The Contemporary Revival and Diffusion of Indigenous Sovereignty Discourse

Erich Steinman

Introduction

The concept of sovereignty currently dominates Indigenous affairs in the United States.[1] The advancement and defense of sovereignty is quite arguably tribal nations' number one agenda, and sovereignty is a persistent focus of tribes' political, economic, legal, and social action. Sovereignty undergirds tribal gaming, natural resource management, and a wide variety of jurisdictional and political powers. Today, federal policy explicitly affirms Indian sovereignty, and support for tribal self-government is at the center of federal Indian policy.

It is thus somewhat surprising that as recently as 1970 sovereignty was virtually absent from public discussion and dialogue regarding Indian affairs and tribal issues—and had been so in the decades immediately preceding the 1970s. Notably, as one small indicator, the term doesn't appear in the special issue of the *Midcontinental American Studies Journal* on "The Indian Today" published in 1965 (Levine and Lurie 1965). Even into the early 1980s, the term was absent from any contemporary federal public policy declarations. Neither the general public nor federal (or state) policymakers prior to the 1970s conceived of tribes through a sovereignty framework, and thereafter did so only slowly.

This relative absence of tribal sovereignty in public discussion and federal policy in the decades prior to the contemporary era did not reflect the con-

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sciousness and understandings among many tribal communities. Although they suffered under the stifling control of the Bureau of Indian Affairs (BIA), tribal members sustained conceptions of their own sovereignty. Participants at the historic 1961American Indian Chicago Conference expressed, through their desire for more self-determination, the resiliency of a sovereignty framework, even though it did not utilize the language of sovereignty itself (American Indian Chicago Conference 1961). While for the most part the concept of sovereignty was not publicly expressed, some tribes publicly and emphatically voiced assertions of sovereign nationhood status in the middle decades of the twentieth century.[2] Such claims received little favorable response or attention from the non-Indian world; in the absence of a framework through which to interpret such claims, they were largely incomprehensible to non-Indians. Thus while many tribal members conceived of their tribes as sovereign nations, and this conception, in turn, fueled a more generalized desire for self-determination, this perception was seldom embraced by the non-Indian society around them.

How is it that sovereignty has become the dominant and ubiquitous framework for Indigenous issues in the United States? This article addresses this puzzle through a focus on the emergence of *sovereignty talk*. Underlying the approach is the belief that discourses—clusters of associated concepts and language—enable and constrain ways of thinking and acting. A variety of theoretical approaches in the social sciences and humanities affirm that discourse shapes and/or reflects patterns of behavior.[3] Varying discourses provide different concepts and logics through which individuals define themselves, interpret the world, and identify courses of action. Thus this article attempts to contextualize and account for the striking contemporary emergence of sovereignty *discourse*; that is, how Indigenous issues have come to be discussed, considered and evaluated through the prism and talk of sovereignty. I attempt to account for the increased attention to sovereignty within Native communities, and the diffusion of the concept of tribal sovereignty beyond Native communities.

For a number of reasons, I focus on the emergence of sovereignty talk within the public policy discourse of the federal government in particular. One reason for this focus is the centrality of federal policy discourse in the arena of Indian affairs in the United States. In the continuing colonial context, federal Indian policy discourse has predominant influence in setting the terms through which Indian nations are perceived and treated. The discourses of federal Indian policy enable and constrain the policy options considered by policymakers and shape the perceptions of the public. They also influence tribal self-conceptions, the public talk tribes engage in, and the types of claims tribes make. Given its centrality, changes in federal policy discourse present a clear indicator of shifting discourse, and also serve to legitimate and further spread new discourse. Thus while I will discuss at length the influence of Native actors in generating the renewed sovereignty discourse, I will most centrally highlight their impact on federal policy discourse in particular. As the previous comments suggest, Indigenous impacts on federal policy discourse are not only an important sign of

change, but also an important mechanism for spreading new discourses to an expanding range of parties: other state actors, the public, media, and importantly, additional Indigenous communities. The emergence of a sovereignty discourse in federal policy has spurred continuing Indigenous political revitalization and invited new claimsmaking by tribal communities, producing a cascading effect of proliferating sovereignty talk.

In response to U.S. colonialist conceptions, tribes have both actively resisted and reformulated various federal policy discourses. Given the federal government's cultural authority and resources, and its domination over tribes, it has been a vastly unequal struggle. So long as tribal survival kept Indigenous discourses alive, however, the possibility of influence flowing in the opposite direction, from Indigenous discourses to federal policy discourses, has remained a plausible, albeit challenging, means of resistance, survival, and decolonization. Indeed, given the extreme power inequalities and the U.S. repression of any direct challenges to federal domination,[4] influencing the discourse of federal Indian policy has certainly appeared as a more promising avenue of change.

This article will argue that the contemporary emergence of sovereignty as the focus of Indian affairs is the result of a sustained, though not necessarily coordinated, effort by Indigenous leaders to revitalize sovereignty as both discourse and as practice. While both discourse and practice are fundamentally intertwined, the article will limit its focus to the former; I will discuss the revitalized practice of sovereignty (and in particular, nation-building) primarily in terms of its role in revitalizing discourse. My argument will emphasize the gradually successful Indigenous efforts to (re)insert a discourse of tribal sovereignty into federal policymaking.

To be fully appreciated, these contemporary developments must be placed in a historical context. To begin the analysis, I present a historical narrative of U.S. political and legal recognition of tribal sovereignty. Given the centrality and complexity of this history, this is the largest section of the article.[5] My narrative emphasizes the *discontinuities* in the de facto U.S. recognition of tribal sovereignty. While the events I refer to in my narrative are well-established and uncontroversial in historical scholarship, my interpretation of the overall pattern they constitute, and in particular my focus on the lapses of federal recognition of tribal sovereignty, is somewhat unconventional. Many historical summaries emphasize the continuous nature of federal recognition of tribal sovereignty. Such continuity narratives generally focus on legal agreements and interpretations. They highlight treaties between the federal government and Indian nations and a corresponding lineage of rulings recognizing the principal of tribal sovereignty as enunciated in the 1820s and 1830s by Supreme Court Justice John C. Marshall.[6] The continuity narrative is internally complicated, however, by a lineage of legal rulings that deny tribal sovereignty (Wilkinson 1987; see below).

More at odds with the continuity narrative are numerous public policies adopted by the federal government since treaty making and the Marshall rul-

ings. As scholars in many disciplines have amply documented, the executive and legislative branches of the federal government have frequently created policies that have diminished or simply ignored tribal sovereignty. When actions in both the legal and policymaking arenas are taken into account, as well as both de jure and de facto actions, the historically uneven and inconsistent federal recognition of tribal sovereignty becomes evident. While there are understandable reasons for the frequent promotion of the continuity thesis,[7] this historical narrative masks more complex dynamics necessary to understanding the current situation. Taking into account the federal inconsistency regarding tribal sovereignty is crucial to understanding both the absence of sovereignty discourse in public policymaking (and in other arenas) in the decades preceding the 1970s and the dramatic revival of sovereignty discourse since then.

Following the historical narrative of tribal sovereignty in federal policy and law, the article then addresses the prevalence of tribal sovereignty in contemporary federal policy discourse. My interpretation of the causes and process that led to this development is somewhat unconventional. Unlike most descriptions, I argue that the embrace of sovereignty was neither intended nor made inevitable by the policy of Indian self-determination pronounced by President Richard M. Nixon in 1970. Indeed, for the first thirteen years of the policy there was self-determination *without* explicit recognition of tribal sovereignty. I contend that federal policymakers' recent adoption of sovereignty discourse, and through this the policy legitimization of tribal sovereignty, was a contingent outcome. These developments resulted from tribal leaders' persistence in asserting tribal sovereignty as the vague self-determination policy was being implemented. In the context of confusion and contradiction regarding both the contemporary status of Indian tribes and the parameters of the self-determination policy, tribal leaders aggressively and persistently attempted to introduce tribal sovereignty into federal policy discourse.

Thus, when in 1983 President Ronald Reagan explicitly affirmed tribal sovereignty, he broke new ground; since then tribal sovereignty has gradually become a taken-for-granted aspect of federal Indian policy discourse. This expansion of the sovereignty framework within federal policy has in turn further multiplied and amplified sovereignty talk by tribes and other actors in a variety of public (and private) arenas. While the federal adoption of tribal sovereignty discourse is only one part of these broader developments, it is unquestionably a crucial aspect. To foreground these contemporary changes, I now turn to their historical contextualization.

Tribal Status and the Discontinuity of Tribal Sovereignty in Federal Discourse

To make sense of the disappearance and reappearance of sovereignty in federal policy discourse requires attention to two aspects of U.S. Indian policy history. The first of these is the infamously vacillating nature of federal policy,

which has swung between opposing themes of separatism and assimilation. The second aspect is the variation in the perceptions of tribal status conveyed by these changing policies. The significance of this second aspect has received minimal explicit scholarly attention to date. By status, I refer to the categorical quality of tribes: i.e., the quality addressed by the question, "What type of social entity are tribes?" As federal officials' perceptions of tribal status changed over time, so too did the language with which they referred to tribal issues. More concretely, the historically varying federal answer(s) to the question, "What are tribes?", have differentially served to encourage or discourage discourses of sovereignty as fitting or, conversely, as inappropriate, for framing tribal issues. I address these two aspects in turn, first briefly describing the overall federal policy vacillation before identifying the categories through which tribes have been conceived in federal policy and legal interpretation, respectively.

Federal Policy Swings: Assimilation and Separatism

In an initial period (1770s-1820s, and for tribes further west, arguably until 1871[8]) the United States dealt with tribes as international sovereigns, engaging in diplomacy and making treaties when not in armed conflict. Through treaties with the United States, tribes renounced relations with other sovereign nations, relinquished claims to specified land, and accepted affiliation with the United States in exchange for peace and guarantees of land, rights, and assistance. In subsequent historical periods, separatism and assimilation were alternately pursued by the United States as American colonization of the continent expanded. Separatism was followed through removal (1830-1850s) and reservation (1850s-1890s) policies that respectively moved tribes westward and into discrete (and less desirable) tracts of land. Beginning in the 1870s, assimilation became ascendant through a variety of land, educational, and other policies, most notably the 1887 Dawes Act[9] breaking up tribal ownership of reservation land. This effort lasted until the 1930s, when a policy of cultural, social, and political tribal revitalization was implemented through the 1934 Indian Reorganization Act (IRA),[10] which allowed tribes to restore Indian land or create new reservations, hire attorneys, receive loans for economic development, and most controversially, to adopt constitutions.[11] After World War II another wave of assimilation policies emerged to reverse this emphasis on separatism and Indian self-rule. Known as "termination" because selected Indian tribes were involuntarily terminated and could no longer receive federal recognition and benefits,[12] this policy also included the selective expansion of state jurisdiction over tribes[13] and a relocation program to depopulate reservations. Since 1970, as noted above, the federal government has denounced termination and formally adopted a policy of supporting tribes to choose their own path, a policy known as "self-determination."

The Categorization of Tribes in Federal Policies

Federal officials have explicitly or implicitly conceived of tribes in a number of identifiable ways. Federal policymakers (i.e., executive and legislative branch officials, including administrators) have formally and informally conceived of and treated tribes as *sovereign nations* represented by governments; *conquered peoples/wards*; *minorities*; and as *rights-holders*. Similar conceptions are also perceptible in Supreme Court rulings and the judicial branch more generally. While these various categories are not necessarily mutually exclusive—and indeed, their utilization has historically overlapped—each of these differentially functions to legitimate or discredit the saliency, or indeed the basic intelligibility, of sovereignty in relation to Indigenous people. In the earliest periods of treaty relations between the fledgling United States and tribes, the latter were treated as sovereign nations represented by governments. Even in this period, however, there was uncertainty by state and federal officials about the propriety of treating tribes as sovereign nations, uncertainties that expanded after the War of 1812 strengthened the military and geopolitical position of the United States (Prucha 1994, 44, 129, 153-154). Indeed, between 1827 and 1840 there were extensive debates in Congress on tribal status and treaties (Prucha 1994, 156-161). Stimulated by the state of Georgia's demands to forcibly expel the Cherokee even though a treaty guaranteed their claim to the land, the debate became moot when the U.S. Army forced the Cherokee on the "Trail of Tears" in 1838.

As the United States forced more tribes westward and onto reservations throughout the next few decades, it became harder to perceive recognition of tribal sovereignty in federal Indian policies. Soon after the end of treatymaking in 1871, assimilation policies were institutionalized in the Dawes Act (1887), which promoted individualized reservation property ownership. Because sovereignty is a collective property, such efforts to assimilate tribal members and break up tribal collectivities were inherently antithetical to and undermined tribal sovereignty. While sovereignty was part of policy discourse in the 1830s, by the latter part of the century the perception of tribes as Indian nations was fading; sovereignty was increasingly absent from public policy and broader public discourse regarding Indians (Prucha 1994, 353-359).

In the place of national conceptions, tribes came to be viewed as conquered peoples and relatedly as wards of the state in both federal policy and Supreme Court rulings (see Wilkins and Lomawaima 2001, 19-97). Such perceptions overlooked the fact that most treaties (which were often treaties of peace and friendship rather than of surrender, per se) affirmed the continuing independent or semi-independent existence of tribes. The reality of deepening U.S. domination of tribes via the Bureau of Indian Affairs thus overrode the original political and legal agreements. While the U.S. government in general did not cease providing payments and services guaranteed by treaties, it increasingly cast these as part of its obligation to people it now ruled over rather than as part of an

exchange with a sovereign nation. In that the newly dominant conceptions of tribes as conquered peoples and wards of the state were incompatible with independent nationhood status, sovereignty talk was all the more completely expunged from policy discourse as well as public talk. The concept of "wards" replaced that of "nations" in operative federal frameworks.

In 1924, Congress unilaterally extended U.S. citizenship to all tribal members living within the boundaries of the United States, including both those residing on reservations and those retaining tribal membership.[14] Citizenship status further encouraged emergent conceptions of tribes and their members as an ethnic or racial minority. Concern about the loss of Native cultures had generated concern about Indians in the first decades of the twentieth century. The minority conception also dovetailed with the notion of the "vanishing Indian" popular in this era (Dippie 1982). Needless to say, conceptions of tribes as disappearing minority cultural groups did not suggest the continuing salience of tribal sovereignty (Prucha 1994, 373-375).

The 1934 Indian Reorganization Act or "Indian New Deal" halted the destruction of tribes and enacted measures to help tribes regain self-control. Most interpretations of this policy assert that it reflected a revitalized conception of tribes as nations (Deloria 1984, 2002; Rusco 2000; see Tsuk 2001a, 2001b for a differing interpretation). However, if so, this conception was not widespread, even among federal policymakers, much less the public. Not only did the policy begin to fade a decade later, it failed to generate any significant discourse regarding tribes as sovereigns.

Concerns about Indians as an impoverished minority informed public policy (and popular) discourse about tribes in the 1940s and 1950s (as it also had in the 1920s[15]). A conception of tribes as minorities provided motivation and justification for the post-World War II termination policy, as tribal separatism was unfavorably compared to the post-war integration enjoyed by other ethnic groups (see Cornell 1988, 121-123; Nash et al. 1986, 129-135). The concept of sovereignty was, unsurprisingly, absent from a policy discourse that conceived of Indians as a minority group.

A conception of tribal members as rights holders also clearly emerged in this period. This conception granted that tribal members had legitimate claims to rights granted in treaties, but simultaneously implied that the tribal communities that technically held these rights no longer had a political character. The rights holders conception of tribal members was manifested in the Indian Claims Commission (ICC), created by Congress in 1946 to implement a "final" resolution of treaty land rights claims.[16] The Commission had broad jurisdiction to award money judgments as compensation for Indian losses, but it could not return land in any situation. The ICC did not endorse a conception of tribes as sovereign nations or attribute an *active* sovereignty to tribes. Instead, it suggested that the United States had historic legal obligations from treaties, but not an active sovereign-to-sovereign relationship with Native nations.

In the 1960s policy perspectives within the federal government began to gravitate towards the concept of self-determination. Even then, however, the concept of sovereignty was not part of policy discourse. Significant federal funding began to flow to tribal governments via their inclusion in War on Poverty programs, but this was based on their status as "public agencies of the poor" rather than as sovereign governments (see Wilkins 2002, 137-138, 221-222; Castile 1998).

It is here, in the decade before the focal action begins, that this historical review ends. This brief policy history suggests how different conceptions of tribal status evident in federal policy have justified or called into question the use of sovereignty to refer to tribes and Indian issues. Since the mid-nineteenth century, the general trend in conceptions of tribal status and in the discourses utilized by federal policymakers clearly moved away from "nationhood" concepts and associated sovereignty talk. However, a discourse of sovereignty has been sustained, albeit unevenly, within the legal realm. I now turn to the complex and confusing treatment of Indian tribes and tribal sovereignty by Supreme Court rulings and legal scholarship.

Legal Incoherence and the Categorization of Tribes in Federal Law

The Supreme Court, as the ultimate arbiter of federal law, is the central legal authority influencing the legal categorization of tribes and the corresponding legitimization or discrediting of tribal sovereignty discourse. The Court has been historically inconsistent on both accounts. To understand the Court's inconsistency requires placing its sovereignty-related rulings and its conceptions of tribal status in the interpretive context created by the Constitution and the overall structure of the Court's rulings on federal authority over tribes. While treaties are theoretically "the law of the land" and equal in status to the Constitution, tribes themselves are extraconstitutional and are "not afforded constitutional protection because they were not created pursuant to, and are not beholden to, the U.S. Constitution" (Wilkins 1997, 5).[17] The Supreme Court has ruled that Congress has plenary power, an apparently unlimited and unreviewable authority, over tribes, (but see Wilkins and Lomawaima 2001, 98-116). Unconstrained by the Constitution, the Court can exercise great latitude in interpreting tribal rights.

Legally, the relative fragility of tribal status stands in contrast to that of states. As a consequence, tribal legal rights in practice are best understood as a reflection of changing policy rather than as law understood as first principles or as enactments that must be respected "to the letter of the law" once established.[18] In interpreting laws passed in various historical eras, each informed by different conceptions of tribal status, courts often use the current federal policy as a guide in lieu of the intent of the law at the time it was passed. That is, courts to some degree re-interpret laws based on current policy, taking signals not only from

Congress but from the Executive Branch, including the President and the Bureau of Indian Affairs (Wilkinson 1987, 23). As Indian law professor and policy participant Rennard Strickland has asserted,

> It may be heresy for a law professor. . . . But it is an historical truth . . . that this collection of doctrines and decisions we call Indian law is primarily an expression of Indian policy. And that policy is little more than the collective judgments of society at any given moment: a matter of history. . . . The content of our Indian law depends upon society's definition at any point in time of the so-called Indian problem (Strickland 1997, 109).

Similarly, law professor Charles Wilkinson speaks of Indian law as "time-warped" (1987, 13). Variation and uncertainty about even the most fundamental issues of federal Indian law have led noted legal scholars to describe it as "bizarre" (Pommersheim 1995, 44), and as a "middle-eastern bazaar where practically anything is available" (Wilkins 1997, 20).

Issues of tribal status and tribal sovereignty have been at the heart of the Court's schizophrenic rulings. The Court has sometimes used a circular logic involving tribal status on the one hand, and tribal sovereignty on the other. Classifications of tribal status have then been used, either within the same case or in subsequent cases, to justify upholding or denying sovereign rights. Confusingly, the Supreme Court has explicitly referred to tribal nationhood and sovereignty in a number of conflicting ways—by affirming tribes' retention of inherent sovereignty, suggesting a qualified or diminished sovereignty due to their status as domestic, dependent nations, and denying tribes sovereignty and nationhood status.

In the *Johnson v. McIntosh* case (1823), the first of the seminal "Marshall Trilogy" cases, the Court ruled that tribes' "rights to complete sovereignty, as independent nations, were necessarily diminished" (as discussed in Wilkinson 1987, 55, and critiqued by Wilkins 1997, 27-35, and Wilkins and Lomawaima 2001, 53-56). Basing the legitimacy of his interpretation on the doctrine of discovery, Chief Justice John Marshall declared that the United States held a superior claim over Native land and that its sovereignty was superior to and more complete than tribes. The Justice asserted that, as a consequence, tribes no longer had the ability to freely decide to whom they could sell their land, although they retained rights of occupancy. The second case, *Cherokee Nation v. Georgia* (1831), found that tribes were not foreign nations. Marshall wrote about the Cherokees as a state in the general sense (i.e., not as a U.S. state such as Alabama or Delaware), noting that "The acts of our government plainly recognize the Cherokee Nation as a State, and the Courts are bound by those acts." But the ruling rejected the notion of the Cherokee as a foreign nation, and Marshall instead suggested that "they may, more correctly, perhaps, be denominated do-

mestic dependent nations." In *Worcester v. Georgia* (1832),[19] Marshall strongly affirmed the national status of the Cherokee, writing that by sanctioning previous treaties with Indian nations, Congress "consequently admits their rank among those powers who are capable of making treaties." He furthermore explicitly referenced Cherokee nationhood in holding that state laws did not apply in Cherokee territory, writing that "The Indian Nations had always been considered as distinct, independent political communities."

In contrast to these opinions, which cast tribal governments as largely autonomous and immune to federal authority, another interpretation of Native Peoples' status emerged later in the century, punctuated by the Supreme Court's 1886 *United States v. Kagama* decision.[20] According to Wilkinson, in *Kagama* the Court

> upheld sweeping congressional power over tribes. . . . The Court could have justified the federal legislation simply by invoking the notion that Congress possesses broad power over Indian affairs and that it can legislate over the tribes, as dependent sovereignties, a concept already thoroughly formulated in the Marshall Trilogy. Instead, the *Kagama* Court recognized the superior sovereignty of both the United States and the states . . . and flatly denied the existence of tribal sovereignty: "Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. *There exist within the broad domain of sovereignty but these two*" [*Kagama* 379] (Wilkinson 1987, 57, italics are mine).

Wilkinson writes that Kagama "implicitly conceptualized tribes as lost societies without power, as minions of the federal government . . . unable to wield an acceptable level of governmental authority" and, in the words of the Supreme Court, "wards of the nation" (Wilkinson 1987, 24). Similarly, four years later the Supreme Court stated that "the proposition that the Cherokee Nation is a sovereign in the sense that the United States . . . or . . . the states are sovereign . . . finds no support."[21] Other rulings declared similar findings.[22]

About fifty years later, the publication of Felix Cohen's *Handbook of Federal Indian Law* (Cohen 1942) spurred renewed attention to these fundamental issues.[23] Cohen presented the Marshall Trilogy as the foundational rulings for Indian law, and as part of a coherent doctrinal lineage. Pommersheim states that "Cohen's efforts to formulate a doctrinal benchmark about tribal sovereignty" in those particular rulings, issued over a century earlier, "was an extraordinary achievement. By culling the strongest interpretations from the Marshall trilogy, as well as exercising his own scholarly heft, Cohen established a theoretical

solidity" (Pommersheim 1995, 53) that cast the opposing line of rulings as departures. Thus "Cohen's formulation of tribal sovereignty . . . played a vital role in countering a growing federal perception of the decline of the viability of tribal autonomy and self-government" (Pommersheim 1995, 53). In light of the general trend of rulings in the first half of the twentieth century, as well as the continuing U.S. domination of tribes and the glaring absence of sovereignty in federal Indian policy discourse, Cohen's writing brought forward in time concepts that could easily have appeared to be headed for irrelevance as anachronisms outside of tribal communities.

Thus it is true that the discourse of tribal sovereignty and the national status it invokes (and is conceptually dependent upon) were indeed sustained within the federal legal arena across the 150 years following the Marshall rulings up to the 1970s. However, as both Wilkinson and Pommersheim suggest, there were significant discontinuities and inconsistencies regarding tribal status and tribal sovereignty within this history of rulings, just as there have been within federal policymaking. The variation and inconsistency up to the 1970s both within and across the federal policy and legal arenas hardly offered much evidence that sovereignty would soon emerge as the focus of Indian affairs. Given this, the recent rise of sovereignty as the core concept around which Indian and tribal affairs revolve, and the presence of sovereignty discourse well beyond the confines of tribal communities and the courts, are all the more remarkable. Before presenting an explanatory account of these developments, however, I will address the conventional account of the contemporary federal acknowledgement of tribal sovereignty.

Self-Determination Without Sovereignty

Current federal policy affirms tribal sovereignty and is oriented towards supporting tribal self-government. It also explicitly acknowledges that the United States and tribes are in a nation-to-nation or government-to-government relationship. Many accounts of this policy and its sovereignty-laden discourse state or imply that federal recognition of tribal sovereignty was either originally intended by the policy of self-determination or that it inevitably or unproblematically led to this outcome (see, for example, Nichols 2003, 218; O'Brien 2002, 43; Castile 1998, 178-180; Lyden and Legters 1994, 5). As with the broader continuity narrative of federal support for tribal sovereignty, upon closer inspection this characterization is at best problematic. While President Nixon's formal and public declaration of Indian "self-determination without termination" in 1970 is appropriately acknowledged as a crucial, unequivocal reversal of past policy, his pronouncement did not refer to tribal sovereignty, Indian tribes as nations or as a third type of government (in addition to federal and state governments) within (or voluntarily associated with) the United States.

In the statement itself, delivered July 8, 1970, Nixon refers to "Indian communities" and the "special relationship" between Indians and the federal gov-

ernment, even referring to treaties (Nixon 1970). Yet Nixon clearly casts the nature of the relationship as one in which the United States committed itself to providing "community services" rather than as an ongoing relationship between sovereigns. The Nixon policy is broadly seen by scholars as, in part, an expression of his commitment to new federalism—the transfer of responsibility for social programs from the federal government to subnational communities.

Much evidence supports this interpretation. As put straightforwardly by BIA official Marvin Franklin in May 1973, "The new program will turn over to tribal government, as rapidly as possible, a maximum amount of administration for Indian affairs. Minimum control will be retained in Washington; policy will be set there, but administration of that policy will be in the hands of tribal representatives or Bureau superintendents" (Forbes 1981, 120; emphasis added). Simultaneously, as suggested by the comments of Nixon staffers, the self-determination policy was an attempt to score easy points in minority politics (Kotlowski 2001, 193, 195).

Administration support for reservation economic development dovetailed with Nixon's broader promotion of minority capitalism. Nixon's 1971 State of the Nation speech reaffirmed the generalized community self-development and community control approach underlying self-determination, asking Congress to join in "helping Indians help themselves," an appeal in which the central thrust could as easily have been made about any other group.

The origins of the self-determination policy do not clearly pre-figure the distinctive federal affirmations of tribal sovereignty and the federal proliferation of sovereignty discourse that began in the 1980s.[24] Perhaps most indicative of Nixon and post-Nixon self-determination policies of the 1970s is that the historians who have most closely examined and written about these policy developments have scarcely mentioned tribal sovereignty, tribal nationhood, or a political relationship between the United States and tribal nations as part of the policy (Castile 1998; Kotlowski 2001). Nor did Indian affairs scholars perceive in the administration's actions a renewed political relationship between the federal government and tribes as sovereign or semi-sovereign bodies (Taylor 1972; Deloria 1974, 53, 61). Subsequent actions implementing the new policy in its first decade, such as the Indian Self-Determination and Education Assistance Act (1975), were similarly lacking references to any such aspects of the policy.[25]

These policies did emphasize and affirm Indian "self-government," and it is on this basis that most scholars have seen the current emphasis on tribal sovereignty as a natural evolution of self-determination. However, there is little evidence that Indian self-government as originally conceptualized by federal policymaker was linked to a notion of tribes as sovereign nations. The term "self-government" can be interpreted in many ways; declaring support for Indian self-government committed the federal government to very little in particular (Esber 1992).

Native leaders' reactions in the years after the launch of the self-determination policy further call into question the intended or inevitable relationship be-

tween self-determination and sovereignty. Seasoned by broken federal promises, tribal leaders and Indian advocates were both supportive and skeptical of self-determination. As time went on, and the range of tribal power remained limited, the skepticism continued. Proceedings from an historic 1983 conference on self-rule provide extensive documentation of these views thirteen years into the policy (Philp 1986). Longtime Indian policy advocate La Donna Harris stated that "We have become mere extensions of a federal government in order to carry out federal programs. We are not governing ourselves in any sense of the word that governance means" (Nash et al. 1986, 108). Others echoed this same point. "The Indian Bureau under PL 638 has made tribal governments an extension of the federal bureaucracy," argued Quinault President Joe De La Cruz (Old Person et al. 1986, 258), and National Indian Youth Council activist Hank Adams said, "[W]e have never been talking about self-determination, but about self-administration" (James et al. 1986, 239).

Clearly, there is little in such perceptions to suggest that self-determination policy recognized tribal nationhood and legitimized the notion of tribal sovereignty or its salience within (or beyond) policymaking arenas. If the self-determination policy did not clearly lead to an emphasis on tribal sovereignty, and past policies and legal rulings were at best inconsistent regarding the recognition of sovereignty, what accounts for the contemporary developments? In the final section of the article, I present an (necessarily brief) account of this development.

The Tribal Reinvigoration of Sovereignty in Discourse and Practice

I argue that the continuing (albeit not exclusive) existence of sovereignty discourse in the legal system, the decentralized nature of the federal government, and contradictory Indian policies and rulings all provided the grounds for the contemporary revival of sovereignty within federal policymaking. These longstanding features of the Indian policy environment were newly salient because of the self-determination policy context. Self-determination did not equate with or inevitably lead to sovereignty, but, combined with these other factors, it provided conditions advantageous to Indian promotion of sovereignty discourse.

By denouncing termination as a legitimate policy option, self-determination first of all provided breathing room for tribes to be even more proactive. As self-determination unfolded, its implementation was complicated by the fundamental question it left unanswered: "What are tribes?" More concretely, the applied version of the question asked, "What is the nature of the relationship between tribes and various non-Indian laws, people, governmental bodies, and other entities?" Each of the various ways tribes had historically been conceptualized in policy and law suggested different approaches or structures for tribal-non-Indian relations. Given the inconsistent and idiosyncratic nature of legal interpretations, Court rulings failed to establish clear answers that could be widely

applied to even slightly dissimilar cases (Getches 1993). Even when courts did rule clearly, policymakers and agencies sometimes ignored their rulings.

Native leaders were the primary party to realize the centrality of the tribal status question, or even to take it seriously. Most federal (and state) officials likely continued to construe Indians as an ethnic minority with some legitimate historic rights and grievances. But most could not imagine that the existence of such rights meant that tribes were still, in the contemporary world, sovereign nations with a unique political status superior to states.[26] To the vast majority of non-Indians, this was a nonsensical idea, making recognition of the tribal status question more difficult to identify, much less address. As a result, disputes founded on this fundamental issue were expressed through countless struggles more nominally centered on narrowly construed questions of jurisdiction, natural resource rights, the range of tribal powers, and other issues. While important in their own right, each of these nevertheless pointed to the underlying issues of tribal status and tribal sovereignty. Continuing confusion regarding these issues meant there were no shared principles upon which to reconcile conflicting claims.

The core phrase of the new federal policy—"Indian self-determination," and even its stronger form, "Indian self-government"—provided no clear answer; as already noted, the policy notably lacked any meaningful reference to tribal sovereignty or to tribes as nations. In 1974 the historic circuit court decision in *U.S. v. Washington* explicitly affirmed the contemporary legitimacy of treaty rights.[27] The ruling went beyond this by also affirming the continuing existence of tribal governmental powers, and hence the political status of tribal communities. While upholding *U.S. v. Washington*, the Supreme Court nonetheless issued incongruous rulings.[28] The ruling in *McClanahan v. Arizona State Tax Commission* (1973), which excluded state tax law from reservations on the basis of federal preemption and not because of tribal sovereignty, had seemed to suggest "the demise of tribal sovereignty, now a 'platonic notion' and a 'backdrop'" (Wilkinson 1987, 60).[29] Four years after *U.S. v. Washington* the Supreme Court found in *Oliphant v. Suquamish Indian Tribe* that "When tribes became dependencies of the United States, they lost those powers 'inconsistent with their status' as dependencies."[30] Accordingly, the Court ruled that "Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress." The Court's decision in *U.S. v. Wheeler*, a mere 16 days later, by contrast, offered a strong affirmation of tribal sovereignty.[31]

Therefore, in the first decade of self-determination policy neither Congress, nor the executive branch, nor the Supreme Court coherently and comprehensively answered the linked questions of tribal status and tribal sovereignty. Of course, even had any of these parties been motivated to do so, there were limits to what they could have done. There were not sufficient shared incentives to stimulate concerted action, and no overarching strategy emerged. Overall, even with periodic attention to militant Indian protest, tribal issues were relatively minor and episodic on the national political scene. When tribal matters did re-

ceive attention from policymakers, the underlying and fairly "structural" issue of tribal status was largely overshadowed by a host of other issues.

The one detailed consideration of tribal status and sovereignty was the American Indian Policy Review Commission. Created in 1975 in response to Indian militancy, the Commission was made up of three Senators, three Congresspersons, three Indians representing federally recognized tribes, and one Indian representing non-federally recognized tribes and urban Indians, respectively. Eleven task forces composed of various Indian officials from around the United States addressed specific issues and generated the substantive content of the Commission.

Charged with the sweeping task of reviewing the federal-Indian relationship as well as federal Indian policies and programs, the Commission compiled a massive study with scores of policy proposals (American Indian Policy Review Commission 1977). Included among them were calls for definitively recognizing tribal sovereignty and tribes' national status, along with substantive support for tribal governments (American Indian Policy Review Commission 1977, 100-101, 153, 159). The impact of the AIPRC is disputed.[32] Emblematic of the minimal immediate impact of the AIPRC was that, even though it provided a clear affirmation of tribal sovereignty, no solutions to the sovereignty-related confusion and conflict across Indian country were forthcoming from policymakers or the judiciary throughout the 1970s.[33]

In this evolving context Native activists and tribal leaders would combine, albeit independently, to more comprehensively establish sovereignty as a focal element of the self-determination policy. In part, they did so by providing sovereignty-based solutions to problems that federal policymakers faced, especially but not exclusively in Indian affairs. Such efforts followed the prior introduction of sovereignty discourse into contemporary Indian affairs by the Red Power movement. In 1972 American Indian Movement (AIM) presented its Twenty Points or demands as part of the Trail of Broken Treaties protest. As described by Vine Deloria, Jr., the Twenty Points "presented a new framework for considering the status of Indian tribes and the nature of their federal relationship" (Deloria 1974: 48). Indeed, the first point called for the U.S. government to treat tribes as nations and to reopen treaty relations. Such actions joined with the rising treaty rights activism to unleash a discourse of sovereignty around Indian country. AIM was effectively repressed by the federal government, however, and its demands went unfulfilled (Churchill 1988). The discourse of sovereignty did not directly enter federal policy frameworks as a result of AIM's efforts.

Subsequently, however, tribal leaders vigorously promoted sovereignty in discourse and practice through various routes. In 1974 the pan-tribal National Congress of American Indians (NCAI) issued its own "Declaration of Sovereignty" (NCAI 1974). Bolstered by supportive legal rulings, tribes became more assertive in claiming treaty rights, voicing the underlying principle of sovereignty and declaring their nationhood status.[34] Simultaneously, they began to

engage in nation-building: the development of organizational and governmental capacity to manifest their inherent, but latent, sovereign powers (Wilkinson 2005; Simcosky 2005; Lopach, Brown, and Clow (1998). These efforts were assisted by the BIA's weakened ability under the self-determination policy to control reservation life. The increased flow of federal resources that had commenced with the War on Poverty programs was also crucial. Nonetheless, tribes had to newly develop their own ability to exercise the range of their possible powers. Equally important, they had to loosen themselves from the cognitive effects of decades of domination.

Innovative tribal leaders around the country, such as Joe De La Cruz of Washington's Quinault tribe, were particularly aggressive in developing tribal governments and claiming an expansive range of sovereign tribal powers. Such leaders exhorted other tribes to do the same, rather than waiting for federal policy to specify the status and place of tribes. De La Cruz in particular became a well-known advocate for taking initiative in this way (De La Cruz 1985, 34-52). He and a number of associates from both the northwest and elsewhere around the country did *not* adopt the defiantly confrontational and extrainstitutional approach of Red Power activists. Rather, based on their growing experience in dealing with state governments, they perceived that the best way to advance the acceptance of tribal sovereignty was to promote intergovernmental cooperation (NCAI 1979, 136-137; Ryser 1982). Effective tribal governments would not only advance tribal sovereignty in practical terms but would also demonstrate its advantages to non-Indians, especially to other governmental officials dealing with the practical issues of (multi-jurisdictional) reservation governance. Cooperation premised on intergovernmental respect for tribal governments would be more efficient, productive, and stable (and less costly) than denying tribal status via continuing conflict (Commission on State-Tribal Relations 1984; Mannes 1984). This approach produced gradual results within Washington State and across the populations of states with federally recognized Indian tribes (Steinman 2004, 2005).

Because many of the clashes between active tribes and state governments in the 1970s and early 1980s involved the regulation of natural resources, they increasingly involved the Environmental Protection Agency (EPA). As the courts failed to establish clear rulings that could be broadly applied, the underlying issues of tribal status and tribal sovereignty became salient to EPA officials in this period. In this context tribal leaders entered into dialogues and discussions with EPA officials, in which they urged that the EPA treat tribes in ways appropriate to their sovereign national status (Sachs 1999). As called for by De La Cruz, who served as President of the NCAI for three terms in the late 1970s and early 1980s, tribal leaders similarly solicited new arrangements and relationships from many other agencies (De La Cruz 1985).

Throughout this era, and at every level of government, De La Cruz and his associates more simply sought statements—from legislative bodies, executives, administrators, and others—that would affirm tribal nationhood claims, and rec-

ognize tribal governments as sovereigns (Washington Council of Tribal Governments 1976, 1985). In this vein De La Cruz and his close political associate Rudolph Ryser approached the Reagan administration, seeking to promote sovereignty discourse as a foundation for federal Indian policies they hoped would subsequently implement that recognition.[35]

For what were likely a variety of self-interested reasons originating beyond the realm of Indians affairs, the Reagan administration made history in 1983 by explicitly affirming tribal sovereignty and the nation-to-nation (or government-to-government) relationship in an Indian policy statement (Reagan 1983). While Reagan did little to support tribal governments, and instead slashed BIA budgets, his actions legitimated the discourse of tribal sovereignty. The next year the EPA announced its own Indian policy, which referred to the President's statement and affirmed that it would work with tribes as sovereign governments rather than as subsidiaries of state governments (Ruckelshaus 1984). Eventually the EPA began an ongoing education program about tribal sovereignty for its staff. In 1991 President George H.W. Bush reaffirmed tribal sovereignty and the government-to-government relationship (Bush 1991).

In the next decade, the continued and creative tribal promotion of sovereignty as the central framework for Indian affairs made sovereignty discourse much more commonplace in federal policy frameworks. In 1994 and 1998, following an initial request from NCAI President Gaiashkibos (National Congress of American Indians 1994), President Clinton issued executive orders that required all executive branch agencies to work with tribes in a manner respectful of tribal sovereignty and the government-to-government relationship (Clinton 1994, 1998). By the end of the decade, numerous agencies and departments had created or were in the process of creating new policies acknowledging tribal sovereignty.

Conclusion

The absence of any discussion of sovereignty in the 1965 special issue of *American Studies* reflected the times. There was a relative dearth of sovereignty talk outside of tribal communities and specialized legal scholarship. The terms and language of federal policymaking reflected a mix of perspectives, but a clear emphasis on Indians tribes as sovereign nations was not evident among them. Although the seeds of self-determination had been sown, tribal communities were still dominated by the BIA. Today the situation is strikingly different. The federal government is now thoroughly involved in the production of tribal sovereignty talk through a wide variety of statements, policies, and programs. This factor helps explain the broader explosion of sovereignty talk.

Changes in the language and focus of federal Indian policy are only one part of this broader development, of course. But the same set of actors—a variety of Native activists and leaders—motivated both the changes in federal discourse and the rise of sovereignty talk outside of federal policymaking. As I

have argued, they did so not only through the creative promotion of a sovereignty framework but also by assertively building a new reality in which tribal sovereignty was manifested. One consequence of doing so was that the underlying ambiguities of self-determination policy and the status of tribes became increasingly salient for a variety of federal and state officials. This situation, along with other aspects of the political and legal context, created conditions conducive to the Indian promotion of sovereignty within federal policy frameworks.

The account presented here of the contemporary revival of sovereignty and of the longer history of Indian sovereignty in federal policy and law is, of necessity, quite incomplete. Given the complexity of these issues and their history, this article has limited its primary focus to a narrow topic: the rise of sovereignty discourse. I have suggested links between this development and more substantive shifts (especially policy shifts, only some of which I have specifically identified), but I have not advanced causal arguments to that effect. As I hope is evident, the assumption that discourse enables and constrains action in various ways informs the whole article. However, asserting and empirically supporting a detailed causal argument for the relationship between discursive shifts and the various substantive changes is beyond the scope of this article. Nonetheless, I believe that the characterization and analysis of historical and contemporary discursive shifts does yield insight into these past and recent developments.

One lesson from this analysis is that the tenacity, persistence, and innovation of Native Peoples in the United States are the forces that have kept Indian sovereignty alive. Tribal communities sustained the idea of sovereignty across periods in which U.S. policy or legal rulings, or both, had effectively abandoned it. As numerous other scholars of indigenous survival have asserted, the future of Indigenous nations in the United States, and the existence and nature of their sovereignty, is now more under their influence than at any point in the past 150 years (Cornell 1988; Wilmer 1993; Robbins 1992).

The second lesson is that the degree of tribes' control over their own destiny has been enabled by the relative incoherence of U.S. policy. In some periods various federal government agencies have deviated from the Indian policies and practices of other federal actors. In many other periods, federal officials have simply failed to act in concert. While the result—federal inconsistency—has not always been helpful to tribes, it often has been. More to the point, this lack of federal cohesion leaves tribes much more equipped to act strategically and with a long-term perspective than these other sets of actors. The vision that tribes develop, and the ways they may promote it, will undoubtedly have a powerful impact on the future.

Notes

1. This claim is one of the various statements made in this article that refer to either well-documented events or widely shared historical characterizations (or, as in this particular claim,

relatively self-evident developments). Given the complexity of the task attempted here, and the modest length of the article, I have chosen to minimize citations for such uncontroversial statements. Extensive documentation supporting these statements is easily available through a variety of sources. In addition to the specific citations listed in the text, more in-depth information about the major topics of the article can be found in the following sources. For an overall and fairly up-to-date source, consult Wilkins (2002). For information about federal policy and legal history (first section of the article), see Wilkins (1997, 2003), Wilkins and Lomawaima (2001), Aleinikoff (2002), Wilkinson (1987), Cornell (1988), Deloria, Jr. (1983, 1984, 1985), and Deloria, Jr. and Cadwalader (1984). For information about the self-determination policy and dynamics of its first decade in particular (second section), see Castile (1998), Clarkin (2001), Gross (1989), Forbes (1981), and Ryser (1992), as well as multiple works of Deloria, Jr. cited above. For information on the Red Power movement and AIM (part of the third section), see Deloria, Jr. (1974), Josephy, Nagel, and Johnson (1999), Johnson et al. (1997), Cornell (1988), Smith (1996), and Churchill (1988).

2. For example, the Haudenosaunee (also known as the Six Nations or the Iroquois Confederacy), had long asserted a strong sovereignty claim. The Six Nations had rejected U.S. citizenship in 1924 and in the early 1920s sent a leader, Deskaheh, to the League of Nations to seek assistance in resisting further encroachment by Canada and the United States (Wilmer 1993, 19).

3. There is, of course, significant theoretical divergence regarding the asserted relationship between discourse and actual behaviors.

4. While the nineteenth century military aggressions of the U.S. government are widely known, the Federal Bureau of Investigation targeting of the Red Power movement in the 1960s and 1970s demonstrated the continuing federal willingness to squelch Indian threats by a variety of means, including repression; see Churchill and Vander Wall (1988, 1990).

5. As one reviewer noted, because of the extensive attention to legal interpretation, this article might be seen as minimizing the role of executive and legislative branches, and of Indian tribes and leaders. It is important to note that these various sets of actors are absolutely central to the analysis informing this article. In a much broader treatment, the legalistic emphasis here would be somewhat diminished. But to make sense of things to readers approaching tribal sovereignty issues without prior knowledge, paying detailed attention to the legal issues seemed essential. In doing so I am also responding to one common explanation proffered for recent changes: that it was just the treaties/laws being enforced. Hopefully I complicate that understanding. I do believe that my argument in the end emphasizes the agency of Indian communities and tribal leaders, even though it acknowledges that this is sometimes indirect and may work through affecting federal and state officials. I hope readers come away recognizing that my claim is that Indian communities kept tribal sovereignty alive, and re-energized it.

6. *Johnson v. McIntosh*, 21 US (8 Wheat.) 543 (1823), *Cherokee Nation v. Georgia*, 30 US 1 (1831), *Worcester v. Georgia*, 31 US 515 (1832).

7. Most simply put, asserting that the U.S. government has continuously recognized tribal sovereignty strengthens the arguments presented in support of indigenous legal claims. Given the centrality of precedent in U.S. legal interpretation, continuity of court support for a legal principle bolsters its original basis (i.e., legislation, treaties, etc.). While lawyers representing tribal interests have clear reasons for highlighting the continuity of legal recognition of sovereignty in legal proceedings, understanding the history of federal recognition or lack thereof through such lenses undermines accurate scholarship regarding the actual nature of the Court's activities. Therefore, it is important to distinguish between tribes' inherent sovereignty and the federal recognition of that sovereignty. The fundamental legitimacy of the former is not dependent on the latter. Noting that the latter has been inconsistent does not undermine the principle of the former.

8. Some whites perceived that the continued treatymaking throughout the middle of the nineteenth century functioned primarily as mechanisms of pacification and dispossession, rather than as an honorable way to treat tribes (Prucha 1994, 129, 152-155, 160-162, 249; Miner 1976, 11-18).

9. General Allotment Act, 24 Stat. 388 (1887).

10. Indian Reorganization Act, also known as Wheeler-Howard Act; 48 Stat. 984.

11. Questionable voting procedures (in which abstentions were counted as affirmative votes) in particular cast doubts about the adoption of constitutions under the IRA (Deloria and Lytle 1984, 171-173). These constitutions followed a boilerplate model supplied by the BIA and frequently undercut traditional authority structures.

12. Congress imposed this policy on 109 tribes while preparing lists for future termination of all tribes.

13. PL 280, passed in 1953, gave states new and expanded criminal and civil jurisdiction over reservations in five states and set up a procedure whereby other states could also assume such powers.

14. Indian Citizenship Act 41, Stat. 408 (1924).

15. In particular, the IRA policy had been stimulated by the 1928 Merriam report, which described Indian reservations as impoverished and socially disorganized (Institute for Government Research 1928).

16. Indian Claims Commission Act 60 Stat. 1049 (1946).

17. Tribes are mentioned only in the Commerce Clause (Article I, Section 8, Clause 3), which reserves for the federal government the right "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

18. For critical reviews from a pro-tribal perspective, see especially Wilkins (1997), Williams (1990), and Frickey (1997).

19. *Worcester v. Georgia*, 31 US 515 (1832).

20. *United States v. Kagama*, 118 US 375.

21. *Cherokee Nation v. Southern Kansas Railway Co.*, 135 US 641.

22. Rulings partly echoing such conceptions continue to be issued in the modern era. For example, in *Oliphant v. Suquamish Indian Tribe*, 435 US 191 (1978) the Court found that "When tribes became dependencies of the United States, they lost those powers '*inconsistent with their status*' as dependencies." Accordingly, the Court ruled that the Suquamish Indian Tribe did not retain jurisdiction over non-Indians and that "Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress." For further analysis, see Wilkins (1997, 2003), and Aleinikoff (2002).

23. Cohen worked in the Solicitor's Office of the Department of the Interior between 1933-1947. In that role he served as a primary author of the IRA legislation. The *Handbook* was the product of his work as Chief of the Indian Law Survey project.

24. Indeed, one of the first major Indian policy developments occurring after the policy announcement was the 1971 passage of the Alaska Native Claims Settlement Act (ANCSA). A settlement on Native Alaskan rights, ANSCA constructed Native corporations to hold Indigenous rights, a structure that notably did not vest such power in traditional Indigenous governments.

25. The Indian Self-Determination and Education Assistance Act was the central piece of self-determination legislation passed in the 1970s. Most concretely, the bill allowed tribes to become contractors and replace the BIA as provider of federal services including housing, community development, and law enforcement.

26. Tribal leaders routinely assert that, as independent sovereigns, tribes' status is superior to that of states. In addition to the international nature of treaties, the ruling in *Williams v. Lee* (358 U.S. 217 [1959]), which declared unequivocally that tribes hold a higher status than states, provides explicit support for this assertion.

27. *U.S. v. Washington*, 384 F Supp, 312 (1974). In interpreting the meaning of "in common" rights reserved by tribes through treaties, the ruling (also known as the Boldt decision, after the presiding judge), declared that tribal members had rights to 50% of the fish stock in their traditional fishing grounds.

28. The Supreme Court upheld *U.S. v. Washington* in 1975 by denying review. Upon further challenge, the ruling was later upheld in *Washington et al. v. Fishing Vessel Association* 443 US 658 (1979).

29. *McClanahan v. Arizona State Tax Commission*, 411 US 164 (1973).

30. *Oliphant v. Suquamish Indian Tribe*, 435 US 191 (1978).

31. Citing both Marshall's rulings and Felix Cohen's scholarship, the Court in *United States v. Wheeler* clearly asserted the inherent basis of tribal sovereignty (435 US 313 [1978]). Dealing only with the source of tribal powers, not their scope, the ruling identified tribal sovereignty as a third type of sovereignty within the United States.

32. A number of scholars have asserted that the Commission produced few direct results or functioned primarily to defuse lingering protest (Cornell 1988, 203; Nagel 1996, 177; Deloria 1985, 254; Deloria and Lytle 1983, 24). However, much subsequent legislation in various issue areas reflected the analysis and proposals generated by the Commission.

33. Indigenous scholars Russel Lawrence Barsh and James Youngblood Henderson (1980) did offer a thoughtful analysis of the situation and future possibilities with their publication of *The Road: Indian Tribes and Political Liberty*.

34. Supreme Court rulings bolstering tribal claims include the following: *Morton v. Mancari*, 417 US 535 (1974), which held that Indians and tribes were a trust-protected *political* status, not a racial classification; *Bryan v Itasca County*, 426 US 373 (1976), which upheld Indian tax exemption; *Santa Clara Pueblo v. Martinez*, 436 US 49 (1978) which limited federal court review over tribal actions; *United States v. Wheeler*, 435 US 313 (1978), which affirmed the inherent nature of tribal sovereignty; *White Mountain Apache Tribe v. Bracker*, 448 US 136 (1980), which struck down state motor vehicle and fuel taxes; *Merrion v, Jicarilla Apache Tribe*, 455 US 130 (1982), which upheld tribes' sovereign rights of taxation; and *New Mexico v. Mescalero Apache Tribe*, 462 US 324 (1983), which struck down state taxes on mineral development. More generally, the authors of a major casebook on American Indian law noted that the decade between 1973 and 1983 was "characterized by a rising crescendo of success for the efforts of Indian

peoples [as] on balance Indian tribes and members were winning more cases than they were losing" (Clinton, Newton, and Price 1991, v).

35. Interview with Rudolph Ryser, March 19, 2003, Olympia, Washington.

References

Aleinikoff, T. Alexander. 2002. *Semblances of Sovereignty: The Constitution, the State, and American Citizenship.* Cambridge: Harvard University Press.

American Indian Chicago Conference. 1961. *Declaration of Indian Purpose.* Chicago: University of Chicago Press.

American Indian Policy Review Commission. 1977. *Final Report.* Washington, DC: U.S. Government Printing Office.

Barsh, Russel Lawrence, and James Youngblood Henderson. 1980. *The Road: Indian Tribes and Political Liberty.* Berkeley and Los Angeles: University of California Press.

Bush, George H. 1991. "Reaffirming the Government-to-Government Relationship Between the Federal Government and Tribal Governments." Presidential press release.

Castile, George Pierre. 1998. *To Show Heart: Native American Self-Determination and Federal Indian Policy, 1960-1975.* Tucson: University of Arizona Press.

Churchill, Ward, and Jim Vander Wall. 1988. *Agents of Repression: The FBI's Secret Wars Against the Black Panther Party and the American Indian Movement.* Boston: South End Press.

———. 1990. *The Cointelpro Papers: Documents From the FBI's Secret Wars Against Domestic Dissent.* Boston: South End Press.

Clarkin, Thomas. 2001. *Federal Indian Policy In The Kennedy and Johnson Administration.* Albuquerque: University of New Mexico Press.

Clinton, Robert N., Nell Jessup Newton, and Monroe E. Price. 1991. *American Indian Law: Cases and Materials.* Charlottesville, VA: The Michie Company.

Clinton, William J. 1994. Memorandum on Government-to-Government Relations With Native American Tribal Governments. Weekly Compilation of Presidential Documents.

———. 1998. "Executive Order 13084—Consultation and Coordination With Indian Tribal Governments." *Federal Register,* 27655-27657.

Cohen, Felix. 1942. *Handbook of Federal Indian Law.* Washington, DC: U. S. Government Printing Office.

Commission on State-Tribal Relations. 1984. *Handbook on State-Tribal Relations.* Albuquerque, N.M.: American Indian Law Center.

Cornell, Stephen. 1988. *The Return of the Native: American Indian Political Resurgence.* New York: Oxford University Press.

De La Cruz, Joseph B. 1985. *Our People, Our Homeland: A Collection of Speeches.* Edited by Percy C. Howell. Snoqualmie, WA: Center for World Indigenous Studies.

Deloria, Jr., Vine. 1974. *Behind the Trail of Broken Treaties: An Indian Declaration of Independence*. Austin: University of Texas Press.

Deloria, Jr., Vine, and Clifford M. Lytle. 1984. *The Nations Within: The Past and Future of American Indian Sovereignty*. Austin: University of Texas Press.

Deloria, Jr., Vine, and Sandra Cadwalader, eds. 1984. *The Aggressions of Civilization: Federal Indian Policy Since the 1880s*. Philadelphia: Temple University Press.

Deloria, Jr., Vine, ed. 1985. *American Indian Policy in the Twentieth Century*. Norman: University of Oklahoma Press.

Deloria, Jr., Vine, ed. 2002. *The Indian Reorganization Act: Congresses and Bills*. Norman: University of Oklahoma Press.

Deloria, Jr., Vine, and Clifford M. Lytle. 1983. *American Indians, American Justice*. Austin: University of Texas Press.

Dippie, Brian W. 1982. *The Vanishing American: White Attitudes and U.S. Indian Policy*. Middletown, CT: Wesleyan University Press.

Esber, Jr., George S. 1992. "Shortcomings of the Indian Self-Determination Policy." *State and Reservation: New Perspectives on Federal Indian Policy*. Edited by George Pierre Castile and Robert L. Bee. Tucson: University of Arizona Press. 212-223.

Forbes, Jack D. 1981. *Native Americans and Nixon: Presidential Politics and Minority Self-Determination, 1969-1972*. Los Angeles: American Indian Studies Center, UCLA.

Frickey, Philip P. 1997. "Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law." *Harvard Law Review* 110:1754.

Getches, David. 1993. "Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding Self-Government." *Review of Constitutional Studies* 1:121-170.

Governments, Conference of Tribal. 1985. "Resolution #2: Principles Of Government-To-Government Relations." Meetings held in Seattle, Washington.

Gross, Emma R. 1989. *Contemporary Federal Policy Towards American Indians*. Westport, CT: Greenwood Press.

Institute for Government Research. 1928. *The Problem of Indian Administration: Summary of Findings and Recommendations*. Washington: The Institute.

James, Lenada, Ada Deer, Ramona Bennett, Gerald Wilkinson, and Hand Adams. 1986. "Activism and Red Power." *Indian Self-Rule*. Edited by Kenneth Philp. Salt Lake City: Howe Brothers. 228-242.

Johnson, Troy, Joane Nagel, and Duane Champagne, eds. 1997. *American Indian Activism: Alcatraz to the Longest Walk*. Urbana: University of Illinois Press.

Josephy, Jr., Alvin M., Joane Nagel, and Troy Johnson, eds. 1999. *Red Power: The American Indians' Fight for Freedom.* Lincoln: University of Nebraska Press.

Kotlowski, Dean J. 2001. *Nixon's Civil Rights: Politics, Principle, and Policy.* Cambridge: Harvard University Press.

Levine, Stuart, and Nancy Oestreich Lurie, eds. 1965. *Midcontinent American Studies Journal* 6 (2).

Lopach, James, Margery Hunter Brown, and Richard L. Clow. 1998. *Tribal Government Today: Politics on Montana Indian reservations.* Niwot, CO: University Press of Colorado.

Lyden, Fremond J., and Lyman H. Legters. 1994. "Introduction." In *Native Americans and Public Policy.* Edited by Lyden Fremond J. and Lyman H. Legters. Pittsburgh: University of Pittsburgh Press. 3-10.

Mannes, Marc. 1984. *Improving The Tribal-State/Local Intergovernmental Relationship.* Albuquerque: American Indian Law Center.

Miner, H. Craig. 1976. *The Corporation and the Indian: Tribal Sovereignty and Industrial Civilization in Indian Territory, 1865-1907.* Columbia: University of Missouri Press.

Nash, Philleo, Sol Tax, R. David Edmunds, Gary Orfield, and Ada Deer. 1986. "Federal Indian Policy 1945-1960." *Indian Self-Rule.* Edited by Kenneth Philp. Salt Lake City: Howe Brothers. 129-141.

National Congress of American Indians. 1974. "American Indian Declaration Of Sovereignty." In NCAI 31st Annual Session. San Diego.

———. 1979. "A Challenge For The 80s' Political Unity." Albuquerque, N.M.

Nichols, Roger L. 2003. *American Indians in U.S. History.* Norman: University of Oklahoma Press.

Nixon, Richard M. 1970. Special Message to the Congress on Indian Affairs. Pp. 101A-105A. *Congressional Quarterly Almanac.*

———. 1971. State of the Union Address. The American Presidency Project.

O'Brien, Sharon. 2002. "Tribal Governments." In *American Indians and U.S. Politics: A Companion Reader.* Edited by John M. Meyer. Westport, CT: Praeger. 41-47

Old Person, Earl, Russell Jim, Gerald One Feather, and Joe De La Cruz. 1986. "Contracting Under the Self-Determination Act." *Indian Self-Rule.* Edited by Kenneth Philp. Salt Lake City: Howe Brothers. 251-259.

Philp, Kenneth, ed. 1986. *Indian Self-Rule.* Salt Lake City: Howe Brothers.

Pommersheim, Frank. 1995. *Braids of Feathers: American Indian Law and Contemporary Tribal Life.* Berkeley: University of California Press.

Prucha, Francis Paul. 1994. *American Indian Treaties: The History of a Political Anomaly.* Berkeley and Los Angeles: University of California Press.

Reagan, Ronald. 1983. American Indian Policy Statement. White House Press Release.

Richotte, David E. Wilkins, and Keith. 2003. "The Rehnquist Court and Indigenous Rights: The Expedited Diminution of Native Powers of Governance." *Publius: The Journal of Federalism* 33 (3): 83-110.

Robbins, Rebecca. 1992. "Self-Determination and Subordination: The Past, Present, and Future of American Indian Governance." *The State of Native America*. Edited by M. Annette Jaimes. Boston: South End Press. 87-121.

Ruckelshaus, William D. 1984. "EPA Policy for the Administration of Environmental Programs on Indian Reservations." Policy Statement.

Rusco, Elmer R. 2000. *A Fateful Time: The Background and Legislative History of the Indian Reorganization Act*. Reno: University of Nevada Press.

Ryser, Rudolph C. 1986. *Whose Law In This Land?* Olympia, WA: Center for World Indigenous Studies.

———. 1992. *Solving Intergovernmental Conflicts: A Tribal Solution*. Olympia, WA: Center for World Indigenous Studies.

———. 1992. *The Anti-Indian Movement on the Tribal Frontier*. Special Revised Edition. Olympia, WA: Center for World Indigenous Studies.

Ryser, Rudolph C., and Inter-Tribal Study Group on State/Tribal Relations. 1982. *Tribes and States in Conflict: A Tribal Proposal*. Seattle: Rational Island Publishers.

Sachs, Stephen, La Donna Harris, and Barbara Morris. 1999. "Devolution of Federal Authority to the States: The Growth of Tribal Government Authority and the Development of Tribal-State and Local Government Relations." Paper presented at the annual meeting of the Southwest Political Science Association, San Antonio, April.

Simcosky, Brent with Cyndi Holmes. 2005. *Proud Nations: Celebrating Tribal Self-Governance*. Washington, D.C.: National Congress of American Indians.

Smith, Paul Chaat, and Robert Allen Warrior. 1996. *Like A Hurricane: The Indian Movement from Alcatraz to Wounded Knee*. New York: New Press.

Steinman, Erich. 2004. "American Federalism and Intergovernmental Innovation in State-Tribal Relations." *Publius: The Journal of Federalism* 34 (2).

———. 2005. "Legitimizing American Indian Sovereignty: Mobilizing the Constitutive Power of Law through Institutional Entrepreneurship." *Law and Society Review* 39 (4).

Strickland, Rennard. 1997. *Tonto's Revenge: Reflections on American Indian Culture and Policy*. Albuquerque: University of New Mexico Press.

Taylor, Theodore W. 1972. *The States and their Indian citizens*. Washington, D.C.: U.S. Bureau of Indian Affairs.

Tsuk, Dalia. 2001a. "Pluralisms: The Indian New Deal As A Model." *Margins: Maryland's Interdisciplinary Journal* 1:393-449.

Tsuk, Dalia. 2001b. "The New Deal Origins of American Legal Pluralism." *Florida State University Law Review* 29:189-268.

Washington Council of Tribal Governments. 1976. "Tribal Government and Washington State Relations: A Blueprint for State Government Organiza-

tions to Conduct Relations with Tribal Governments." Unpublished document.

Wilkins, David E. 1997. *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice.* Austin: University of Texas Press.

———. 1998. "Tribal-State Affairs: American States as 'Disclaiming' Sovereigns." *Publius: The Journal of Federalism* 28:55-81.

———. 2002. *American Indian Politics and the American Political System.* Boulder, CO: Rowman and Littlefield.

Wilkins, David E., and K. Tsianina Lomawaima. 2001. *Uneven Ground: American Indian Sovereignty and Federal Law.* Norman: University of Oklahoma Press.

Wilkinson, Charles F. 1987. *American Indians, Time and the Law: Native Societies in a Modern Constitutional Democracy.* New Haven: Yale University Press.

Williams Jr., Robert A. 1997. *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800.* New York: Oxford University Press.

Wilmer, Franke. 1993. *The Indigenous Voice in World Politics: Since Time Immemorial.* Newbury Park, CA: Sage.