that Scotland is, in any way, a wholly-independent entity; there are significant restrictions on the powers of the Scottish Parliament. For instance, the taxing power is limited to tax increases or decreases of three percent.¹⁰³ This may lead to significant restrictions, and “it remains to be seen what will be the real financial impact on the

⁹⁶ *Id.*

⁹⁷ *Id.* at 42. Two referenda were presented to the Scottish electorate. *Id.* at 43. The first asked whether the people wanted a separate parliament; the second whether that parliament should have the power to tax. *Id.* at 43-44. Both referenda passed with more than sixty percent of the vote. *See id.* at 42 n.253.

⁹⁸ *Id.*

⁹⁹ Scotland Act, 1998, c. 46, § 1 (Eng.) (“There shall be a Scottish Parliament.”).

¹⁰⁰ *Id.* § 73.

¹⁰¹ Picker, *supra* note 88, at 43.

¹⁰² *See id.* at 44 (“[T]his was a case of asking the electorate whether they desired to pay more for real devolution, a perceived question of payment not normally put to the electorate (of course the vote was on the power to tax, not an actual tax increase itself).”).

¹⁰³ Scotland Act § 73.

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Scottish Parliament's ability to carry out its policies free from the budgetary constraints" of the British Parliament.¹⁰⁴

In addition, the Scottish Parliament lacks complete legislative sovereignty.¹⁰⁵ The Scottish Parliament is an inferior legislative body to the British Parliament in Westminster.¹⁰⁶ Though not directly analogous, this relationship is similar to that of the relationship between the U.S. government and the states.¹⁰⁷ Interestingly, the limitation on the legislative competency of the Scottish Parliament is limited only to those areas specifically reserved to the British Parliament.¹⁰⁸ Thus the Scottish Parliament retains residual powers; the "powers not reserved to Westminster are devolved to Scotland."¹⁰⁹

When devolution was proposed, executive powers, along with legislative powers, were thought to be among the powers that needed to be devolved.¹¹⁰ The Scotland Act provided for a similar Scottish Executive to that of the British Parliament.¹¹¹ The Scottish Executive is comprised of a Scottish First Minister, along with other ministers, all of whom are Members of Scottish Parliament ("MSPs").¹¹² The executive power is, in many ways, less independent than the legislative power, at least to the extent that many decisions, including who will ultimately lead the Executive, is not left in Scotland.¹¹³ For instance, the Queen appoints the First Minister from among the MSPs.¹¹⁴ Furthermore, the two leading judicial positions, Lord Advocate and Solicitor General, are

¹⁰⁴ See Picker, *supra* note 88, at 44-45.

¹⁰⁵ *Id.* at 45.

¹⁰⁶ Scotland Act § 28; see also Picker, *supra* note 88, at 45.

¹⁰⁷ Picker, *supra* note 88, at 45 (comparing Scotland Act § 28 to the Supremacy Clause of the U.S. Constitution).

¹⁰⁸ See Scotland Act sched. 5.

¹⁰⁹ Picker, *supra* note 88, at 45-46. The freedoms devolved to the Scottish Parliament provide an interesting contrast to the relationship between the U.S. government and the states. Compare Scotland Act sched. 5 (specifically detailing areas exclusively reserved for the British Parliament), with U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Yet, in some cases, the powers reserved by Westminster are similar to the those powers reserved "under the Interstate and Foreign Commerce Clauses of the Constitution and under the foreign affairs powers of the federal government." Picker, *supra* note 88, at 47 (citing U.S. CONST. art. I, § 8).

¹¹⁰ Picker, *supra* note 88, at 49.

¹¹¹ *Id.* at 48-49.

¹¹² Scotland Act §§ 44-51; Picker, *supra* note 88, at 48.

¹¹³ See Scotland Act §§ 44-51.

¹¹⁴ Scotland Act §§ 45-46; see also Picker, *supra* note 88, at 49 (noting that the Queen appoints a First Minister "upon the nomination of the Parliament following a vote of the MSPs after an election or resignation or other vacancy").

appointed by the Queen and, unlike the other members of the Scottish Executive, cannot be removed by the First Minister.¹¹⁵ “Only the Queen, and hence Westminster, may terminate their positions.”¹¹⁶

Despite some clear limitations on sovereignty, in just a few years the Scottish Parliament has passed more than thirty laws, indicating that “Scottish representative democracy is alive and well and able to focus on ‘Scottish solutions for Scotland.’”¹¹⁷ It remains to be seen whether the Scottish Parliament and Scottish Executive will be willing to lead independently on difficult issues, thus exposing themselves to inevitable backlash.¹¹⁸ But all early indications point to a willingness to embrace the newly devolved power for the benefit of the Scottish people.¹¹⁹

V. REWRITING HISTORY: THE PROBLEMS OF A NEW AUSTRALIAN CONSTITUTION

Australia’s history with its Aboriginal predecessors parallels that of the United States in many ways. For instance, Australia has gone through policy periods that roughly mirror those of the U.S. government.¹²⁰ In the colonial period, the Australian government followed a policy of eradication, which included “waterhole poisonings, shootings, massacres and other savagery.”¹²¹ The next era, well into the nineteenth century, involved a policy of protection.¹²² This era was influenced, in part, by a need for an inexpensive and available workforce.¹²³

Beginning around 1937, the Australian government adopted an assimilation policy, followed by an integration policy in the early 1960s.¹²⁴ Furthermore, the ability to vote in federal elections was not granted to the Aborigines until 1962; it was not until 1965 that all six Australian states granted franchise rights to all citizens, regardless of race.¹²⁵ Finally, a policy of multiculturalism was adopted, politically and

¹¹⁵ Scotland Act § 48; Picker, *supra* note 88, at 50.

¹¹⁶ Picker, *supra* note 88, at 50.

¹¹⁷ *Id.* at 52-53.

¹¹⁸ *Id.* at 52.

¹¹⁹ *Id.*

¹²⁰ Rick Sarre, *Critical Perspectives of Native People: The Imprisonment of Indigenous Australians: Dilemmas and Challenges for Policymakers*, 4 GEO. PUB. POL’Y REV. 165, 167 (1999).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

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legally, in the last fifteen years.¹²⁶ The goals of this policy are self-determination and self-management,¹²⁷ similar to the stated goals of current U.S. policy.

Yet the purported governmental policy does not appear to be the policy of the majority of Australians. A referendum held to determine whether to recognize officially the status of the Aborigines as Australia's "first people" was soundly defeated in 1999.¹²⁸ The proposal, which garnered only forty percent of the vote, included adding a new preamble to Australia's constitution.¹²⁹ Interestingly, there is some sentiment that the Aborigines were not particularly fond of the preamble as presented.¹³⁰ This sentiment is understandable. In a press release, Prime Minister John Howard stated: "The legislation will contain a clause declaring that the preamble has no legal force or effect and cannot be invoked in the interpretation of the Commonwealth Constitution."¹³¹

¹²⁶ See Aboriginal and Torres Strait Islander Commission Act (1989) (Austl.), available at http://www.austlii.edu.au/au/legis/cth/consol_act/aatsica1989478/ (last visited July 6, 2004).

¹²⁷ See Sarre, *supra* note 120, at 168.

¹²⁸ *Australia Rejects Republic*, BBC NEWS (London), Nov. 6, 1999, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/507293.stm> (last visited July 6, 2004).

¹²⁹ *Id.* The proposed preamble read as follows:

With hope in God, the Commonwealth of Australia is constituted as a democracy with a federal system of Government to serve the common good. We the Australian people commit ourselves to this Constitution. Proud that our national unity has been forged by Australians from many ancestries; never forgetting the sacrifices of all who defended our country and our liberty in time of war; upholding freedom, tolerance, individual dignity, and the rule of law; honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country; recognising the national building contribution of generations of immigrants; mindful of our responsibility to protect our unique natural environment; supportive of achievement as well as equality of opportunity for all; and valuing independence as dearly as the national spirit which binds us together in both adversity and success.

Id.

¹³⁰ *No Official Recognition for Aborigines*, BBC NEWS (London), Nov. 6, 1999, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/507377.stm> (last visited July 6, 2004). Kim Beazley, the Labor opposition leader stated the following: "None of the indigenous people it seemed to me particularly wanted the way in which they were referred to in the constitution. So I doubt whether they'll be feeling a deep sense of loss tonight." *Id.*

¹³¹ Press Release, John Howard, Prime Minister of Australia, Preamble to the Constitution (Mar. 23, 1999), available at http://www.pm.gov.au/news/media_releases/1999/preamble.htm (last visited July 6, 2004).

Apparently, despite indications to the contrary, there was some fear that the courts would use the preamble.¹³²

This referendum also included a vote on a separate issue: Whether Australia would “break ties with the British monarchy and become a republic.”¹³³ This kind of controversy is hard to imagine in the United States, given that U.S. independence began with a sudden break from British control.¹³⁴ The concept of any British control, however small, is unthinkable to most Americans.¹³⁵ It appears, though, that having a British Head of State is less offensive to the Australian people than allowing their parliament to choose their leader; the majority, it seems, prefers a direct election or no change at all.¹³⁶

On the other hand, the Australian constitutional amendment process is very similar to that of the United States in the sense that it is extremely difficult to change.¹³⁷ The process requires a nationwide majority vote, along with a majority in four out of six states.¹³⁸ Only eight of the forty-four referenda have succeeded, none of which were on contentious issues.¹³⁹ The defeat of the preamble was a lost opportunity “to define the nation as it recognised the contribution of immigrants, the sacrifices of soldiers, and the historical role of Aborigines in creating a free and

¹³² See ARTHUR TUCK, *Republic or Constitutional Monarchy?*, at <http://www.angelfire.com/id/ronajoyner/tuckvote.html#Offer> (last visited July 6, 2004) (stating that, according to Sir Harry Gibbs, a retired Chief Justice of the High Court, the preamble would be used by the High Court and the United Nations “to undermine or destroy our system of land title in unforeseen ways”).

¹³³ *Australia Rejects Republic*, *supra* note 128. This proposal was defeated 54.22% to 44.87%. *Id.* The proposal stated:

Do you agree with “A proposed law to alter the constitution to establish the Commonwealth of Australia as a Republic with the Queen and Governor General being replaced by a President appointed by a two-thirds majority of members of the Commonwealth Parliament?”

Id.

¹³⁴ See, e.g., Ellis, *supra* note 93, at 5 (“The creation of a separate American nation occurred suddenly rather than gradually, in revolutionary rather than evolutionary fashion . . .”).

¹³⁵ See Seth Mydans, *Sydney Journal*; and *Elizabeth Windsor Is Still the Strong Favorite*, N.Y. TIMES, Nov. 5, 1999, at A4 (“Now neither Britain nor the United States would think of having an Australian as head of state.”) (quoting Gerard Henderson, executive director the Sydney Institute).

¹³⁶ See *id.* (reporting that a minority of the Australian population are “monarchists,” but that the vote failed because a large majority wanted to elect the Head of State directly, not via Parliament).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

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tolerant democracy.”¹⁴⁰ A similar opportunity is lost every day that the United States fails to recognize formally the wrongs perpetrated on Native Americans in the past and fails to act to improve the current treatment of Native Americans. It is this lesson that we should take from the Australian experience. If not, the consequences could be significant.¹⁴¹

VI. PROPOSED SOLUTIONS

A. *The Need for a New Era*

In order to move forward, the time is right for a new approach to Native American policy, using new, if largely symbolic, language that embodies this policy shift and the dawn of a new era. The new era would be called Self-Domination to highlight the need for Native Americans to control their future. Domination, defined as the “exercise of preponderant, governing, or controlling influence,”¹⁴² is more appropriate than “determination” in describing what should be the policy goals of the courts and legislatures. In many ways, any “new era” would be a largely semantic change, at least short of any new legislation or constitutional amendment. But often a change in language can be a precursor to new legislation and judicial doctrines that will lead to real change for those affected. At this point, it may be that a change in language is the first realistic step in the process of improving the autonomy of Native Americans.

Furthermore, a new era is necessary because of the gross ineffectiveness of the Self-Determination Era. This ineffectiveness, coupled with neglect and mismanagement by the government, is largely tied to a lack of sufficient Native American control over Native

¹⁴⁰ See K.P. Waran, *Link to the Monarchy at Stake*, NEW STRAITS TIMES (Malay.), Nov. 6, 1999, at 10 (providing the statements of Aden Ridgeway, Australia’s only Aboriginal politician). *But see id.* (“Opponents of the preamble include several Aboriginal leaders who have called for stronger terms than ‘deep kinship’ to recognise Aboriginal ownership of the land.”).

¹⁴¹ Cf. Kathy Marks, *Aboriginal Protests May Turn Violent, Says Leader*, INDEPENDENT (London), Sept. 8, 2000, at 14 (“In protest situations you are always going to have a volatile situation which may have the capacity to go out of control.”) (quoting Geoff Clark, chairman of the Aboriginal and Torres Strait Islander Commission, Australia’s biggest indigenous body). In no way is this meant to imply that a Native American riot is around the corner. It is merely a recognition that the longer people live under the control of an unsympathetic government, the more likely violent confrontation is to occur.

¹⁴² MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 344 (10th ed. 1996).

American affairs.¹⁴³ Current policy gives Native Americans insufficient control, effectively limiting their ability to find lasting solutions.

B. Judicial Doctrine

Next, current judicial doctrine can promote a judicial change in attitude toward Native Americans. This change in attitude should lead the courts to revisit some of the definitions and descriptions from cases in which decisions were made on highly biased and dubious grounds.

For instance, Congress's plenary power has been reduced somewhat over time¹⁴⁴ through the courts' application of the trust doctrine.¹⁴⁵ At times, the trust doctrine has led to interpretations of treaties and statutes in ways favorable to Native Americans.¹⁴⁶ "However, the modern Court relies less on the canons [of construction] and sometimes interprets old statutes and treaties according to perceptions of contemporaneous (and racist) government officials."¹⁴⁷ Furthermore, interpretations of old treaties and statutes using "contemporaneous views" invariably mean the views of the white-male majority of the time period, not of all the parties involved.¹⁴⁸ For Native Americans, treaties were sacred, fulfilling "a divine command for all the peoples of the world to unite as one."¹⁴⁹ For the "Indians of the Classical Era," treaties were often about life and death, and they regarded treaties as such. The goals of these Native Americans included the following: ensuring a "lasting peace after the shedding of blood, quelling the desire for revenge, being assured that a military ally would respond quickly to a call for help," and finding trustworthy trading partners.¹⁵⁰ If courts are going to use the views of the original era to interpret old treaties, the entire picture must be considered. Treaties are inherently two party documents; to look only at the judges or the generals or the Congress of the time leaves half of the story untold. Native Americans deserve the benefit of their bargain.

¹⁴³ See *supra* Part II.B.

¹⁴⁴ See Note, *supra* note 47, at 1753.

¹⁴⁵ See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831) (providing an early example of the trust doctrine).

¹⁴⁶ See Note, *supra* note 47, at 1753-54 (citing *Winters v. United States*, 207 U.S. 564, 576-77 (1908); *United States v. Winans*, 198 U.S. 371, 380-81 (1905); *Ex parte Crow Dog*, 109 U.S. 556, 570-72 (1883)).

¹⁴⁷ *Id.* at 1754.

¹⁴⁸ See *Williams*, *supra* note 26, at 991.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 992.

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Additionally, international law doctrine should be considered when courts interpret laws or statutes pertaining to Native Americans. The “international standard-setting process,” through which states draft international treaties and human rights agreements, can assist in determining congressional intent.¹⁵¹ For example, the U.S. government has participated in the process, worked with tribes in creating various documents, and expressed a commitment to Native American self-determination.¹⁵² These should all be considerations when a court determines the rights of Native Americans.¹⁵³

C. Current Constitutional Options

Third, the Constitution itself, especially the Indian Commerce Clause and the Fourteenth Amendment, can provide additional motivation to change judicial and legislative policy toward Native Americans. Though it is not without controversy, it has been said, “Indian tribes, of course, constitute a third domestic sovereign entity recognized by, but predating, the U.S. Constitution.”¹⁵⁴ This is probably correct.

For example, from the outset, Justice John Marshall set limits on tribal sovereignty,¹⁵⁵ but recognized Indian tribes as “domestic dependent nations.”¹⁵⁶ For about “150 years, . . . the presumption remained that tribal sovereignty extended to all preexisting tribal powers, unless those powers were abrogated by federal treaty or statute.”¹⁵⁷ Despite changes and reductions over the years in tribal sovereignty, the Supreme Court’s federal Indian law until the late 1970s still seemed to apply “a presumption in favor of tribal sovereignty.”¹⁵⁸ The courts should return to this presumption, returning to Native Americans some of the limited rights that were available in even less-enlightened times.

¹⁵¹ See Note, *supra* note 47, at 1764.

¹⁵² *Id.*

¹⁵³ See *id.*

¹⁵⁴ Stephen J. McHugh, *The Integration of State Private Law in Federalized Fields of Law: The Case for Federal Common Law*, 74 DENV. U. L. REV. 207, 214 n.32 (1996).

¹⁵⁵ Catherine T. Struve, *How Bad Law Made a Hard Case Easy: Nevada v. Hicks and the Subject Matter Jurisdiction of Tribal Courts*, 5 U. PA. J. CONST. L. 288, 290 (2003).

¹⁵⁶ See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

¹⁵⁷ Struve, *supra* note 155, at 290-91.

¹⁵⁸ *Id.* at 291-92.

D. *The Amendment Option*

Finally, though obviously more academic than practical at this point, a constitutional amendment could promote Self-Domination and, hopefully, a more fruitful existence for Native Americans. Such an amendment could be as simple as drafting language to define specific rights of Native Americans, thus dictating the approach the courts and legislature should take in setting policy. This could lead to an amendment that would be arguably a tautology, much like the Tenth Amendment.¹⁵⁹ However, given the continuing struggles and unique role of Native Americans in U.S. history, such an amendment would secure, in a small but significant way, recognition of North America's indigenous peoples that has been severely lacking since before the drafting of the Constitution. Any drafting of such language must involve Native Americans, as we have learned from the Australian experience¹⁶⁰ and the Canadian Commission's research.¹⁶¹

Another issue of concern is the issue of sovereignty. It has been long established, and regularly repeated, that Native American tribes are a sort of dependent sovereign.¹⁶² Native Americans "remain a 'separate people, with the power of regulating their internal and social relations.'"¹⁶³ Furthermore, "[t]hey have power to make their own substantive law in internal matters."¹⁶⁴ As discussed earlier, this is extremely misleading because Congress, at any time, has power over virtually all Native American rights. "Supreme Court case law repeatedly creates and then recognizes the enormity of the 'plenary' federal power over the Indian tribes."¹⁶⁵ The Termination Era represents a good example of Congress exercising its power. "Termination stands

¹⁵⁹ See *New York v. United States*, 505 U.S. 144, 156-57 (1992) ("The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology."); cf. U.S. CONST. amend. X.

¹⁶⁰ See *supra* Part V.

¹⁶¹ See *supra* notes 73-75 and accompanying text.

¹⁶² See, e.g., Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 696 n.116 (1989); cf. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 580 (1832) ("At no time has the sovereignty of the country been recognized as existing in the Indians, but they have been always admitted to possess many of the attributes of sovereignty. All the rights which belong to self government have been recognized as vested in them.").

¹⁶³ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (quoting *United States v. Kagama*, 118 U.S. 375, 381-382 (1886)).

¹⁶⁴ *Id.*

¹⁶⁵ Resnik, *supra* note 162, at 693.

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as a chilling reminder to Indian peoples that Congress can unilaterally decide to extinguish the special status and rights of tribes without Indian consent and without even hearing Indian views."¹⁶⁶

To have any sovereignty, some sovereignty must be guaranteed. The states, for instance, are often considered sovereigns of sorts, but under the Constitution, they are clearly subordinate to the federal government.¹⁶⁷ Despite this subordinate relationship, the states do have some, albeit indirectly, recognized rights in the Constitution. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, *are reserved to the States* respectively, or to the people."¹⁶⁸ While this power is often recognized as a tautology, nonetheless, the mere existence of the Tenth Amendment provides for a certain amount of interpretive deference. Though not recently, the courts have applied the Tenth Amendment "to prove that states reserved all nondelegated powers."¹⁶⁹ Thus the Tenth Amendment is, if nothing else, a reminder that federal government power over the states was not meant to be absolute.

Despite the difficulties in drafting and passing a constitutional amendment, the effort could be time well spent. For one thing, generating a real and focused discourse about Native American rights has value. Such a discourse has the potential to inspire, motivate, and reenergize a culture that has been long ignored. It would also likely inflame and open old wounds, but that is part of the healing process. By taking a close look at what rights should be guaranteed to those that occupied the land now known as the United States and attempting to guarantee such rights, the people of the United States would be taking a long overdue step toward formal recognition of the great cost that was borne by the Native Americans in the name of progress.

To suggest exactly what kind of language should be used for such an amendment is premature. The process must include Native peoples from a variety of backgrounds, historians to assist the majority in understanding what was already promised and never delivered, and politicians because this is inherently a political process. The proposed language should create a clear place for Native Americans in the

¹⁶⁶ GETCHES, *supra* note 25, at 204.

¹⁶⁷ See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the land . . .").

¹⁶⁸ *Id.* at amend. X. (emphasis added).

¹⁶⁹ Alfred L. Brophy, Note, *Let Us Go Back and Stand upon the Constitution: Federal-State Relations in Scott v. Sandford*, 90 COLUM. L. REV. 192, 198 n.37 (1990).

Constitution, and thus in this country. Some have argued that this already exists. Professor Resnik has argued that “[t]he U.S. Constitution appears to recognize tribes as having a status outside its parameters, as entities free from the taxing powers of states and of the federal government and with whom the federal government shares commercial relations and makes treaties.”¹⁷⁰ Some Native American legal scholars have argued that “the net result is constitutional recognition of a third domestic sovereign, while others describe the relationship as existing outside the Constitution.”¹⁷¹ Regardless, constitutional recognition of a “third domestic sovereign” by the founders has been ignored to the point that a constitutional amendment is necessary to reinforce and guarantee any rights that may or may not exist at this time.¹⁷²

VII. CONCLUSION

This Article has proposed the following changes to improve the ability of Native Americans to control their own destiny: a change in governmental and judicial policy from Self-Determination to Self-Dominance; the use of judicial doctrine, including international law interpretations, to promote an increased recognition of tribal rights; a return to the early constitutional-based view of a presumption of tribal sovereignty; and the passage of a constitutional amendment to guarantee tribal rights and influence judicial interpretation of already existing rights. These recommendations, all in some way linked to constitutional interpretation or change, will not make every Indian well-educated, well-fed, and independent. They would not necessarily make any visible changes for generations, but that is to be expected. Significant cultural change takes time.

Before the white man landed on the shores of the so-called New World, Native Americans lived vibrant, if at times difficult, lives for centuries. Unquestionably, the indigenous peoples were self-sufficient and independent. While it seemed to happen quickly, the near-

¹⁷⁰ Judith Resnik, *Multiple Sovereignties: Indian Tribes, States, and the Federal Government*, 79 JUDICATURE 118, 118 (1995).

¹⁷¹ *Id.*

¹⁷² Of course, any amendment that is drafted should be crafted in a manner that will ensure that any Native American rights that already exist remain intact. In no way should any proposed change reduce the limited rights Native Americans may have already secured. See *supra* notes 63-67 and accompanying text (discussing the Commission’s recognition that some rights may be guaranteed already to the indigenous people of Canada through section 35 of Canada’s constitution and that any such rights should not be altered by constitutional amendment).

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destruction of Native American culture took hundreds of years from the day Columbus first arrived. It will take generations to rebuild any semblance of the autonomy that Native Americans once had.

Native Americans are resilient. They have survived, with at least part of their culture intact, through attempts to terminate their existence entirely. It is time for the United States to open a dialogue and make some changes. Most U.S. citizens recognize that Native Americans hold a unique place in the United States and the world; they recognize that Native Americans have suffered greatly in the development of the country. The time has come for the people of the United States to recognize formally and explicitly the rightful place of this nation's first inhabitants within the Constitution and to allow Native Americans the means to a continued and fruitful existence.