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"ANOTHER SUCH VICTORY AND WE ARE UNDONE": A CALL TO AN AMERICAN INDIAN DECLARATION OF INDEPENDENCE

William Bradford*

I. INTRODUCTION

In 279 B.C., Pyrrhus, King of Epirus, a city-state in Greece, was summoned by the people of Tarentum, a Greek colony in southern Italy, to aid them against the tyranny of Rome. At the Battle of Asculum, Pyrrhus defeated the Roman legions after two days of bloody combat in which he lost a great many of his most competent officers and many of his men. When congratulated on the victory by a subordinate, Pyrrhus, far from home and unable to replace his losses with fresh troops—unlike the Romans, who only needed to outlast Pyrrhus on their home soil—is reported to have said, "Another such victory and we are undone." This statement gave rise to the expression "Pyrrhic victory," used to describe a triumph accompanied by such enormous losses that it is the functional equivalent of a defeat. Indeed, soon after the Battle of Asculum, Pyrrhus, unable to continue the campaign, abandoned the Italian Greeks and sailed for Epirus.[1]

United States v. Lara,[2] hailed as a rare victory by proponents of Indian self-determination,[3] is, under closer scrutiny, no less Pyrrhic a victory than the Battle of Asculum. Although the opinion upheld the essential power of Indian tribes[4] to exercise criminal jurisdiction over non-member Indians,[5] in so doing it granted

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1. For a discussion of the Battle of Asculum and its historical significance, see Plutarch, *Plutarch's Lives* vol. IX (Bernadotte Perrin trans., William Heinemann, Ltd. 1968).

2. 124 S. Ct. 1628 (2004).

3. *See infra* n. 15 (defining "self-determination" under international law and in the context of Indian sovereignty).

4. "Indian," "Indians," and "Indian tribe(s)" denote the indigenous inhabitants of the United States in the singular, plural, and collective forms. James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. Intl. & Comp. L. Rev. 55, 55 n. 1 (1997). "'Native American' is a [politically correct] term . . . [that] perpetuates colonial efforts to subordinate indigenous sovereignty to mere ethnicity, as in the case of African-Americans or Irish-Americans." Robert B. Porter, *Strengthening Tribal Sovereignty through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 Colum. Hum. Rights L. Rev. 235, 237 (1997).

5. In the absence of the power to exercise criminal jurisdiction over non-member Indians, tribes are left with "no more governmental power than a club or a union or a church may exercise." Sen. Comm. on Indian Affairs, *Rulings of the U.S. Supreme Court as They Affect the Powers and Authorities of the Indian Tribal Governments*, 107th Cong. 48 (Feb. 27, 2002) (prepared statement of William C.

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opportunities and ammunition to opponents of the centuries-long struggle to defend what remains of Indian sovereignty against colonialism. Read with a jaundiced eye, *Lara* simply reaffirms contemporary judicial understandings of the doctrine of plenary power, long since remolded to connote not merely immunity from judicial review but rather absolute authority over Indian tribes, while telegraphing a message reminding readers that the radical readjustment of the "metes and bounds"[6] of tribal sovereignty, to include the legislative termination of each and every Indian tribe and the abrogation of all four hundred plus Indian treaties, requires only that Congress choose to wield its unbridled legislative authority. If the right to make and enforce law is the most fundamental constituent of sovereignty,[7] the sovereignty of Indian tribes, even post-*Lara*, survives at the sufferance of Congress, and history suggests that its future is grim.[8]

Non-Indians, contemplating the political and legal enormity of the task of doing justice by the subjects of their policies of conquest, genocide, expropriation, legal assaults on tribal land and sovereignty, and forced political and economic dependency, have long bemoaned their "Indian problem."[9] At least it is a problem of their own making; Indians, by contrast, have been saddled with a "Euro-American problem"[10] created, maintained, and, as *Lara* reveals, as yet unacknowledged by the political and legal system imposed and preserved by the might of the conqueror. Federal Indian law, not just willfully blind to crucial questions of agency and responsibility for past wrongs but often overtly racist, is the current instrument of choice whereby a non-Indian majority thwarts the assertion of sovereign tribal rights to engage in economic development projects resulting in the transborder movement of goods and persons,[11] the production of

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Canby, Jr., Judge, U.S. Court of Appeals for the Ninth Circuit). Moreover, because of jurisdictional gaps created by the withdrawal of tribal jurisdiction in respect to broad categories of crimes and persons, the absence of jurisdiction in tribes often dictates that no sovereign exercises criminal jurisdiction over crimes committed on Indian reservations, a result that produces lawlessness and social pathologies on reservations. *See* Natl. Am. Indian Ct. JJ. Assn., *Indian Courts and the Future: Report of the NAICJA Long Range Planning Project* 33-35 (1978). For a discussion of the evolution and consequences of the jurisdictional complexity in Indian country, see Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503 (1976).

6. 124 S. Ct. at 1635 (stating that the exercise of congressional plenary power over Indians "inevitably involve[s] major changes in the metes and bounds of tribal sovereignty").

7. *See* William Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 Am. Indian L. Rev. 1, 47-67 (2002-2003) (identifying legal autonomy, along with powers of political and economic self-governance, as the core constituents of sovereignty).

8. *See* Robert B. Porter, *A Proposal to the* Hanodaganyas *to Decolonize Federal Indian Control Law*, 31 U. Mich. J.L. Reform 899, 1005 (1998) (concluding that, on the basis of the history of congressional legislation in derogation of Indian sovereignty, "[u]nless some drastic action is taken soon, . . . Indian nations are in grave jeopardy").

9. Gertrude Bonnin, *America's Indian Problem*, in *American Indian Stories* 185-95 (Hayworth Publg. H. 1921).

10. Stephen Cornell, *The Return of the Native: American Indian Political Resurgence* 7 (Oxford U. Press 1988) ("In its essence this [Euro-American] problem seems to have been tribal survival: the maintenance of . . . some measure of political autonomy in the face of invasion, conquest, and loss of power.").

11. *See generally* Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 Or. L. Rev. 75, 111-13 (2003) (discussing the contemporary importance of tribal sovereignty claims in the context of economic development projects that produce off-reservation effects).

significant wealth,[12] or the expression of religious or cultural difference.[13] Simply put, *Lara,* albeit a win for the "good guys," offers nothing to contradict the lesson of more than two centuries of practice: federal Indian law, and in particular the doctrines of plenary power and stare decisis, is the thinnest of veneers for "*de facto* rule over both tribes and individual Indians without restraint and across all manner of human affairs."[14]

Even if federal Indian law was not already structurally incompatible with the self-determination[15] of Indian nations and ready-made for exploitation by foes of sovereign governments within the external borders of the United States, its interpretation, guided by the dominant philosophies of Western liberal jurisprudence and modern international legal positivism—the former distrustful of

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12. *See* Rennard Strickland, *Tonto's Revenge: Reflections on American Indian Culture and Policy* 105 (U. N.M. Press 1997) (stating that when Indians engage successfully in economic development that displaces dependency, and thus fail to "behav[e] in the forms that white society has historically defined as the appropriate Indian form," the United States moves to check tribal sovereignty).

13. For an example of non-Indian intolerance of tribal economic development that implicates religious and cultural differences between Indian and non-Indian worldviews, see William Bradford, *"Save the Whales" v. Save the Makah: Finding Negotiated Solutions to Ethnodevelopmental Disputes in the New International Economic Order*, 13 St. Thomas L. Rev. 155 (2000) (examining the religious and ethical roots of the legal conflict between the Makah tribe and anti-whaling activists over the Makah effort to resume whaling, a simultaneously sacramental and developmental practice, in the late 1990s).

14. Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule*, Faculty Research Working Papers Series 7 (Harv. U. March 2004) (available at http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP04-016?OpenDocument). For a discussion of the extent of federal control over every aspect of the affairs of Indian tribes, see generally Bradford, *supra* n. 7.

15. Decolonization whetted interest in the customary international legal principle of self-determination—the concept that institutions should be substantially and continuously guided by the will of the governed. *See* U.N. Charter arts. 1(2), 55, 56, 73 (calling for mutual respect among nations based on "self-determination of peoples"); *Draft United Nations Declaration on the Rights of Indigenous Peoples*, U.N. ESCOR, 46th Sess., Provisional Agenda Item 15, at art. 3, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994) [hereinafter *Draft Declaration*] ("Indigenous peoples have the right [to] freely determine their political status and . . . development."); *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, Intl. Labour Organisation, 76th Sess., 28 I.L.M. 1382 (1989), at art. 6.2 [hereinafter *Convention Concerning Indigenous Peoples*] (requiring states to consult with indigenous peoples as to the formation and endowment of indigenous institutions and programs); *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, 123, U.N. Doc. A/8028 (1971) [hereinafter *Friendly Relations Declaration*] (charging states with duty to respect self-determination); *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, at art. 1(1), U.N. Doc. A/6316 (1966) [hereinafter *ICESCR*] ("All peoples have the right [to] . . . freely determine their political status and . . . development."); *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1965) (calling upon states to eliminate colonialism); *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1961) (calling for elimination of "alien subjugation"); *Western Sahara*, 1975 I.C.J. 12, 33 (Oct. 16) [hereinafter *Western Sahara*] (incorporating UNGA resolutions to "[f]ree association [and] voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes"); José R. Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. ESCOR, Comm'n on Hum. Rights, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, 36th Sess., Agenda Item 11, at 74, U.N. Doc E/CN.4/Sub.2/1983/21/Add.8, ¶¶ 58-81 (1983) ("Self-determination . . . must be recognized as the basic precondition for the enjoyment by indigenous peoples of their fundamental rights.").

the Indian normative universe and thus bent upon remaking tribes to comport with a secular, individualist model of governance, the latter unwilling to recognize tribes as subjects of law and as bearers of natural legal rights actionable in domestic and international courts—would prove hostile, and perhaps fatal, to territorially based Indian sovereignty. Even under the moderating influence of the most sympathetic members of the nonpolitical branch, judicial review of questions of federal Indian law, on balance, has been an engine of the destruction of tribal self-determination since the founding of the United States. Plenary power and Indian sovereignty are mutually exclusive, and *Lara* only partially and temporarily obscures the existential reality that, for Indians, federal Indian law is an evil legal system.[16] Rather than celebrate *Lara*, Indians should probe deeper and ask themselves how long before Congress "fixes" it and divests tribes of non-member Indian criminal jurisdiction, whether they intend to mount an effective defense against the destruction of the last vestiges of their judicial sovereignty, what instruments of power—legal, political, and moral—they can marshal in support of this mission, and whether their right to self-determine can be meaningfully exercised in continued association with the United States.

Part II of this article briefly sketches the ongoing historical process whereby tribal sovereignty, once accorded great deference by the international community, has been incrementally denatured and corroded by federal Indian law. Part III situates *Lara* within this history and reframes the decision as a Pyrrhic victory for Indian tribal sovereignty. Part IV defends the premise that federal Indian law and its interpretation and application in courts of the United States is an irremediably evil legal system utterly inconsistent with contemporary understandings of the natural right to self-determination. Part V propounds an alternative legal theory, rooted in natural law and partly reflected in the international indigenous rights regime, that substantiates the right of Indian tribes to a quantum of self-determination incompatible with continued political association with the United States. Part VI elaborates and defends an American Indian Declaration of Independence as the legitimate expression of the natural legal right of Indian peoples to self-determination and as a rejoinder to *Lara* and the philosophical and historical foundation upon which it rests. Finally, Part VII examines and rejects alternate proposals for the realization of Indian self-determination that stop short of secession.

II. PROLEGOMENON: TRIBAL SOVEREIGNTY AND ITS DESTRUCTION BY FEDERAL INDIAN LAW

Indian tribes are independent, sovereign nations whose inherent right to self-determine predates and survives contact with Euro-American peoples. Notwithstanding the Ibero-Catholic presumption that the indigenous people[17] of

16. *See infra* pp. 100-08 (defining "evil legal system" and presenting a claim that federal Indian law is such a system).

17. Indigenous peoples are "descen[dants of] the populations which inhabited [a] country . . . at the time of conquest or colonisation." *Convention Concerning Indigenous Peoples*, *supra* n. 15, at art.

the Western Hemisphere were a distinctly inferior and barbarous species[18] salvageable only through forcible conversion to Christianity or death,[19] and despite the subsequent genocide Spain inflicted upon the original population of the Americas, all of the European colonial powers, including Spain after 1556,[20] recognized the formal sovereignty of the Indian nations of the New World as

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1.1.b. The 300 million indigenous peoples are almost always numerical minorities in their states of residence, and they almost invariably lack access to political and economic power. Dean B. Suagee, *Self-Determination for Indigenous Peoples at the Dawn of the Solar Age*, 25 U. Mich. J.L. Reform 671, 679-80 (1992); *but see* Craig Mauro, *Indians Gain Voice in Bolivia*, Indianapolis Star A19 (Aug. 15, 2002) (reporting that indigenous peoples—60% of the Bolivian population—now control 25% of the seats in the Congress of that nation). Although they now "find themselves engulfed by settler societies," indigenous peoples have embedded ancestral roots "much more deeply than the . . . more powerful sectors of society living on the same lands." S. James Anaya, *Indigenous Peoples in International Law* 3 (Oxford U. Press 1996); W. Michael Reisman, Student Author, *Protecting Indigenous Rights in International Adjudication*, 89 Am. J. Intl. L. 350, 350 (1995) ("'[I]ndigenous peoples' . . . resisted . . . assimilation and survived with a distinct . . . cultural identity.").

18. *See* Strickland, *supra* n. 12, at 124 (noting that sixteenth-century Spanish ecclesiastics and academics viewed Indians as "savage" and spent "considerable time . . . debating the question: Are Indians really people?").

19. *See Bull* "Inter caetera Divinae" *of Pope Alexander VI*, in *Church and State through the Centuries: A Collection of Historic Documents with Commentaries* 153, 155-56 (Sidney Z. Ehler & John B. Morrall eds. & trans., Biblo & Tannen 1967) (describing the grant of papal authority to *conquistadores* to introduce Christianity into the Americas in order to salvage the souls of the indigenous peoples). The *Requerimiento*, read from the bow of Spanish-chartered vessels immediately prior to the commencement of hostilities against the Indians of the New World, offered, in a language incomprehensible to its targets, the choice of the cross or the sword:

> [W]e ask and require that you consider what we have said to you, . . . and that you acknowledge the Church as the ruler and superior of the whole world, and the high priest called Pope, and in his name the king and queen Doña Juana our lords, in his place, as superiors and lords and kings of these islands and this mainland . . ., and that you consent and permit that these religious fathers declare and preach to you the aforesaid.
>
> . . .
>
> But if you do not do this . . ., I certify to you that with the help of God we shall forcefully enter into your country and shall make war against you . . ., and shall subject you to the yoke and obedience of the Church and of their highnesses; we shall take you and your wives and your children and shall make slaves of them . . .; and we shall take away your goods and shall do to you all the harm and damage that we can, . . .; and we protest that the deaths and losses which shall accrue from this are your fault, and not that of their highnesses, or ours, or of these soldiers who come with us.

The Spanish Tradition in America 59-60 (Charles Gibson ed., U. S.C. Press 1968).

In addition to the *Requerimiento*, the Laws of Burgos "explicitly denied" Indian nations in the Americas "all rights to self-determination." Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. Cal. L. Rev. 1, 64 (1983).

20. Protestations of Spanish legal academics against the unlawfulness and barbarity of Spanish treatment of Indians in the Americas led to the abolition of the *Requerimiento* in 1556. *See* Robert F. Berkhofer, Jr., *The White Man's Indian: Images of the American Indian from Columbus to the Present* 125 (Alfred A. Knopf, Inc. 1978) (attributing abandonment of the *Requerimiento* to the labors of Vitoria and other Dominican scholars); Francisco de Vitoria, *De Indis et de Jure Belli Reflectiones* 125-28 (Ernest Nys ed., John Pawley Bate trans., Oceana Publications 1964) (criticizing Spanish use of Papal bulls to legitimize genocide and land expropriation as violations of international law and defending the rights of Indian nations to their entitlements); Robert A. Williams, Jr., *The American Indian in Western Legal Thought* 86 (Oxford U. Press 1990) (quoting Antonio de Montesinos's protest against barbarous treatment of indigenous peoples in Hispaniola in early sixteenth century: "Are these not men? Have they not rational souls? Are you not bound to love them as you love yourselves?" (internal citation omitted)). For a discussion of the tension between Spanish military policy and existing international law, see generally Williams, *supra* n. 19. For a more general discussion of the conflict between positivism and naturalism in international law, see *infra* pp. 108-12.

separate and distinct peoples with whom relations were governed by international, rather than domestic, law.[21] For at least three centuries subsequent to the first contact between Indian nations and Europeans in 1492, international law recognized a normative order independent of and higher than the decisions of temporal authority and withheld the imprimatur of law from acts of earthly sovereigns that violated a universal moral code.[22] Under international law, the territory and sovereignty of nations were sacrosanct,[23] and self-defense, arbitrary refusal to engage in trade, and exclusion of Christian missionaries constituted the only lawful grounds for the use of force in contravention of Indian sovereignty.[24] Throughout the Renaissance and the Enlightenment, European powers, with the notable exception of Spain, honored the formal sovereignty of Indian nations as a general rule,[25] and international legal philosophers were openly critical of Spanish conquest in the New World.[26]

The conception of Indian nations as sovereign was not merely a European reserve or an academic theory: indeed, the founders of the United States, successor state to Great Britain, directly incorporated the international legal conception of Indian peoples as juridically distinct and prior sovereigns in their constitution,[27] and during its first several decades of existence the fledgling United States respected Indian rights to sovereignty and property consistent with its

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21. *See* Rupert Costo & Jeannette Henry, *Indian Treaties: Two Centuries of Dishonor* 6 (Indian Historian Press 1977) (citing decision of British Royal Commission of 1763 to this effect); Francis Paul Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790-1834*, at 141 (U. Neb. Press 1970) (quoting Thomas Jefferson: "[T]he Indians [have] the full, undivided and independent sovereignty as long as they choose to keep it, and . . . this might be forever." (internal quotation marks and citation omitted)); Felix S. Cohen, *Original Indian Title*, 32 Minn. L. Rev. 28, 44 n. 34 (1947) (noting consistent state practice regarding recognition of Indian sovereignty).

22. *See* John Finnis, *Natural Law: The Classical Tradition*, in *The Oxford Handbook of Jurisprudence and Philosophy of Law* 1, 52-53 (Jules Coleman & Scott Shapiro eds., Oxford U. Press 2002) (describing international law as of the sixteenth century as a natural legal system that emerged from the dissolution of unitary Christendom); Oliver Gierke, *Natural Law and the Theory of Society* vol. 1, at 36 (Ernest Barker trans., 1934) (describing the international system of 1500-1800 as a universal commonwealth of independent states whose international relations were governed by a natural law of nations); Stephen Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, 12 Eur. J. Intl. L. 269 (2001) (defining and distinguishing positivism from natural law in the development of international law). For a discussion of the distinction between naturalism and positivism, see *infra* pp. 97-99.

23. Anaya, *supra* n. 17, at 15.

24. *See generally* Hugo Grotius, *De Jure Belli ac Pacis* vol. 2 (Francis W. Kelsey trans., Oceana Publications 1964) (elaborating sixteenth-century international just war theory generally and as applied to the New World); Vitoria, *supra* n. 20, at 151-52 (limiting legal justifications for war against Indians to their refusal to permit travel, commerce, or religious proselytizing).

25. *See* Anaya, *supra* n. 17, at 10.

26. *See e.g.* Bartolomé de las Casas, *History of the Indies* (Andrée Collard ed. & trans., Harper & Row 1971) (describing failed clerical efforts to protect indigenous peoples by invocation of natural legal theories); Vitoria, *supra* n. 20, at 125-28, 151, 156 (contending that Indian nations possessed natural legal rights identical to those possessed by European nations and that the papal grant to Spain of Indian title was without legal foundation).

27. *See* U.S. Const. art. I, § 8, cl. 3 (granting to Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). The differentiation of Indian nations from the states is understood to constitute a recognition of Indian sovereignty that is prior to and independent of the United States. *See* Russel Lawrence Barsh & James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* 261-64 (U. Cal. Press 1980) (describing the "Indian Commerce Clause" as U.S. recognition of Indian sovereignty).

international and domestic legal obligations.[28] Moreover, well into the nineteenth century, the United States continued to regard Indian sovereignty as a jurisprudential fact, and alliances, trade agreements, and land cessions were accomplished by treaties[29] after peaceful negotiations between mutual sovereigns.[30]

Respect for mutual sovereignty, however, collapsed under the weight of white land hunger and burgeoning U.S. military capacity. Although prudence restrained U.S. aggression in the early decades of the republic,[31] by the nineteenth century a majority of the U.S. population regarded the presumption of Indian sovereignty under international and domestic law as an obstacle to white notions of progress. It fell to federal Indian law to legitimate the violent expropriation of Indian lands and the destruction of rival polities within what would become the boundaries of the United States.

A. Destruction of Powers of External Sovereignty

In the 1823 case *Johnson v. M'Intosh*,[32] Chief Justice John Marshall domesticated emerging positivist international jurisprudence rejecting the formal

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28. *See* Statement of U.S. Att. Gen. William Wert, Apr. 26, 1821 ("So long as a tribe exists and remains in possession of its lands, its title and possession are sovereign and exclusive. . . . [We] have no more right to enter upon their territory than we have to enter upon the territory of a foreign prince." (quoted in Matthew Atkinson, *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 Okla. City U. L. Rev. 379, 383 (1998)). Although early federal jurisprudence limited the capacity of Indian tribes to conduct independent foreign policies with other Western states, the United States otherwise regarded Indian nations as "distinct, independent political communities, . . . admit[ting] their rank among those powers who are capable of making treaties . . . [like] the other nations of the earth." *Worcester v. Ga.*, 31 U.S. 515, 559-60 (1832).

29. The United States-Indian treaties of the post-Revolutionary period, though they ceded Indian land in exchange for U.S. promises, were acts not of tribal surrender but negotiated contracts, governed by international law, in which Indian tribes reserved those rights not clearly granted to the United States and acquired other rights and privileges from the United States. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 402 (1993).

30. For at least the first three centuries post-contact, prudence directed Euro-American states, whose foothold in the Americas remained tenuous, to formally recognize militarily potent Indian tribes as independent sovereigns. Even as of the late eighteenth century, U.S. policy with regard to land acquisition from Indian tribes was motivated by a desire for peaceful relations and predicated upon mutual respect for sovereignty and territorial integrity. *See* Bradford, *supra* n. 7, at 26 n. 116 ("The principle of the Indian right to the lands they possess being thus conceded, the dignity and the interest of the nation will be advanced by making it the basis of the future administration of justice toward the Indian tribes." (quoting *Report of Secretary of War Henry Knox on the Northwestern Indians*, (June 8, 1789)); *see also* 25 U.S.C. § 177 (2000) ("Trade and Intercourse Act") (precluding acquisition of Indian land except for by cession via a United States-Indian treaty); Prucha, *supra* n. 21, at 142-43 ("Treating with the Indians . . . gave foundation and strength to the doctrine that the Indian tribes were independent nations with their own rights and sovereignty . . . ."). In those rare eighteenth-century instances of military hostilities initiated by the United States to annex Indian land, most campaigns resulted in stalemate or decisive Indian victory. Robert T. Coulter & Steven M. Tullberg, *Indian Land Rights*, in *The Aggressions of Civilization: Federal Indian Policy since the 1880s*, at 193-94 (Sandra L. Cadwalader & Vine Deloria, Jr. eds., Temple U. Press 1984) [hereinafter *Aggressions of Civilization*]. By 1871, the putative end of treaty making, the United States had entered into as many as 800 treaties with Indian nations. Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 Harv. Hum. Rights J. 65, 66 n. 4 (1992).

31. *See* Coulter & Tullberg, *supra* n. 30, at 190-91 (noting European "conquerors" of militarily superior Indian tribes would have been handily defeated prior to the mid-nineteenth century).

32. 21 U.S. 543.

equality of peoples.[33] Although he acknowledged the "impossibility of undoing past events and the fact that the sovereign he represented was born in sin,"[34] and although he recognized that tribes were as yet independent polities in retention of original rights to property and self-governance, Marshall accepted the extravagant premise that European discovery—not Indian occupancy—constituted ultimate title to lands in the United States when perfected by conquest.[35] While Marshall admitted that this argument was "opposed to natural right"[36] and contrary to principles of justice, he drew from the doctrine of stare decisis, comparisons to the practice of other states, and the presumption of Indian "inferiority"[37] to find that

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33. In the mid-seventeenth century, international law began to gradually morph away from its earlier naturalistic and ecclesiastical foundations and into a Western, state-centric instrument justifying European colonialism. *See* Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (Charles G. Fenwick trans., Oceana Publications 1964). By the eighteenth century indigenous peoples were often regarded by jurists as ineligible for statehood by virtue of their failure to exhibit attributes of Western civilization in property relations and trade, and state practice increasingly placed them beyond the pale of the protective premises of the positivist law of nations, such as mutual respect for sovereignty and nonintervention. L. Oppenheim, *International Law: A Treatise* §§ 134-135 (Ronald F. Roxburgh ed., 3d ed., 1920). By the nineteenth century, states, freed from external scrutiny, generally denied indigenous peoples status as subjects of international law and instead treated them according to domestic law and policy. Anaya, *supra* n. 17, at 19-20, 131.

34. Joseph William Singer, *Well-Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 Ga. L. Rev. 481, 489 (1994).

35. The international legal fiction of "discovery" bestowed occupancy and exclusive negotiating rights to impair the title of a "discovered" Indian nation upon a so-called discovering European nation. Although Europeans initially affirmed the collective rights of indigenous peoples, once European military superiority was established state sovereignty trumped claims to collective rights, and indigenous peoples were relegated to the status of minorities devoid of legal personality and entitled to protection only as individuals within states. Anaya, *supra* n. 17, at 22. By fiat, discovery permitted European colonial powers to construct mutually exclusive and distinct spheres of influence and thereby prevent internecine conflicts. *See M'Intosh*, 21 U.S. at 572-73:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire . . . [I]t was necessary, in order to avoid . . . war . . ., to establish a principle, which all should acknowledge as the law by which the right of acquisition . . . should be regulated . . . . This principle was, that discovery gave title to the government . . . by whose authority, it was made, against all other European governments, which title might be consummated by possession.

Although the discovery doctrine affected Indian title only via allocation of spheres of influence, it provided colonial nations sufficient time and space to survey, claim, and defend footholds in what became the United States. *See id.* at 574:

> [T]he original inhabitants . . . were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it . . .; but their rights to complete sovereignty, as independent nations, were necessarily diminished . . . by the original fundamental principle, that discovery gave exclusive title to those who made it. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; . . . subject only to the Indian right of occupancy.

See also id. at 588-89 (noting that while the denial of good title to original Indian occupants was unjust, "[c]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted").

36. *M'Intosh*, 21 U.S. at 591-92.

37. *See id.* at 573 ("[T]he character and religion of [Indians] afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to

"if [such arguments] be indispensable to that system under which the [United States] has been settled, [they] . . . certainly cannot be rejected by Courts."[38] Although the progressive Marshall intended to impose legal limits on the future conduct of those less charitably disposed toward Indians than he,[39] *M'Intosh* fueled subsequent claims that "Indians were conquered as soon as John Cabot set foot on American soil" and that "tribal property rights are not . . . rights at all, but merely . . . 'permission by the whites to occupy.'"[40]

Still, although in *M'Intosh* Marshall divested Indian nations of the external powers to form alliances with or grant land to a power other than the European discoverer or its successor, and despite his resort to a theory of "heathen subjugation"[41] to effect this divestment, he left undisturbed the internal powers of sovereignty they had exercised since time immemorial. However, subsequent cases provided the occasion to further diminish tribal sovereignty.

B. Imposition of Dependent Status

In the 1831 case *Cherokee Nation v. Georgia*,[42] Marshall determined that, despite their retention of reserved rights to occupy their lands subject only to voluntary cession or conquest[43] and their irrefutable status as distinct political communities,[44] Indian tribes were, in no small measure by virtue of their imperfect land tenure judicially imposed in *M'Intosh*, mere "domestic dependent nations" under U.S. "pupilage,"[45] not sovereign foreign nations or states within the meaning of the Commerce Clause of the Constitution. As a result, the Court could not exercise original jurisdiction over a case wherein the Cherokees sought to enjoin enforcement of Georgia law on land guaranteed by treaties.[46] Although Marshall held that the United States owed a common law trust duty to its Indian

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the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.").

38. *Id.* at 591-92.

39. *See id.* at 596-97 ("The peculiar situation of the Indians . . . too powerful and brave not to be dreaded as formidable enemies, required, that means should be adopted for the preservation of peace; and that their friendship should be secured by quieting their alarms for their property. This was to be effected by restraining the encroachments of the whites . . . ."); *see also id.* at 574 (making clear that in the absence of conquest, Indian title can only be lawfully acquired by the United States through a consensual transfer, as Indians were the "rightful occupants of the soil, with a legal as well as just claim to retain possession of it").

40. Singer, *supra* n. 34, at 489-90 (noting citation of conquest theories derived from *M'Intosh* for proposition that Congress has unlimited authority over Indians in cases such as *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272 (1955)).

41. Porter, *supra* n. 8, at 912 (coining the term).

42. 30 U.S. 1.

43. *Id.* at 17 ("Indians are acknowledged to have an unquestionable . . . right to the lands they occupy, until that right shall be extinguished by a voluntary cession" or by conquest).

44. *See id.* at 16 (noting that a majority of the justices agreed that the Cherokee Nation was "a distinct political society, separated from others, capable of managing its own affairs and governing itself").

45. *See id.* at 17 ("[Indian tribes] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.").

46. *Id.* at 15-18 (citing U.S. Const. Art. III, § 2).

"wards," he conceded that such a duty was judicially unenforceable,[47] and an examination of other justices' opinions, construing the United States-Cherokee relationship as that between a conqueror and a subject people,[48] hinted that the "trust doctrine," true to its roots in cultural racism and xenophobia,[49] would become yet another legal tool with which to diminish Indian sovereignty.[50]

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47. *Cherokee Nation*, 30 U.S. at 20 ("If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future."). As of 2004, the U.S. Supreme Court has never granted relief for a breach of duty arising under the trust doctrine as defined at common law: congressional authority over Indians need only "be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. 535, 555 (1974). Moreover, relief is available only in those limited circumstances where the United States acts in the narrow and specific role of private, rather than public, trustee. *See Nev. v. U.S.*, 463 U.S. 110, 128 (1983). In short, the trust is a moral, but not a legal, duty. *See* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 Stan. L. Rev. 1213, 1223-30 (1975) (undertaking historical analysis of judicial enforcement of the trust as applied to Congress).

48. *See Cherokee Nation*, 30 U.S. at 23-24 (Johnson, J., concurring) (stating that Indian nations are disqualified from consideration as states because they reject adherence to modern Western theories of social progress and thus lack the requisite degree of "civilization" under international law); *id.* at 27-28 (describing Indian tribes as "nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state"). In a rather stark dissent, Justice Thompson concluded that the Cherokees were a sovereign nation inasmuch as they constituted a "body of men, united together, to procure their mutual safety and advantage by means of their union" and that any such state which governs itself is sovereign, regardless of the nature of its alliances with other, more powerful states. *Id.* at 52-53; *see also id.* at 53 (holding further that "a weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power").

49. *See* Anaya, *supra* n. 17, at 24 (arguing that the trust doctrine is a form of "scientific racism" that posits that whites have a duty to "wean native peoples from their 'backward' ways and to 'civilize' them" (citing *Imperialism* 1-40 (Philip D. Curtin ed., Walker & Co. 1971)); *see also* Lesley Karen Friedman, *Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts*, 14 U. Haw. L. Rev. 519, 563-64 ("[T]he federal-tribal trust doctrine . . . explicitly relie[s] upon the 'primitivism' of natives to justify interference in their affairs."); Coulter & Tullberg, *supra* n. 30, at 200 (critiquing the trust doctrine as the political will of a white population committed to the notion of Indians as a "semi-barbarous" people who ought to yield to white civilization). In fact, subsequent Supreme Court decisions have reinforced the conception of the trust as simply the duty to act as "a Christian people in their treatment of an ignorant and dependent race." *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877). The "white man's burden" motivated federal Indian policy well into the twentieth century. *See U.S. v. Sandoval*, 231 U.S. 28, 39, 46 (1913) ("Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism [sic], and chiefly governed according to the crude customs inherited from their ancestors, [Indians] are essentially a simple, uninformed and inferior people . . . . [A]s a superior and civilized nation [the United States has] the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders . . . .").

50. Admittedly, the trust doctrine has broadened over the past two centuries to encompass, at least in theory, a set of duties greater than those pertaining strictly to guardianship over Indian land and more expansive than those bargained for in treaties, including the duties to "ensure the survival and welfare of Indian[s]," to "provide those services required to protect and enhance Indian lands, resources, and self-government," and to "raise the standard of living and social well-being of the Indian people." Robert N. Wells, Jr., *Native American Resurgence and Renewal: A Reader and Bibliography* 19 (Scarecrow Press 1994) (quoting Am. Indian Policy Rev. Commn., *Final Report* (U.S. Govt. Prtg. Off. 1977); *see also* Bradford, *supra* n. 7, at 62 n. 297 (enumerating legislative programs enacted to discharge trust obligations). However, political pressure has ensured, predictably, that these obligations have almost never been discharged in good faith: in a democratic republic, a self-interested majority represents a powerful barrier to honoring treaty commitments benefiting a discrete minority not formally an organic part of the body politic yet in possession of vast lands and resources. *See* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 135-79 (Harv. U. Press 1980) ("There will always be a conflict when a government . . . must act both as trustee in the best interests of a small

C. *Discovery of Congressional Plenary Power*

Having reduced Indian nations from sovereigns to dependencies with a stroke of his pen in *Worcester v. Georgia*,[51] Marshall, while retreating somewhat from his position in *Cherokee Nation*, opened the floodgates to Indian subordination.[52] Although he concluded that, as a matter of domestic as well as international law, Indian nations were distinct political and legal communities that enjoyed full powers of internal sovereignty[53] and immunity from the operation of state laws even in a relationship of dependency upon the United States,[54] to support his holding Marshall interpreted the grant to Congress of the power to regulate commerce with Indian nations—a power denied to the states[55]—to afford Congress "plenary" power, to the exclusion of the states, over Indian affairs. While subsequent opinions have cited *Worcester* for the foundational principle of federal Indian law—that the powers of Indian tribes are "inherent powers of a limited sovereignty which has never been extinguished"[56]—Marshall's failure to clearly and precisely define the term "plenary"[57] has allowed an often hostile Congress to auto-determine its powers relative to Indian nations.[58]

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segment of the populace and also as a servant of the best interests of the entire society."). Even worse, the rationale for the trust doctrine—that Indians are uncivilized and therefore incompetent to manage their own affairs—provided the indispensable moral and political basis for the assertion of plenary power to circumscribe Indian self-determination. *See infra* at pp. 81-82 (discussing plenary power); *see also* Porter, *supra* n. 8, at 919-20 (arguing that *Cherokee Nation* "embedded th[e] ideology [of Indian inferiority that justifies the trust doctrine] firmly within the fabric of the American law dealing with the Indian nations"). For a contrary view that credits the trust doctrine as "essential to the future cultural and social survival of the Indian peoples," see Raymond Cross, *The Federal Trust Duty in an Age of Indian Self-Determination: An Epitaph for a Dying Doctrine?*, 39 Tulsa L. Rev. 369, 371 (2003).

51. 31 U.S. 515 (1832).

52. *See* Porter, *supra* n. 8, at 919-20 (postulating that Marshall revealed in *Worcester* that he believed his conclusions about federal authority over Indian affairs as stated in *Cherokee Nation* were overstated, but criticizing *Worcester* for retreating somewhat from *Cherokee Nation* "only after he had established the legal justification for American colonial policies designed to secure wealth, resources, and opportunity for the emerging nation").

53. *Worcester*, 31 U.S. at 559 ("Indian nations had always been considered as distinct, independent political communities . . . . The very term 'nation,' so generally applied to them, means 'a people distinct from others.'"); *id.* at 548-49 (recognizing that Indian tribes had inherent powers of self-government predating the Constitution which survived its ratification and observing that the "settled state of things when the war of our revolution commenced" was that tribes were considered "nations capable of . . . governing themselves").

54. *See id.* at 560-61:

> [T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. . . . "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self government . . . [is] left in the administration of the state."

55. *See id.* ("The Cherokee nation . . . is a distinct community, . . . in which the laws of Georgia can have no force . . . .").

56. *U.S. v. Wheeler*, 435 U.S. 313, 322 (1978) (quoting Felix S. Cohen, *Handbook of Federal Indian Law* 122 (U.S. Govt. Prtg. Off. 1945) (emphasis omitted)).

57. The "plenary power" doctrine, with origins in medieval-era traditions of Christian cultural racism, was carried into the New World by Columbus, developed by successive European arrivals, and reified as moral imperative in U.S. jurisprudence to permit the "superior" race to exercise whatever power necessary to "civilize" indigenous peoples. David H. Getches, Charles F. Wilkinson & Robert

Accordingly, in a real sense, *Worcester* was a battle won and a war lost: by 1900, Congress, with the imprimatur of the Court, had qualified nearly every aspect of tribal life by legislation,[59] and presently Indian nations are subject to the broadest conception of plenary power pursuant to which their sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance."[60] By merely wielding the crushing force of plenary power, Congress may determine whether an Indian tribe exists, ascertain its membership, and even legislatively terminate it;[61] take tribal lands with only limited obligations to pay compensation;[62] and "limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."[63] While *Worcester* was, on its face, a victory for Indian sovereignty, the judicial invention of plenary power provided a mechanism for the destruction of its vision of a separate and legally protected status—dependent upon the United States but yet still sovereign—for Indian nations.

A. Williams, Jr., *Cases and Materials on Federal Indian Law* 326 (3d ed., West 1993); *see also* 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, 265 (arguing plenary power "erase[s] the difference presented by the Indian in order to sustain . . . European norms and value structures"). Other commentators suggest Marshall's use of the term "plenary" was not meant to denote "absolute" or "total" power but rather to signify federal, as opposed to state powers, thereby shielding tribal sovereignty from state legislation. *See* Rachel San Kronowitz, Joanne Lichtman, Steven Paul McSloy & Matthew G. Olsen, Student Authors, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 Harv. Civ. Rights-Civ. Libs. L. Rev. 507, 525 (1987).

58. The past two centuries of U.S. practice suggest that the term "plenary" as used in *Worcester* implies general police powers, as opposed to the limited, delegated powers the federal government bears in relation to states, and as such arrogates to Congress power to regulate every aspect of Indian affairs. By the late nineteenth century "plenary power" was accepted as the absolute prerogative of Congress vis-à-vis the Indian tribes. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (holding Congress, under its plenary power, could abrogate a treaty when "in the interest of the country and the Indians themselves"); *U.S. v. Kagama*, 118 U.S. 375, 381-85 (1886) (holding Congress has incontrovertible right to exercise authority over Indians for their own well-being). The judicial branch has adopted Congress's definition. *See e.g. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."); *Wheeler*, 435 U.S. at 323 ("The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance."). As of 2004, no congressional exercise of regulatory jurisdiction over Indian affairs has ever been set aside by the courts, with the exception of *Hodel v. Irving*, 481 U.S. 704, 718 (1987), which declared specific statutory escheat provisions a taking as applied to Indian land and thus constitutionally invalid under the Fifth Amendment. For a discussion of the evolution of plenary power from an inhibition on the power of states to a general writ to intervene in Indian self-government, see Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195, 212-36 (1984).

59. *See American Indian Policy: Self-Governance and Economic Development* 38 (Lyman H. Legters & Fremont J. Lyden eds., Greenwood Press 1994) (noting that subsequent to *Kagama*, Congress has passed more than 5,000 laws regulating Indians).

60. *Wheeler*, 435 U.S. at 323.

61. *See Sandoval*, 231 U.S. at 46-47; *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 306-08 (1902) [hereinafter *Hitchcock*].

62. *See U.S. v. Sioux Nation of Indians*, 448 U.S. 371, 408 (1980) (recognizing congressional plenary power over Indian nations in relation to property law).

63. *Santa Clara Pueblo*, 436 U.S. at 56.

D. *Congressional Plenary Power Unleashed*

It did not take long for Congress to design a legal regime, built around the assertion of its plenary power, that would eradicate tribal sovereignty. The 1883 case of *Ex parte Crow Dog*,[64] in which the U.S. Supreme Court overturned, for lack of jurisdiction, the federal conviction of an Indian charged with the murder of another Indian, provided the catalyst. Determined to rectify the barbarous, savage quality of tribal law and mollify public fervor, Congress applied "white man's morality"[65] with the Major Crimes Act of 1885 ("MCA")[66] to expressly establish concurrent federal jurisdiction over major felonies committed by Indians on reservations regardless of the membership status of their victims.[67] Unsuccessful legal challenges to the MCA, predicated upon claims to inherent Indian sovereignty at least insofar internal relations were concerned, simply provided the judiciary occasion to undergird the trust doctrine and plenary power and to sanction further incursions against *Worcester*.[68]

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64. 109 U.S. 556. Spotted Tail, an authoritarian Brule Sioux chief who had staked his political fortunes on accommodation with U.S. authorities, was shot and killed on the reservation by his political rival, Crow Dog. After a peacemaking ceremony, the family of Spotted Tail agreed to accept a payment from Crow Dog of $600, eight horses, and one blanket to resolve the dispute. *See* Sidney L. Harring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 Am. Indian L. Rev. 191, 198-99 (1989). Despite the satisfaction of the entire Brule tribe, the case presented federal authorities the pretext for extension of federal criminal law to Indians. *Id.* at 200-01. Crow Dog was arrested, tried in the Territorial Court of South Dakota, and sentenced to hang by an all-white jury. *Id.* at 204-12. However, the Supreme Court reversed the conviction, albeit with reference to Indian "savagery," finding that the Brule had the sovereign right to resolve, free from U.S. interference, disputes wholly internal to the tribe. *See Crow Dog*, 109 U.S. at 567-68, 571 (refusing to extend U.S. criminal law to acts occurring on Indian reservations on the ground that to do so would "measure[] the red man's revenge by the maxims of the white man's morality"). Nonetheless, for a white majority *Crow Dog* was a "legal atrocity" inasmuch as an Indian killer had "escaped punishment." Harring, *supra* at 191, 194.

65. *Crow Dog*, 109 U.S. at 571. As Rep. Cutcheon (D-Mich.) stated before the Indian Affairs Committee in 1884:

> [A]n Indian, when he commits a crime, should be recognized as a criminal, and so treated under the laws of the land. I do not believe we shall ever succeed in civilizing the Indian race until we teach them regard for law, and show them that they are not only responsible to the law, but amenable to its penalties.
>
> . . .
>
> It is an infamy upon our civilization, a disgrace to this nation, that there should be anywhere within its boundaries a body of people who can, with absolute impunity, commit the crime of murder . . . .

16 Cong. Rec. 934 (1885).

66. 23 Stat. 362, 385 (1885).

67. The MCA in its current version subjects Indians charged with 14 serious felonies to exclusive federal criminal jurisdiction regardless of the place of the alleged offense or the identity of the victim. 18 U.S.C. § 1153 (2000).

68. *See e.g. Kagama*, 118 U.S. 375. In fairness, it should be noted that federal judicial review of the exercise of Indian legal sovereignty has not been exclusively jurispathic: in 1896 the Court concluded, upon the basis of historical evidence that tribal criminal jurisdiction predated the United States, that tribal powers are not derivative of federal law because they predated the Constitution and consequently the Cherokee Nation did not have to use federal constitutional processes, such as the grand jury, in prosecutions. *Talton v. Mayes*, 163 U.S. 376 (1896). However, the worst was yet to come. *See infra.*

E. Judicial Power Grab: The Implicit Divestiture Doctrine

Even after a century and a half of congressional assertions of plenary power, however, the internal legal sovereignty of Indian nations remained largely intact. Indeed, the 1978 case of *United States v. Wheeler*,[69] in which the Court determined that the Double Jeopardy Clause[70] did not bar a federal prosecution of a Navajo tribal member subsequent to a Navajo tribal prosecution for the same offense on the ground that the exercise of tribal jurisdiction was "part of the Navajos' primeval sovereignty,"[71] and not delegated authority, reinforced the separate sovereignty of Indian nations at least with regard to their own memberships.[72] However, just as in *Worcester*, this legal victory for Indian sovereignty carried within it the seed of future defeats: in affirming Indian sovereignty, the *Wheeler* Court reminded all concerned that "existing sovereign powers" survived only "until Congress acts," and that in future cases Indian nations would be presumed to possess only those aspects of sovereignty "not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[73] This judicially crafted "implicit divestiture" doctrine thereby cleared the road to the judicial discovery of powers inconsistent with the status of Indian tribes as domestic dependencies and thus to the ultimate destruction of Indian legal sovereignty.[74]

F. Judicial Negation of Indian Sovereignty

Implicit divestiture was quickly put to use. In the 1978 case of *Oliphant v. Suquamish Indian Tribe*,[75] the Court held that Indian nations had lost their inherent power to exercise criminal jurisdiction over non-Indians on Indian land due to their alleged "submi[ssion] to the overriding sovereignty of the United States."[76] In rationalizing the application of the implicit divestiture doctrine to a power recognized by treaties,[77] the Court, intimating that Indians were insufficiently civilized to be trusted with the freedom and property of non-Indians, explained that exercise of tribal jurisdiction would imperil the personal liberty of non-Indian U.S. citizens who would be hauled into the alien legal systems of the tribes, denied due process and the protections of the Bill of Rights, and subjected

69. 435 U.S. 313.

70. The Double Jeopardy Clause of the Constitution prohibits any person being "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V, cl. 2.

71. *Wheeler*, 435 U.S. at 328.

72. *Id.* at 332.

73. *Id.* at 323.

74. For a detailed examination of the implicit divestiture doctrine, see N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 Am. Indian L. Rev. 353 (1994).

75. 435 U.S. 191.

76. *Id.* at 210.

77. Read broadly, *Oliphant* could be understood to terminate all powers of Indian sovereignty "inconsistent with their status" as domestic dependencies. *Id.* at 208 (describing Indian nations as retaining "elements of quasi-sovereign authority" yet holding that the tribes are "prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers inconsistent with their status" (internal quotation marks and citations omitted)).

to "unwarranted intrusions on their personal liberty."[78] Because failure to find implicit divestiture would permit savages "separated by race [and] tradition"[79] to subject non-Indians to their laws, the Court reversed the presumption that Indian sovereignty survives unless and until expressly revoked by Congress. With *Oliphant*, judicial review, rather than congressional assertion of plenary power, became the mechanism of choice for the destruction of Indian sovereignty.[80]

In 1981 the Court expanded the reversal of the long-established presumption in favor of inherent Indian sovereignty in *Montana v. United States*,[81] holding that tribes generally have no civil jurisdiction over non-members on non-member owned land within reservations[82] on the ground that Indian sovereignty does not extend "beyond what is necessary to protect tribal self-government or to control internal relations"[83] and that exercise of tribal powers beyond these limits, in the absence of express congressional delegation, is "inconsistent with the dependent

78. *Id.* at 210. Empirical evidence suggests that racism, rather than sound social science, is the father of this presumption and that comparisons between tribal and U.S. courts reveal many similarities. *See e.g.* Kalt & Singer, *supra* n. 14, at 20 (contending that "it has not been demonstrated that all or even many tribes are judicially unfair or otherwise disrespectful of the rights of those who appear before them"); Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of* Marbury v. Madison *to Tribal Courts' Criminal Jurisdiction*, 36 Ariz. St. L.J. 77, 103-05 (2004) (reviewing voluminous evidence and concluding that tribal courts "have produced many legal institutions with systems of law that sometimes share and sometimes diverge from state and federal practices"). Moreover, only a few years subsequent to *Oliphant*, Justice Rehnquist adopted a contrary position in regard to non-Indian legal systems. In his words:

> [I]t is wholly inaccurate to say that a government or a society ought to be measured primarily by the way in which it accords due process of law to its criminal defendants. This is undoubtedly a very important measure; but equally important is the extent to which a society succeeds in vindicating the moral judgments of its members as they are embodied in its criminal laws.

William H. Rehnquist, *Isaac Parker, Bill Sikes and the Rule of Law*, 6 UALR L.J. 485, 499 (1983).

Further evidence that judicial anxiety over tribal jurisprudence is the product of racism is the fact that similar concerns are not expressed in the subjection of Indians to the judgments of non-Indians, and to non-Indian norms, in state courts and in federal courts exercising MCA jurisdiction. *See* Kalt & Singer, *supra* n. 14, at 19 (stating that while "[i]t is possible that tribal courts may be unfair to nonmembers[,] . . . it is also true that state courts may be unfair to tribal members, especially in states where state court judges are elected and subject to political pressure to limit tribes' jurisdiction and property rights").

79. *See Oliphant*, 435 U.S. at 210 (citing *Crow Dog*, 109 U.S. at 571).

80. Legislation, known colloquially as the *Duro* fix, purports to reverse *Oliphant* and restore to Indian nations their inherent sovereignty over non-member Indians. *Indian Civil Rights Act Amendments*, Pub. L. No. 101-511, 104 Stat. 1856 (1990), Pub. L. No. 102-137, 105 Stat. 646 (1991) (codified at 25 U.S.C. §1301(2) (2000)). However, the *Duro* fix failed to resolve the question of whether the grant of power to the tribes to try non-member Indians had simply effected the restoration of a constituent of their inherent sovereignty, thus rendering tribal prosecutions the acts of sovereigns independent of the United States, or whether the power had been delegated through the Act, thereby effectively converting tribal prosecutions of non-member Indians into federal prosecutions, and commentators predicted the very question presented in *Lara*. *See e.g.* Nell Jessup Newton, *Permanent Legislation to Correct* Duro v. Reina, 17 Am. Indian L. Rev. 109, 112 (1992) (querying whether the *Duro* fix delegated power to the tribes or restored power and predicting future litigation over the question).

81. 450 U.S. 544.

82. *Id.* at 565-66.

83. *Id.* at 564. *See also id.* at 566 (holding that a "tribe . . . retain[s] inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe").

status of the tribes."[84] Subsequent cases reformulated and reinterpreted the implicit divestiture doctrine to further constrain tribal powers, holding that Indian nations are implicitly divested of sovereignty, despite the need to assert authority to protect or enable tribal self-government, in issue areas where there is merely a "lack of a tradition of self-government,"[85] or where the exercise of tribal sovereignty can be characterized as "inconsistent with the overriding interests of the National Government."[86]

In 1990 the Court extended *Oliphant* and the implicit divestiture doctrine to impose still greater limitations on Indian legal sovereignty, holding in *Duro v. Reina*[87] that the absence of tribal jurisdiction over the criminal acts of non-member Indians applies equally to all non-members.[88] Although the *Duro* Court accepted in principle that Indian nations were "a good deal more than private voluntary organizations," it stressed that post-*Oliphant*, tribes could no longer be described as fully sovereign within their own territory[89] and that to ascertain the quantum of residual sovereignty possessed by any given tribe required a determination of whether the powers in question were "needed to control [the tribe's] own internal relations, and to preserve [its] own unique customs and social order."[90] The argument that the exercise of criminal jurisdiction over non-members was a primary concomitant of internal self-government and thus not implicitly divested fell victim to the *Oliphant* presumption of the savagery of Indians and their legal systems. Because "[c]riminal trial and punishment is so serious an intrusion on personal liberty," and because Indian legal systems are "influenced by the unique customs, languages, and usages of the tribes they serve,"[91] Indian tribes could not be trusted to be civilized in the prosecution of non-Indians. Consequently, the *Duro* Court concluded that criminal jurisdiction over non-members was "necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States."[92]

Over the past decade, a hostile Supreme Court has capitalized upon congressional apathy and decided a series of civil cases that have drained the concept of Indian legal sovereignty enunciated in *Worcester* of almost all meaning while amplifying the presumption in favor of Indian cultural inferiority. Two in particular bear specific mention.

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84. *Id.* at 564.
85. *Rice v. Rehner*, 463 U.S. 713, 731 (1983).
86. *Wash. v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153-54 (1980).
87. 495 U.S. 676.
88. *Id.* at 688.
89. *Id.* at 688 (internal quotation marks omitted).
90. *Id.* at 685-86.
91. *Id.* at 693.
92. *Duro*, 495 U.S. at 693. Curiously, although the *Duro* Court refused to "adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them," it found no need to impose similar restrictions on the prosecution of Indians under the MCA by political bodies—i.e., the United States—that do not grant them full and equal citizenship. *Id.*

The first, *Strate v. A-1 Contractors*[93] grafted the Indian savagery trope onto an exceedingly narrow interpretation of the *Oliphant/Montana* implicit divestiture formulation to hold that tribes lack the power to govern the conduct of non-member tortfeasors, even for the protection of their members, because to subject them to the "alien" and unfamiliar (read: "savage") legal systems of the tribes cannot reasonably be regarded as either consent-based jurisdiction or as essential to protect the "political integrity, the economic security, or the health and welfare" of the tribe or to "control internal relations."[94]

The second, *Nevada v. Hicks*,[95] carried forward the Indian savagery theme and gutted the *Montana* presumption in favor of Indian civil jurisdiction over non-members on tribal lands, holding that state officials are immune from tribal jurisdiction even when they tortiously enter tribal land.[96] The majority, committed to the notion that Indian courts are so different from other American courts in regard to their structure, substantive law, and degree of judicial independence that it would be fundamentally unfair to subject non-members to their jurisdiction,[97] concluded that neither *Montana* exception—consensual conduct by non-members or the protection of tribal government—applied to the facts, as the purpose of the non-member conduct had not been commercial and "the issue [was] whether the Tribes' law will apply, not to their own members, but to a narrow category of outsiders."[98] In short, the *Hicks* Court erected a presumption, contrary to *Montana*, *against* inherent tribal civil jurisdiction over non-members, regardless of the status of the land,[99] thereby withdrawing the last vestige of Indian territorial sovereignty over non-members.

G. *Judicial Derogation of Indian Sovereignty: An Explanatory and Predictive Heuristic*

Several scholars explain the rapid post-*Oliphant* mobilization of the judiciary against Indian sovereignty as a reaction to the proliferation of "economic success stories in Indian country" sparked by three-plus decades of support from the political branches for Indian self-determination.[100] In Indian country,[101] economic

93. 520 U.S. 438, 456-59 (1997).

94. *Id.* at 458-59 (citing the *Montana* exceptions to the presumption in favor of application of the implicit divestiture doctrine). Subsequent case law of the circuit courts, interpreting *Strate*, has bolstered the narrow interpretation of the powers tribes require to protect their powers of self-government. *See e.g. Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210 (9th Cir. 2000) (holding that the Hoopa Valley Tribe lacks authority to regulate timber harvesting on non-Indian owned land within the reservation inside a "buffer zone" designated by the tribe as necessary for preservation of a protected cultural site); *Big Horn County Elec. Coop. v. Adams*, 219 F.3d 944 (9th Cir. 2000) (holding that Crow Tribe did not have jurisdiction to tax an electric company on the value of its utility right of way through the reservation).

95. 533 U.S. 353 (2001).

96. *Id.*

97. *Id.* at 383-84.

98. *Id.* at 371.

99. *Id.* at 375-76 (Souter, Kennedy & Thomas, JJ., concurring).

100. In 1970 Congress delegated authority to the Secretaries of the Interior and Health, Education, and Welfare to enter contracts with Indian tribes in which federal Indian programs would continue to be funded by the United States but responsibility for planning and administration would be assumed

success bred from the implementation of Indian self-determination policies promotes increased political activism and more aggressive assertions of sovereignty[102] and draws tribes into greater contact, and conflict, with non-member individuals, corporations, and governments.[103] According to this explanation, despite—or, perhaps, because of—the public commitment of the political branches to Indian sovereignty and the unwillingness of either to pay the direct costs associated with a retreat from that position, the judiciary has backstopped Congress and the executive and assumed responsibility for preventing the emergence of Indian tribes as competitors within, and regulators of, markets.[104]

However, this theory, while positing a coherent explanation for the development of the implicit divestiture doctrine to strip civil jurisdiction away from Indian tribes, does not account for the withdrawal of criminal jurisdiction, let alone for the active suppression of Indian ethnodevelopment[105] and religious expression,[106] activities arguably wholly internal to the tribes and vital to the

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by tribal governments. *Indian Self-Determination and Education Assistance Act of 1975*, 25 U.S.C §§ 450-458 (2000). Support for Indian self-determination took on a bipartisan tint in the early 1980s. *See* President Ronald Reagan, *Statement on Indian Policy*, http://www.reagan.utexas.edu/resource/speeches/1983/12483b.htm (Jan. 24, 1983) ("Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis . . . ."). Congress in turn authorized development of enhanced self-governance plans under the rubric of a "New Federalism" advanced by the Senate Select Committee on Indian Affairs. *See Indian Self-Determination and Education Assistance Act Amendments of 1988*, Pub. L. No. 100-472, 102 Stat. 2285 (allowing tribes to assume administration of some Bureau of Indian Affairs programs). Since the 1980s both major political parties have encouraged tribes to enter the world of private enterprise, and federal agencies have been encouraged to initiate extensive leasing and exploitation of tribal resources and to develop programs to lure non-Indian businesses to reservations by offering tax advantages, regulatory relief, preferential contracting, and technical assistance. Wells, *supra* n. 50, at 9. Official support for Indian self-determination remains U.S. policy.

101. "Indian country" is a legal term of art referring to, essentially, all lands within the limits of Indian reservations, dependent Indian communities within the borders of the United States, and parcels allotted to Indian individuals. 18 U.S.C. § 1151 (2000).

102. *See generally* Terry L. Anderson, *Sovereign Nations or Reservations?: An Economic History of American Indians* (P. Research Inst. Pub. Policy 1995) (describing correlations between tribal economic development and the subsequent development and assertion of political sovereignty); John C. Mohawk, *Indian Economic Development: An Evolving Concept of Sovereignty*, 39 Buff. L. Rev. 495, 499 (1991) ("Indian economic development may be less about creating wealth than it is about creating the conditions for political power . . . .").

103. *See* Kalt & Singer, *supra* n. 14, at 2-3 ("Despite—or, perhaps, because of—the economic, social and political success of Native self-rule, tribal sovereignty is now under increasingly vigorous and effective attack.").

104. For a more detailed exposition of the theory that links U.S. withdrawal of support for Indian self-determination to development of tribal economic competition, see Braveman, *supra* n. 11, at 109-13.

105. *See San Jose Declaration*, UNESCO, UNESCO Doc. FS 82/WF.32 (1982) (defining "ethnodevelopment" as autonomous economic activity comporting with religious and cultural requirements of equitability and intergenerational responsibility).

106. *See e.g. Empl. Div., Or. Dept. of Human Resources v. Smith*, 494 U.S. 872, 888-90 (1990) (refusing to apply the compelling state interest test developed under the First Amendment to an Oregon prohibition on the use of peyote applied to religious practice by members of the Native American Church on the grounds that it would be "courting anarchy" to "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind" and that "leaving accommodation to the political process" is the appropriate means to determine the state interest in regulating Indian religion); *Lyng v. N.W. Indian Cemetery Protective Assn.*, 485 U.S. 439, 451 (1988) (upholding U.S. logging and construction activities on national forest lands used for religious purposes by several tribes, even while conceding it was undisputed that the activities could

promotion and protection of tribal self-determination.[107] Recognition of the sovereign power of an Indian tribe to prosecute non-members who are not Indian, or to engage in traditional worship, would not seem to yield substantial economic effects.

Several scholars explain the judicial approach as the shared moral pronouncement of all three branches of the federal government, hailing back to *M'Intosh* and *Crow Dog*, on the desirability of preserving pockets of normative divergence within the national borders: if only Indian sovereignty can be disposed of, Indians will be obligated to assimilate and embrace the trappings of civilization for their own benefit, as well as for the benefit of those whom they would otherwise subject to heathen and barbarous judicial customs.[108] To this end, the political branches and the judiciary work together adroitly, if unconsciously, sharing the burdens and the responsibilities of managing Indians, assuming lead responsibility when it is expedient to do so, and affording each other the necessary social and political cover to avoid the potential costs associated with popular recognition that what they are in fact engaged in is a form of neocolonialism.[109]

This latter account for judicial activism in derogation of tribal sovereignty, if correct, offers better insight into the phenomenon observed serially over the course of the past two centuries—a seeming victory for advocates of tribal sovereignty is followed by a series of losses inflicted principally by a coordinate branch. *Worcester's* holding that tribes possessed the full quantum of internal

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have "devastating effects on . . . Indian religious practices," on the theory that to find otherwise would be tantamount to permitting a religious servitude on public lands); *U.S. v. Dion*, 476 U.S. 734 (1986) (finding in legislative history and text of a criminal statute extending protection to eagles clear evidence of congressional intent to exercise plenary power and abrogate treaty-reserved right to hunt eagles); *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000) (interpreting U.S. executive action in support of Makah petition to International Whaling Commission for an aboriginal subsistence quota of whales prior to completion of environmental assessment as violating timing requirements of National Environmental Policy Act and enjoining the Makah from practicing their treaty-reserved right to engage in the religious sacrament of hunting whales). For a detailed chronicling of the prohibitions on traditional forms of Indian religious practice and ethnodevelopment see Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 Stan. L. Rev. 773 (1997).

107. The withdrawal of tribal criminal jurisdiction over non-Indians has seriously undermined public safety in Indian country. In the absence of state criminal jurisdiction, and the unwillingness of the federal government to expend the resources to prosecute non-Indians who commit relatively minor or nuisance crimes on reservations, a jurisdictional gap exists in practice that promotes lawlessness. *See* Judith V. Royster, Oliphant *and its Discontents: An Essay Introducing the Case for Reargument before the American Indian Nations Supreme Court*, 13 Kan. J. L. & Pub. Policy 59 (2003) (discussing the effects of criminal jurisdictional gaps in Indian country).

108. *See* Braveman, supra n. 11, at 77:

> Underlying the Court's approach to inherent tribal sovereignty since *Worcester* . . . is an implicit understanding of Indian peoples as the "other," as "them" rather than "us." The use of the them/us construction leads the current Court to its conclusion that inherent tribal sovereignty should be limited to instances when Indian peoples are behaving in a distinctive fashion and only to the extent of governing themselves.

109. *See e.g.* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 Yale L.J. 1, 7-8 (1999) (attributing recent judicial service as "our most enthusiastic colonial agent" to political expedience in the interest of all three branches rather than to a profound reshuffling of the distribution of powers over Indian affairs in derogation of congressional plenary power).

sovereignty fell prey to congressional assertion of plenary power and the passage of over five thousand federal laws burdening Indian tribes; *Crow Dog's* defense of the full panoply of tribal legal sovereignty was brushed aside by the MCA and still further assertions of plenary power; and congressional inaction in respect to tribal jurisdiction over non-members, ratified grudgingly by *Wheeler*, prompted the Supreme Court to invent the implied divestiture doctrine to take up where Congress, committed to or at least bound by the principle of Indian self-determination, had left off. If an interbranch concord to perpetuate neocolonialism-by-stealth is in fact the best explanation for two centuries of diminution of Indian sovereignty, *United States v. Lara* may well read less like a triumph for Indian self-determination and more like a harbinger of far worse to come.[110]

III. *UNITED STATES V. LARA*: A PYRRHIC VICTORY

A. Background

When the Eighth and Ninth Circuits split on the question of whether, subsequent to the *Duro* fix,[111] a tribal prosecution of a non-member Indian rested upon its own inherent authority rather than upon authority delegated by Congress in that legislation,[112] the Supreme Court granted certiorari in *Lara* to afford resolution.[113]

In *Lara*, Billy Jo Lara, a non-member Indian, claimed that his prosecution by the federal government for assault on a police officer, subsequent to a prosecution by the Spirit Lake Tribe for the same offense, was barred by the Double Jeopardy Clause. The U.S. Solicitor General, arguing on behalf of tribal inherent authority contended that (1) the United States and the prosecuting tribe were separate sovereigns; (2) the dual sovereignty doctrine, which permits separate sovereigns to

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110. For a diametrically opposed view of the manner in which the three coordinate branches of the federal government collaborate in the creation of federal Indian policy and law, and an argument that the judicial branch "serve[s] as a second institution that is structurally distinct from but potentially able to sit in judgment of and to impose limits . . . on another branch's plenary powers," see Resnik, *supra* n. 78, at 84-86; *see also id.* at 89-90:

> [T]rained in the *Marbury* presumption of constitutional constraint, judges always ask about, sometimes wrestle with, and occasionally even impose limitations on government actors (themselves included) in the name of United States constitutionalism. . . . For better and worse, but time and again, jurists doing Federal Indian Law keep trying to assimilate the interaction between federal power and tribes to American constitutional precepts that, somewhere and somehow, boundaries exist on the powers claimed by government.

111. *See supra* n. 80.

112. *See U.S. v. Lara*, 324 F.3d 635 (8th Cir. 2003) (holding that a tribe prosecuting a non-member Indian exercised federal power); *U.S. v. Weaselhead*, 156 F.3d 818 (8th Cir. 1998) (en banc) (holding that tribes exercising criminal jurisdiction over non-member Indians rely upon delegated authority); *compare U.S. v. Enas*, 255 F.3d 662 (9th Cir. 2001) (en banc) (holding that tribes prosecuting a non-member exercise inherent authority).

113. *Lara*, 124 S. Ct. at 1631 ("We must decide whether Congress has the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority."). Although the Court characterized the restrictions as having been placed on tribal sovereignty by Congress, the conflict giving rise to the case at bar was not the result of any assertion of congressional plenary power but rather judicial activism. *See supra* at pp. 93.

prosecute an individual for the same offense without offending the Double Jeopardy Clause, applied to and disposed of the case; (3) the *Duro* fix was intended by Congress to restore to tribes the power to prosecute non-member Indians, and had that effect;[114] and (4) the power of tribes to prosecute non-member Indians was an aspect of their inherent sovereignty.[115]

B. The Majority Opinion

Writing for a majority that included Chief Justice Rehnquist and Justices Stevens, O'Connor, and Ginsburg, Justice Breyer ruled that Congress intended the *Duro* fix, in language that "recognize[s] and affirm[s] . . . 'inherent' tribal power,"[116] to restore to Indian tribes an aspect of their inherent sovereignty rather than to delegate to them federal prosecutorial power, a conclusion buttressed further by the legislative history.[117] Having reached this conclusion, the sole remaining question for Justice Breyer was whether the Constitution authorized Congress to have done so—i.e., whether Congress possessed the power under the Constitution to amend judicially constructed federal common law.

In answering this question in the affirmative, Justice Breyer did not merely reference plenary power as the source of such authority; rather, he characterized plenary power as a bundle of "preconstitutional powers necessarily inherent in any Federal Government" that are "necessary concomitants of nationality"[118] that authorizes Congress to make "major changes in the metes and bounds of tribal sovereignty" and even to terminate Indian tribes' legal existence entirely.[119] Moreover, although he took pains to stress that federal Indian law is a collaborative project in which the political branches create a "backdrop for the intricate web of judicially made . . . law,"[120] Justice Breyer affirmed that judicial review of a congressional exercise of plenary power, even where such exercise overturns judicially crafted law, presents an all but nonjusticiable political

114. *Lara*, 124 S. Ct. at 1632 (The *Duro* fix, "in permitting a tribe to bring certain tribal prosecutions against nonmember Indians, does not purport to delegate the Federal Government's own federal power. Rather, it enlarges the tribes' own 'powers of self-government' to include 'the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians,' including nonmembers." (emphasis omitted) (quoting 25 U.S.C. § 1301(2)).

115. *Id.*

116. *Id.* (emphasis omitted).

117. *Id.* at 1633.

118. *Id.* at 1634 (quoting *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936)).

119. *Lara*, 124 S. Ct. at 1635 (affirming, in dicta, congressional plenary power to terminate Indian tribes). According to Justice Breyer, so potent is plenary power that the only limits the Constitution imposes upon the power of Congress to contract or expand tribal sovereignty are the sovereignty of the states and the Due Process and Equal Protection Clauses. *Id.* at 1635-36.

120. *Id.* at 1636 (quoting *Oliphant*, 435 U.S. at 206 (emphasis omitted)).

question[121] and disposes of the legal question in favor of the congressional command.[122]

C. *Concurring Opinions*

1. Justice Stevens

In a separate concurring opinion, Justice Stevens joined Justice Breyer in concluding that the grant of power to Indian tribes effected by the *Duro* fix was a restoration of inherent sovereignty: because Congress has the power to authorize states (sovereigns that postdate Indian tribes) to exercise inherent powers that the Constitution has withdrawn and reposited in the U.S., Congress must possess at least as much inherent legislative authority to "relax restrictions on an ancient inherent tribal power."[123]

2. Justice Kennedy

Justice Kennedy, while concurring in the judgment, challenged the reasoning of the majority and suggested that the attempt by Congress to remedy *Duro* had "extend[ed] [tribal] sovereignty beyond . . . historical limits"[124] and subjected Lara, without his consent, "to a sovereignty outside the basic structure of the Constitution," contrary to the constitutional design.[125] Quite pointedly, Justice Kennedy suggested that had the case arisen in a different posture—i.e., if the federal prosecution had preceded the tribal prosecution and Lara had objected to tribal court jurisdiction—constitutional questions under the Due Process and Equal Protection Clauses would have arisen and would likely have precluded the assertion of tribal jurisdiction and disposed of any Double Jeopardy claim.[126]

3. Justice Thomas

With a separate opinion concurring in the judgment that might have been styled as a dissent, Justice Thomas seized upon the fundamental incompatibility between the plenary power doctrine and the concept of Indian sovereignty to call the latter into doubt. Plenary power and Indian sovereignty, in his view, are mutually exclusive:

> To be sure, it makes sense to conceptualize the tribes as sovereigns that, due to their unique situation, cannot exercise the full measure of their sovereign powers. . . . But I do not see how this is consistent with the apparently "undisputed fact that

121. *Id.* at 1637 (quoting *Oliphant*, 435 U.S. at 206) ("[W]e do not read any . . . cases as holding that the Constitution forbids Congress to change 'judicially made' federal Indian law . . . ."); *id.* at 1636 (stating that in the field of federal Indian law "the Court should [not] second-guess the political branches' own determinations").

122. *Id.* ("Congress has enacted a new statute, relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes. And that fact makes all the difference.").

123. *Lara*, 124 S. Ct. at 1639.

124. *Id.* at 1640.

125. *Id.*

126. *Id.* at 1641.

> Congress has plenary authority to legislate for the Indian tribes in all matters . . . ." The sovereign is, by definition, the entity "in which independent and supreme authority is vested." It is quite arguably the essence of sovereignty not to exist merely at the whim of an external government.[127]

Accordingly, because neither the Indian Commerce Clause nor the Treaty Clause can be construed to invest Congress with plenary power to "calibrate the 'metes and bounds of tribal sovereignty,'"[128] either Congress lacks the constitutional authority to alter the inherent sovereignty of tribes, and thus precedential cases that have affirmed this power in Congress at the expense of tribal sovereignty have been wrongly decided,[129] or, if the power to expand or contract Indian sovereignty is of extraconstitutional origin and properly wielded by Congress, then Indian nations are, quite simply, not sovereigns even in a limited *Cherokee* sense.[130]

Describing federal Indian law as "at odds with itself,"[131] Justice Thomas purported to resolve the tension between plenary power and sovereignty by coupling a structural analysis of the relationship between Indian tribes, states, and the United States with an assessment of the practice of the political branches. The failure of the Constitution to allocate sovereignty to Indian tribes, in his view, relegated them to a subordinate position in the constitutional framework beneath that of the states and the federal government, with respect to which the

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127. *Id.* at 1643-44 (quoting *Wheeler*, 435 U.S. 313, 319 (1978) and *Black's Law Dictionary* 1395 (6th ed., West 1990).

128. *Lara*, 124 S. Ct. at 1642 (quoting majority at 1635); *see also id.* at 1647 ("I cannot agree that the Indian Commerce Clause 'provide[s] Congress with plenary power to legislate in the field of Indian affairs.'") (quoting majority at 1633); *id.* at 1648 ("The treaty power does not, as the Court seems to believe, provide Congress with free-floating power to legislate as it sees fit on topics that could potentially implicate some unspecified [Indian] treaty.").

129. *See id.* at 1645 (suggesting, contrary to existing case law, that if plenary power is without constitutional foundation and tribes are inherently sovereign, Indian tribes have the sovereign authority "to punish *anyone* who violates their laws," including non-Indians) (emphasis in original); *but see id.* at 1648:

> I find it difficult to reconcile [cases affirming Indian legal sovereignty] with Congress' 1871 prospective prohibition on the making of treaties with the Indian tribes. The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain that the tribes possess anything resembling 'sovereignty.'

Prior to dismissing the first of these two observations with the second, Justice Thomas appeared prone to embrace the "logical consequence" of discrediting plenary power—"that nearly every law made by Congress and nearly every case decided by the Supreme Court over the last two centuries seeking to impose or sanctioning the imposition of power over Native Americans is invalid because it conflicts with the inherent and recognized sovereignty of Native nations." Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. Rev. L. & Soc. Change 217, 219 (1993).

130. *Lara*, 124 S. Ct. at 1643-44.

131. *Id.* at 1648. In light of his interpretation of the Constitution as offering inadequate support for congressional plenary power and no justification for the coexistence of plenary power with Indian sovereignty, Justice Thomas urged the Court to "ask the logically antecedent question whether Congress (as opposed to the President) has [plenary] power" and to thereby provide a more coherent "foundation for the analysis of the sovereignty issues posed by this case." *Id.* at 1648 (emphasis omitted).

Constitution does make such an allocation.[132] Even more importantly, the gloss on the constitutional text supplied by centuries of congressional assertions of plenary power to enact a great welter of statutes hostile to tribal sovereignty, including an 1871 act terminating the making of treaties with Indian tribes[133] and the imposition of many of the protections of the Bill of Rights upon tribal judicial systems,[134] in conjunction with executive support of congressional actions, supported the conclusion that the political branches have evolved a common policy presumptively, although not conclusively, disfavoring tribal sovereignty.[135]

Although his analysis of the Constitution and subsequent legislative history led him to conclude, in dicta, that he "do[es] not necessarily agree that the tribes have any residual inherent sovereignty,"[136] Justice Thomas rested his concurrence on institutional separation of powers concerns that dictated a limited judicial role in the making of federal Indian law: in his reasoning, judges do not supply final and authoritative interpretations of the Constitution when deciding Indian law cases but merely analyze treaties, statutes, and executive orders to ascertain and effectuate the present intent of the political branches.[137] In short, it is to the "authoritative pronouncements of the political branches"[138] as to their prevailing policy, as evidenced by congressional and executive practice—not to the Constitution—that judges must look to ascertain the answer to the question of whether a specific exercise of tribal sovereignty is legally permissible. Because federal Indian law is more politics than law, "[w]hen the political branches demonstrate that a particular exercise of the tribes' sovereign power is in fact

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132. *See id.* at 1644 ("[T]he States (unlike the tribes) are part of a constitutional framework that allocates sovereignty between the State and Federal Governments and specifically grants Congress authority to legislate with respect to them .... The tribes ... are not part of this constitutional order, and their sovereignty is not guaranteed by it." (citation omitted)).

133. *See id.* at 1644 (citing *Act of March 3, 1871*, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. §71) (2000)) (providing that "no Indian nation or tribe ... shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty").

134. *See Lara*, 124 S. Ct. at 1644 n. 2 (citing *Indian Civil Rights Act of 1968*, 25 U.S.C. §§ 1301-1303 (2000)) (limiting tribal powers to define and punish offenses and imposing substantive due process provisions of Article III and the Fourth, Fifth, Sixth, Seventh, Eight, and Fourteenth Amendments of the Constitution upon tribal governments).

135. One long-standing theory of constitutional interpretation, exercised often in the field of national security and foreign relations law, maintains that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, ... may be treated as a gloss on 'executive Power' vested in the President." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring). Although Justice Thomas did not make a direct citation to Youngstown, the substance of his opinion evinces support for the theory that the political branches can jointly supply meaning to the words of the Constitution, as well as the understanding that Indian law is, in some sense, foreign relations law.

136. *Lara*, 124 S. Ct. at 1647.

137. *See id.* at 1646:

> [C]ritically, our cases have never drawn th[e] line [defining permissible assertions of tribal sovereignty] as a constitutional matter. That is why we have analyzed extant federal law (embodied in treaties, statutes, and Executive Orders) before concluding that particular tribal assertions of power were incompatible with the position of the tribes.

See also id. at 1647 ("[I]t does not follow that this Court's federal-common-law decisions limiting tribes' authority to exercise their inherent sovereignty [such as *Duro*] somehow become enshrined as constitutional holdings that the political branches cannot alter.").

138. *Id.* at 1646.

consistent with federal policy, the underpinnings of a federal-common-law decision disabling the exercise of that tribal power disappear."[139]

D. The Dissent

In dissent, Justices Souter and Scalia defended judicial primacy in the making of federal Indian law by elevating the description of tribes as domestic dependencies into a constitutional principle and holding that Congress lacked the power under the Constitution to "control the interpretation of [the *Duro* fix] in a way that is at odds with the constitutional consequences of the tribes' continuing dependent status."[140] In describing the grant of authority conveyed by Congress in the *Duro* fix as a delegation on the ground that, once divested, even if an erstwhile sovereign power is restored it can never again acquire inherent status, the dissenters insisted that it is the judges, and not the political branches, who are empowered to say what federal Indian law is and that when they do so they are undertaking constitutional analysis—the quintessentially judicial function—rather than making federal common law.[141] In contrast, the political branches, for Justices Souter and Scalia, are cabined within much narrower boundaries and left free only to undertake "independent elaboration . . . of the fine details of the tribes' dependent position."[142] Viewed in this light, principles of stare decisis compel the dissenters to conclude that the Court must not lightly abandon prior pronouncements on the complex question of tribal sovereignty,[143] and, even more significantly, that if the political branches wish to reinvest tribes with the power to prosecute non-members they cannot do so through legislation: rather, they must unambiguously repudiate the domestic dependent status of the tribes by thrusting them beyond the constitutional framework and the reach of the Court through a grant of independence.[144]

E. Analysis

Although seven of nine justices voted to recognize the *Duro* fix as having authorized Indian tribes to exercise the power to try non-member Indians, it would strain credulity to characterize *Lara* as a victory for Indian sovereignty. Rather than denouncing plenary power as a colonialist relic contravened by principles of justice and morality, or at least jettisoning the implied divestiture doctrine to invalidate *Oliphant* and its progeny, the majority, attributing to

139. *Id.* at 1647.

140. *Lara*, 124 S. Ct. at 1651.

141. *Id.* at 1650 ("When we enquire whether the two prosecuting entities draw their authority to punish the offender from distinct sources of power, . . . we are undertaking a constitutional analysis based on legal categories of constitutional dimension . . . ." (internal quotation marks and citation omitted)).

142. *Id.*

143. *See id.* ("[P]rinciples of stare decisis are particularly compelling in the law of tribal jurisdiction, an area peculiarly susceptible to confusion.").

144. *See id.* (opining that the "only two ways that a tribe's inherent sovereignty could be restored" are through judicial repudiation of the doctrine of domestic dependency—a violation of the principle of stare decisis—or through a grant of independence).

plenary power an extraconstitutional pedigree that reinforces congressional power at the expense of judicial review of its exercise, rested its holding upon the very mechanism that has functioned for nearly two centuries as destroyer of Indian sovereignty. Nothing in the majority opinion guarantees any future limits to the unbridled judicial role of imposing common law limitations on tribal sovereignty; on the contrary, the majority promises only to recognize Congress's power to "change 'judicially made' federal Indian law"[145] through legislation. Any expectations that the Court will become a more attractive custodian of tribal sovereignty will find no succor in *Lara*, which the Court plainly regarded as a separation of powers, rather than an Indian law, case.

Worse still, Justice Kennedy, without discounting the continued vitality of plenary power, wrote separately to defend a role for the judicial branch in the review of its exercise and warned that any residual inherent sovereignty that survived *Lara* may have a precarious future to the extent that its exercise, in regard to non-members, trenches upon constitutionally protected rights. In short, even the most Indian-friendly Congress of the future—one that would go much further than the *Duro* fix and legislate to restore tribal criminal and civil jurisdiction over all those who set foot in Indian country—may not be able to prevent the Court from further restricting the exercise of tribal sovereignty, or disposing of it altogether, if Justice Stevens's view of the appropriate judicial role in the review of plenary power gains favor.

If *Lara* is nothing more than the juxtaposition of a close embrace of an expansive understanding of plenary power and an internal judicial debate over the delineation of the institutional boundary separating political from judicial powers within the canon of federal Indian law, tribal sovereigntists will still have struck, at best, a Faustian bargain. Judicial plenary power bites as hard as the congressional variant: there is no practical distinction between the two; both have colonialist consequences. Embracing any variant of plenary power for the purpose of acquiring jurisdiction over non-member Indians, only to be subjected to divestment of this aspect of jurisdiction and more at some future date either by Congress or the Court, would only attrit Indian sovereignty still further.

Still more disconcertingly, *Lara* reveals that the date of ultimate divestment may not be long in coming. Justice Thomas, opining that the political branches are jointly endowed with the power to craft federal Indian policies that utterly destroy Indian sovereignty (if Indian sovereignty, subsequent to the advent of plenary power, can even be said to exist), had the temerity to cry out that the emperor has no clothes and that federal Indian law is little more than politics strutting about in nonexistent judicial garb that everyone is merely pretending to see for fear of being branded, as are all those who cannot see the magnificent raiments, as dimwitted. Moreover, although they are far more skeptical of congressional plenary power and much more defensive of judicial turf in the interpretation of the constitutionality of its assertion, Justices Souter and Scalia

145. *Lara*, 124 S. Ct. at 1637 (quoting *Oliphant*, 435 U.S. at 206)

reach the same conclusions as Justice Thomas regarding the ultimate power of the political branches over Indian tribes. For at least these three justices, and possibly for all nine, the power of Congress and the President to perpetuate the suppression of Indian sovereignty is a nonjusticiable foreign policy question, and the status of Indian tribes as domestic dependencies—a principle to which Congress and the executive have for centuries been committed—renders it highly improbable that the trajectory of Indian sovereignty will do ere else but head south, even if only incrementally, in the future.

If the future holds true to form, a series of defeats should follow hot on the heels of the "victory" in *Lara*. The Indian Removal Act[146] made a mockery of *Cherokee Nation*; a passel of plenary power-based legislation subverted *Worcester* and trumped *Crow Dog*; and *Oliphant* and the implied divestiture doctrine denatured *Wheeler*.[147] *Lara* is not the end of the story: a legislative expansion of the Indian Civil Rights Act, imposing still more of the substantive provisions of the Bill of Rights upon tribal governments,[148] and even the repeal of the *Duro* fix in response to the equal protection and due process concerns raised by Justice Kennedy and collateral litigation[149] are not beyond contemplation. Moreover, Congress is not the only player; each of the three branches of government has a part in this morality play. Should the legislative branch fail to respond to the signals sent by *Lara*, one may expect the Court, particularly if its membership is augmented in the coming years by activist justices unsympathetic to the merits of Indian sovereignty claims and skeptical of congressional plenary power, to be on guard for cases in which to extend the implicit divestiture doctrine at the expense of the remnants of Indian sovereignty. If this comes to pass, then with another *Lara*, implicit divestiture will ripen into de facto judicial termination, and Indian sovereignty will finally be undone.[150]

Still, if in the final analysis *Lara* is a Pyrrhic victory, Indian sovereigntists must refuse to emulate Pyrrhus by, figuratively speaking, abandoning the field and sailing for home. Rather, they should heed the dissent. Justices Souter and Scalia advise us that destruction of Indian sovereignty is not remediable within the U.S. politico-legal framework and that the sole mode whereby sovereignty can be

146. *See Indian Removal Act of May 28, 1830*, ch. 148, 4 Stat. 411 (declaring all Cherokee laws invalid and ordering forced relocation of Cherokee Tribe). Gloating after passage of the Indian Removal Act, President Jackson, still furious over the decision in *Worcester*, is reported to have remarked, "John Marshall has made his decision; let him enforce it now if he can." Fergus M. Bordewich, *Killing the White Man's Indian: Reinventing Native Americans at the End of the Twentieth Century* 46-47 (Doubleday 1996). More than four thousand Cherokees died during the Trail of Tears. *Id.* at 47.

147. *See Oliphant*, 435 U.S. 191; *Wheeler*, 435 U.S. 313; *Crow Dog*, 109 U.S. 556; *Worcester*, 31 U.S. 515.

148. *See supra* at nn. 80, 134, 307 (discussing the Indian Civil Rights Act). Several proposals to effect just such an amendment have already been offered. *See infra* n. 307.

149. *See Navajo Nation v. Means*, No. CH-CR-2205/2207-97, slip op. at 1-2 (Chinle Dist. Ct. July 20, 1998) (challenging the criminal jurisdiction of the Navajo Nation over a non-member Indian).

150. Some commentators have concluded that Indian sovereignty has been dead for a half century, the victim of plenary power. *See e.g.* Cross, *supra* n. 50, at 371 (referencing "realist" Indian law scholars).

reinvested in Indian nations is via independence.[151] While this observation was likely offered to support a view of Indian sovereignty as a quaint, but ultimately unhelpful, historical anachronism and to counsel against Indian independence, it bears close scrutiny nevertheless. Indeed, the entire history of federal Indian law from *M'Intosh* to *Lara* has been a steady retreat from the international legal presumption that Indian nations are in fact nations coequal to all the other nations of the earth and entitled to assert sovereignty and legal jurisdiction over all persons and to the limits of their territorial authority.[152] It is now time to hold ground and fight. Indians have a right and duty to live by Indian law,[153] and all who enter Indian country—whether Indian or non-Indian, member or non-member—should be subject to the jurisdiction of the appropriate Indian sovereign, just as all those who enter France, or China, or Sudan, regardless of nationality and notwithstanding any concerns about the substantive quality of justice offered by those sovereigns, are subject to the jurisdiction of those nations by virtue of their entry, which implies consent.[154] Those who wish to avoid Indian jurisdiction, whether due to their perceptions regarding tribal justice or for any other reason, need only refrain from setting foot therein.

Because, as the next part will demonstrate, federal Indian law fails to offer—and, as Marshall made plain in *M'Intosh*, given its obligation to justify the history of conquest by the political system that creates it, will never offer—any coherent legal or moral justification for the destruction of Indian sovereignty,[155] independence from its constraints must become the lodestar of our journey. To justify this mission it is necessary to develop the argument that federal Indian law is not merely imperfect but rather a profoundly flawed and morally bankrupt legal system within which justice for Indian nations is a practical impossibility, necessitating and rationalizing complete disassociation.

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151. *Lara*, 124 S. Ct. at 1650-51.

152. The presumption that the territorial state possesses exclusive criminal and civil jurisdiction over its nationals as well as over non-nationals to its territorial limits is the most basic principle in the international law of jurisdiction. Oppenheim, *supra* n. 33, at §§ 137, 399. Although domestic jurisprudence incorporates this principle, confirming that "[a] basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens," *Duro*, 495 U.S. at 685, federal Indian law offers no logical explanation—save for race-based considerations—for differentiating between Indians and non-Indians in allowing Indian tribes to exercise only limited territorial jurisdiction.

153. Indian law is an aspect of Indian culture, and observation of Indian culture is central to living as an Indian. As a Seminole elder reminds us, "[w]e can't accept the law of others. We are not any better than other people, but we have our own law. We can't let go of our law, because it directs us where we need to go." Bobby Billie, *The Independent Traditional Seminole Nation: Defending Our Heritage and Our Land*, 14 St. Thomas L. Rev. 337, 337 (2001).

154. For an elaboration of this "implied consent" theory, see Bryan H. Wildenthal, *Fighting the* Lone Wolf *Mentality: Twenty-First Century Reflections on the Paradoxical State of American Indian Law*, 38 Tulsa L. Rev. 113, 127-28 (2002).

155. *See M'Intosh*, 21 U.S. at 591-92 (noting that, despite the injustice of the genocide and land expropriation perpetrated against Indian nations, "if [legal arguments justifying these practices] be indispensable to that system under which the [United States] has been settled, . . . [they] certainly cannot be rejected by Courts").

IV. FEDERAL INDIAN LAW AS AN EVIL LEGAL SYSTEM

A. *Conflicts between Law and Morality: Positivism and Naturalism*

1. Positivism

The relationship between law and morality has been the subject of vigorous academic debate for millennia.[156] For legal positivists,[157] universal moral agreement as to the proper set of legal norms and principles that ought to constitute a legal regime is impossible, as is any universally accepted protocol for deciding between moral claims.[158] Accordingly, positivists conclude that a generalized adherence to law, notwithstanding the normative content of the constitutive rules of the given legal regime, is the best defense against the anarchy that would result if individuals were entitled to form and apply their own particular judgments as to the utility of obedience.[159] The separation thesis, which provides that legal obligations are entirely separate from moral obligations,[160] shelters law from moral criticism, and "the admission that a rule is a valid legal rule preclude[s] . . . condemnation of it by reference to moral standards or principles."[161]

In short, positivism enforces an amoral duty of fidelity to law requiring obedience even where the law itself is immoral;[162] when confronted with a law perceived as unjust or even evil, the legal decisionmaker is obliged to consider law and morality independently of each other and, whatever his personal moral judgments or policy preferences as to the extralegal validity of the substantive

156. *See* Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Harv. U. Press 1977) (discussing the intellectual history of the debate over the relationship between law and morality).

157. A broad array of scholars committed to the premise that legal rules deserve adherence notwithstanding the subjective evaluations of the normative content of the rules but otherwise differentiable in many regards are lumped together under the rubric "positivists" and distinguished from "antipositivists" for the sake of theoretical parsimony and clarity.

158. *See e.g.* Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* 5, 8 (2d ed., U. Notre Dame Press 1984) (concluding, from observations of contemporary moral debates, that there "seems to be no rational way of securing moral agreement in our culture" and that as a consequence the debate is "necessarily interminable").

159. *See* David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* 4 (Clarendon Press 1991) (warning against the anarchy that would issue if judges were given license to declare laws invalid because they failed to accord with "right reason"); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 598 (1958) (describing the anarchist's method of legal reasoning: "This ought not to be the law, therefore it is not and I am free not merely to censure but to disregard it."); Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 Iowa L. Rev. 901, 915-16 (1995) (noting that early positivist scholars such as Jeremy Bentham and John Austin privileged obedience to law over the general freedom to criticize law on utilitarian grounds).

160. *See generally* Hart, *supra* n. 159.

161. H.L.A. Hart, *Law, Liberty and Morality* 3 (Stan. U. Press 1963).

162. *See* Strassberg, *supra* n. 159, at 917 (characterizing the positivist position: "The question of the "Law's" immorality or evilness [i]s simply not a legal question, since legal obligation stood independent from the substance of the law." (citing Dyzenhaus, *supra* n. 159, at 16).

command, apply the law.[163] For positivists, legal reasoning is not only autonomous from political and ethical choice, but the most monstrous laws are nevertheless laws that deserve adherence and merit enforcement.[164] Law is not a rough attempt to codify reason or justice but rather the "command of the sovereign" backed by the threat of sanctions in the absence of compliance.[165] Positivism supplants reason as the source of legal obligation with "fear; fear of violence, fear of lost liberty, advantage or amenity, or fear of social disapproval."[166]

2. Naturalism

For millennia, critics of positivism have propounded and defended the notion that there exists a set of absolute and universal rules or precepts that, although not ascertainable or discoverable by the deductive exercise of human reason, nevertheless binds mankind and the political communities instituted to govern the affairs of men on earth, trumping any inconsistent rules by virtue of its intrinsic moral and rational merit.[167] Natural law,[168] an immediate and eternal expression of the principles of rights and justice that though gleaned from

163. *See* H.L.A. Hart, *The Concept of Law* 210-11 (2d ed., Clarendon Press 1994) (stating that "a refusal . . . to recognize evil laws as valid . . . is too crude a way with delicate and complex moral issues"); Hans Kelsen, *Reine Rechtslehre: Einleitung in die Rechtswissenschaftliche Problematik* [*Pure Legal Teaching: Introduction to the Legal Method*] 101 (Franz Deuticke 1934) ("Even law that is bad in the opinion of the law applying organ has to be applied . . . ."); Ronald Dworkin, *Hard Cases*, 88 Harv. L. Rev. 1057, 1060 (1975) ("[J]udicial decisions . . . even in hard cases . . . characteristically are and should be generated by principle not policy." Dworkin labeled as "principle" the reasoning behind the positive legal rule and as "policy" the independent and subjective assessment of the norm underpinning the legal rule in question.); Hart, *supra* n. 159, at 607 (insisting that the judge may not integrate his personal morality within his legal decisionmaking but must rather make an exclusively legal decision); David Luban, *A Report on the Legality of Evil: The Case of the Nazi Judges*, in *Nazis in the Courtroom: Lessons from the Conduct of Lawyers and Judges under the Laws of the Third Reich and Vichy, France*, 61 Brook. L. Rev. 1139, 1141 (1995) (characterizing positivism as "the legal philosophy . . . that law and morality are separate, that a statute can be legal even if it is wicked, and thus that the question 'is it legal?' is totally distinct from the question 'is it moral?'").

164. Positivists ground the judicial obligation to apply even the most unjust and immoral law not merely upon utilitarian considerations but upon arguably (quasi) moral foundations, attributing to the fact of widespread public acceptance of the legal regime in question the existence of a moral duty to adhere to the collective public preference. *See e.g.* Dyzenhaus, *supra* n. 159, at 251 (describing this argument).

165. *See* John Austin, *The Province of Jurisprudence Determined* (Wilfrid E. Rumble ed., Cambridge U. Press 1995) (elaborating the "command theory" of positivism which holds that law is but the "command" of the sovereign rather than a statement of morality or a pathway to justice).

166. Hall, *supra* n. 22, at 279.

167. *See generally* Aristotle, *Nichomachean Ethics* (Christopher Rowe trans., Oxford U. Press 2002) (explaining that the rules of natural law are those norms universally recognized by civilized men and differentiating natural law from conventional justice); Louis René Beres, *On Assassination as Anticipatory Self-Defense: The Case of Israel*, 20 Hofstra L. Rev. 321, 328 n. 31 (1991) (tracing the development of natural law from ancient Hebraic philosophers through the ancient Greeks and Romans to the present).

168. The term "lex aeterna" is sometimes used to refer to natural law, although the latter is better understood as a subset of the former inasmuch as the lex aeterna includes universal principles of "cosmic reason" that human reason has yet to discover. Louis René Beres, *The Oslo Agreements in International Law, Natural Law, and World Politics*, 14 Ariz. J. Intl. & Comp. L. 715, 728 (1997). Despite its ancient lineage, natural law, for reasons discussed *infra*, is "almost as foreign to American legal consciousness of the twenty-first century as honor," and thus the term requires some elaboration. Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 Am. J. Intl. L. 313, 326 (2001).

observation of the natural universe and referenced as the "ultimate origin of law" and the "beginning of moral life proper,"[169] long antedates the origin of man[170] and is effectively "super-law": where, by the contrivance of man-made institutions, natural law is forced into conflict with positive sources of regulation that are out of harmony with human reason or that represent the arbitrary construction of opinion or base assertion of power, natural law not only prevails over the "will of human governors"[171] but rejects utterly the notion that such contrary statements of obligation have the force of law. Put very simply, for naturalists, natural legal philosophy provides the supreme source of normative guidance for and judgment of human conduct, demarcates the legal universe, affirmatively prescribes rights and duties,[172] and defines the limits of our legal reach in insisting that:

> Only good laws are laws. And for a law to be good, it must be based, in one way or another, upon natural law. If a human law is at variance with natural law it is no longer legal.[173]

Accordingly, naturalists reject the separation thesis in favor of the coherence thesis, which holds that morality and legal rules are not severable into "wholly separate worlds,"[174] and insist that, because there are no immoral laws, any "law" that is immoral, as well as any immoral interpretation of an otherwise moral law, carries no legal force at all.[175] For these critics, legal reasoning is indistinct from policy analysis: all law is "policy and nothing more," and the correct legal solution

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169. A.P. d'Entrèves, *Natural Law: An Introduction to Legal Philosophy* 122 (H.J. Paton ed., Hutchinson & Co. 1960).

170. *See* Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* 4-5 (Cornell U. Press 1955) ("[Natural law] principles were made by no human hands" and either "antedate deity itself" or else "so express its nature as to bind and control it." (emphasis omitted)); *Max Weber on Law in Economy and Society* 288 (Max Rheinstein ed., Edward Shils trans., Harvard U. Press 1954) ("Natural law [is] the collective term for those norms which owe their legitimacy not to their origin from a legitimate lawgiver, but to their immanent [sic] and teleological qualities."); Louis René Beres, *International Law, Personhood and the Prevention of Genocide*, 11 Loy. L.A. Intl. & Comp. L.J. 25, 34 (1989) ("Not of today or yesterday its force . . . It springs eternal; no man know its birth." (internal quotation marks and citation omitted)). Although natural legal philosophy has a branch that posits the origin of natural law stems from the expressed will of a divine creator, a branch of natural law contends that even in the absence of a divinity the authority of natural law is rooted in the objective analysis of the natural order of the universe from which generalizations can be drawn and that the origin of this natural order is not relevant for purposes of establishing the authority of natural law.

171. *See* Corwin, *supra* n. 170, at 4-5 (insisting that only those "human laws" created through the faithful "discovery and declaration" of natural law and codified as a precise "record or transcript" of the same deserve recognition as law (emphasis omitted)).

172. Natural law creates both negative and positive rights and duties. *See* Christian Thomasius, *Fundamenta Iuris Naturae et Gentium*, in *The Philosophy of Law* (W. Hastie trans., 1887) (distinguishing natural law as a source of affirmative and negative obligations and rights).

173. d'Entrèves, *supra* n. 169, at 81-82 (internal quotation marks omitted).

174. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630, 656 (1958).

175. *See* Lon L. Fuller, *The Morality of Law* 53-59 (Yale U. Press 1964) (extending evaluation of law on moral grounds to the process of its interpretation); Gustav Radbruch, *Rechtsphilosophie* [*Legal Philosophy*] 344-46 (1973) ("[W]here justice is not even aimed at, where equity, this nucleus of justice, is knowingly refused entry in the process of the creation of a positive law, then the law is not simply unjust, it is devoid of all legality."); Hart, *supra* n. 159, at 617-18 (noting that for critics of positivism, immoral laws were not laws at all and some permissible acts were prohibited by natural law, a higher form of legal commandment).

to a particular legal problem is identical to the correct moral and ethical solution to that legal problem.[176] Judges are not simply morally agnostic machines created to apply law: rather, judges are moral agents who create and apply moral norms through judicial interpretation[177] and who are constantly charged with the moral duty to exercise and be guided by their consciences.[178]

B. *The Problem of the Evil Legal System*

Positivism and antipositivism have provided starkly different answers to the age-old question—what must legal decisionmakers do when confronted by laws that are evil on their face or as applied, or, more pointedly posed, "Should the judge park his conscience at the courthouse door in applying law?"[179] For positivists, evil laws pose moral, but not legal, dilemmas, and judges are duty bound to apply the law as written whatever the consequences to their own moral sensibilities.[180] In contrast, antipositivists argue that the separation thesis at the core of positivism champions law at the expense of justice, creates a dangerous moral refuge for those judges and lawyers who recognize the immorality of the law while blinding others to moral concerns, and effectively greases the skids for the creation and implementation of substantively evil legal regimes. Accordingly, antipositivists charge legal decisionmakers with the general obligation, in applying law, to integrate moral considerations and to "be guided not simply by its words but also by some conception of what is fit and proper . . . ."[181] Law must yield morally defensible outcomes, and where it cannot or will not it must yield to justice.[182]

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176. Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *The Politics of Law: A Progressive Critique* 40, 47 (David Kairys ed., Pantheon Bks. 1982).

177. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1717-22 (1976) (describing the antipositivistic, or "altruistic," approach to the judicial function); *see also* Charles Fried, *The Laws of Change: The Cunning of Reason in Moral and Legal History*, 9 J. Leg. Stud. 335, 336 (1980) ("The law is a moral science, and judges, in determining the law, decide as moral agents.").

178. Brian H. Bix, *Natural Law: The Modern Tradition*, in *The Oxford Handbook of Jurisprudence and Philosophy of Law* 61, 63 n. 13 (Jules Coleman & Scott Shapiro eds., Oxford U. Press 2002).

179. Norman L. Greene, *A Perspective on 'Nazis in the Courtroom,'* in *Nazis in the Courtroom: Lessons from the Conduct of Lawyers and Judges under the Laws of the Third Reich and Vichy, France*, 61 Brook. L. Rev. 1122, 1122 (1995).

180. Edmund Burke, *Reflections on the Revolution in France* 71 (Thomas H.D. Mahoney ed., 1955) (judging natural law to be too theoretically impoverished to provide moral guidance to modern society and concluding that legal obedience is the lesser of evils); Luban, *supra* n. 163, at 1141 ("[P]ositivism made the German judges treat law the way that German soldiers treated orders: Where the soldier says, 'An order is an order,' the judges said, 'A law is a law.'" (quoting Gustav Radbruch, *Five Minutes of Legal Philosophy*, in *Philosophy of Law* 103, 103 (Joel Feinberg & Hyman Gross eds., 4th ed., Wadsworth Publg. Co. 1991))). Although early positivists accepted in principle the argument that evil legal regimes could arise, they insisted that the value of generalized legal obedience would almost invariably outweigh the evils associated therewith. *See e.g.* H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* 7, 80-81 (Oxford U. Press 1982); *see also* Austin, *supra* n. 165, at 158 (noting that if one were to challenge a law gravely contrary to morality as not binding, "the Court of Justice will demonstrate the inconclusiveness of [that] reasoning by hanging [him] up, in pursuance of the law of which [he] ha[s] impugned the validity.").

181. Lon L. Fuller, *Anatomy of the Law* 59 (Frederick A. Praeger Publishers 1968).

182. Radbruch, *supra* n. 175, at 346.

The capture and perversion of the German state by Nazism, ascribed by antipositivists to the passive complicity of positivist German judges with the Nazis,[183] drew the theoretical argument about the appropriate response to fundamentally evil legal systems into the arena of practical politics. The positivist faith in the rule of law as the last line of defense against anarchy and tyranny was profoundly shaken, and many positivists, without altogether abandoning the separation thesis, retreated from their earlier absolutism and conceded that law is little more than a dumb instrument susceptible to good or ill depending upon the designs of its wielder.[184] Other positivists still went further and counseled judges, facing the necessity of applying an evil law, to either resign or to misrepresent the meaning of the law so as to denature it of its immorality.[185]

Antipositivists, building upon the Nazi example with subsequent evidence from apartheid-era South Africa and a retrospective examination of slavery, extended the critique of positivism by defending the coherence thesis against positivist miscarriages of justice and hypothesizing the existence of a set of minimum characteristics that all legal regimes must satisfy in order to be deemed sufficiently moral as to be worthy of obedience.[186] Laws that do not meet this threshhold are not laws, and do not give rise to moral conflicts. While the state has the physical power to impose and enforce unjust rules, it can make no moral claims of any entitlement to obedience and must rely upon naked coercion.[187]

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183. *See* Hart, *supra* n. 159, at 617 (explaining that antipositivists claimed a causal relationship between positivism and the implementation of Nazi totalitarianism); Arthur Kaufmann, *National Socialism and German Jurisprudence from 1933 to 1945*, 9 Cardozo L. Rev. 1629, 1633 (1988) (attributing the capitulation of German judges to Nazism to a slavish commitment to positivism and querying whether "a career in jurisprudence renders one incapable of recognizing and opposing injustice"); Luban, *supra* n. 163, at 1141 (stating that German judges permitted the "professional duty to maintain the rule of law" to overwhelm their responsibility to exercise moral judgment).

184. *See e.g.* Joseph Raz, *The Rule of Law and Its Virtue*, 93 L. Q. Rev. 195, 208 (1977). Some positivists have modified their doctrine by distinguishing "legal-moral obligations," defined as "legal obligation[s] in the moral sense," from "intra-systemic" legal obligations, defined as rules that establish penalties for disobedience that apply solely within the legal system in question. Finnis, *supra* n. 22, at 33. Others declare the "uncoupling" of authority and obligation by concluding that "[r]ulers and their officials . . . [are] acknowledged as having authority, including moral authority to make and enforce law, and the right not to be usurped, while at the same time none of their laws, not even those imposing intra-systemic legal obligations, would create any legal obligation in the moral sense." *Id.*

185. *See e.g.* Ronald Dworkin, *Taking Rights Seriously* 362-67 (1978). Nazism forced legal positivism to become more sophisticated, and what might be termed neopositivist theories increasingly draw closer to naturalism as they incorporate moral elements and moral judgments within otherwise descriptive theories of law. *See* Roger A. Shiner, *Norm and Nature: The Movements of Legal Thought* (Oxford U. Press 1992) (describing and critiquing positivist transformations).

186. *See* Fuller, *supra* n. 175, at 5-10, 39 (hypothesizing that a moral legal system must possess the following characteristics: (1) administrators who scrupulously adhere to (2) preestablished and (3) publicized rules that are (4) comprehensible but are (5) not retroactive, (6) not contradictory of other rules, (7) not impossible to follow, and (8) not ever-changing). Apartheid-era South Africa erected an evil, racist regime that failed to satisfy these eight conditions of the morality of law. *Id.* at 160. Antebellum judges in the United States—an almost exclusively positivist cohort—were, in the main, similarly complicit with a system of law they thought immoral. *See generally* Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* 8-30 (Yale U. Press 1975).

187. Hilaire McCoubrey, *Natural Law, Religion and the Development of International Law*, in *Religion and International Law* 177, 177-78 (Mark W. Janis & Carolyn Evans eds., Martinus Nijhoff Publishers 1999).

Still, even if antipositivists can claim ascendancy over their positivist colleagues within the legal academy, developing a theory of law in regard to an evil legal system is a far less daunting feat than providing practical guidance to legal decisionmakers who must directly engage with moral issues within such a system. Positivists, not entirely as committed to the separation thesis as they once were, but otherwise unwilling to proclaim that unjust laws lack legal force, have acquiesced when others urged judges and other legal actors to engage in civil disobedience and even to resign from offices that would require them to apply manifestly evil laws;[188] most antipositivists have been far less effective in integrating theory with praxis.[189] Antipositivists, while conscious of the possibilities inherent in the constitutional design that permit judicial officials to counter majoritarianism by the exercise of judicial review,[190] remain skeptical that the gravitational force of public support for evil legal regimes will tolerate much deviation, let alone more radical judicial renunciations of black letter law, in the name of justice.[191]

In sum, positivism denies, or at the very least attributes little theoretical significance to, the evil legal system, while antipositivism, although it is well suited to providing an answer to the logically antecedent question of how one identifies an evil legal system, offers little useful instruction to the decisionmaker committed to the integration of law and morality in the adjudication of rights and duties notwithstanding the crushing force of a fundamentally unjust legal order. The development of an ideal-typic antipositivist theory of law and morality would facilitate not only the identification, but even potentially the remediation, of the evil legal system. Federal Indian law, as the next part demonstrates, is fertile terrain for such an endeavor.

188. Cover, *supra* n. 186, at 150-54 (noting that pre-Civil War positivists believed the sole permissible course of action for antislavery judges called upon to remit recaptured slaves to their owners as the law then required was not to deny the legality of the law but to resign judicial office).

189. *See e.g. Nazis in the Courtroom: Lessons from the Conduct of Lawyers and Judges under the Laws of the Third Reich and Vichy, France*, 61 Brook. L. Rev. 1154, 1155 (1995) (comments of Jack B. Weinstein) (offering no affirmative theory of the appropriate judicial response to the evil legal system and indicating instead that "[o]f the various options available to American judges when faced with an immoral law, only one is ruled out: silent acquiescence").

190. *See* Mark A. Graber, *Desperately Ducking Slavery:* Dred Scott *and Contemporary Constitutional Theory*, 14 Const. Comment. 271, 282 (1997) (noting that institutional theories of U.S. constitutionalism regard judicial review as "a deviant institution in a democratic society" because the judiciary, a "countermajoritarian force[,] . . . thwart[s] the will of the representatives of the . . . people . . . ." (quoting Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 128, 16-17 (Bobbs-Merrill Co. 1962))).

191. *See e.g. id.* at 315-18 (presenting institutionalist and historicist arguments suggesting that the very act of embedding evil principles and values within a constitutional framework diminishes future remedial possibilities).

C. *Rethinking Federal Indian Law as An Evil Legal System*

1. General Presumptions about the U.S. Legal System

Nearly all serious observers, called to assess whether the U.S. legal order is an evil legal system, would likely reach the following three conclusions: (1) the decision in *Dred Scott v. Sandford*,[192] a "public calamity"[193] that ratified the constitutional status of African American slaves as property bereft of civil and political rights, was the worst judgment ever rendered by the Supreme Court;[194] (2) the United States, although born in original sin, "made only one historical mistake—slavery";[195] and (3) while still imperfect, the United States has reclaimed and even extended the wisdom and virtue of the framers of its Constitution by thoroughly repudiating slavery and becoming in the process the global exemplar in the remediation of historic injustices and the promotion and defense of human rights.[196]

Moreover, many scholars would likely concur in the following three additional assessments: (1) if the rights and freedoms of racial minorities within the United States are not yet inviolable, breaches of a well-articulated body of public law securing the fundamental and equal civil and political rights of all persons are almost exclusively private acts for which remedies are available at law;[197] (2) although positivism still reigns as the governing jurisprudential paradigm,[198] when "hard cases"[199] arise, the U.S. legal system is not so irretrievably

192. 60 U.S. 393 (1856) (holding that African-descended slaves are not U.S. citizens but rather property without civil or political rights).

193. Charles Evans Hughes, *The Supreme Court of the United States: Its Foundation, Methods and Achievements: An Interpretation* 50 (Colum. U. Press 1928).

194. Walter Ehrlich, Scott v. Sandford, in *The Oxford Companion to the Supreme Court of the United States* 759, 761 (Kermit L. Hall ed., Oxford U. Press 1992).

195. Richard Delgado, *Derrick Bell's Toolkit—Fit to Dismantle That Famous House?*, 75 N.Y.U. L. Rev. 283, 297 (2000) (noting that many Americans erroneously reach this conclusion).

196. By the early nineteenth century most U.S. lawyers and judges accepted that slavery was a fundamentally immoral institution in conflict with natural law, Cover, *supra* n. 186, at 34, and the United States was ultimately willing to fight a bloody conflict to terminate its legal existence. Moreover, U.S. perfectibility has been much on display since the final year of the Cold War: the United States and its political subdivisions have apologized to or compensated Japanese American internees, native Hawaiians, civilians killed in the Korean War, and African American victims of medical experiments, racial violence, and lending discrimination. *See* William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 Ohio St. L.J. ___ (forthcoming 2005) (surveying history of U.S. remediation of claims of aggrieved groups). Furthermore, American commitments to justice are not confined to the domestic arena: since the fall of the Berlin Wall the United States has intervened in Somalia, Bosnia, Haiti, and Kosovo with the avowed purpose of defending fundamental human rights.

197. For a critique of the fundamental premises of contemporary American liberal legal theory—that the regime is fundamentally fair toward all persons and groups, that it treats like cases alike, and that it has been placed upon an evolutionary course toward greater justice that requires at most only "a little tinkering to make it perfect," see Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buff. L. Rev. 205, 217 (1979).

198. *See* Cover, *supra* n. 186, at 10, 34 (noting that natural law, "foundational" to the American legal mind of the "late eighteenth and early nineteenth centuries," was ultimately subordinated to "constitutions, statutes, and well-settled precedent."); Luban, *supra* n. 163, at 1143 (noting that most American lawyers have been "instinctive positivists" since at least the nineteenth century); Vagts, *supra* n. 168, at 326.

wedded to stare decisis or legislative supremacy that it refuses principles of justice entry into the arena of legal combat,[200] and natural law can be successfully invoked in defense of the rights of racial minorities;[201] and (3) any hostile majoritarian tendencies are kept in check by a watchful and evermore active judiciary empowered to wield judicial review in defense against legal revanchism, even to the point of overturning longstanding case law precedents,[202] striking down legislation and administrative actions,[203] and offering up unpopular interpretations of the Constitution in support of minority rights.[204] Within the U.S. legal system,

199. *See* Dyzenhaus, *supra* n. 159, at 1 n. 2 (defining "hard cases" as those in respect to which, having reviewed the facts and the applicable sources of law, "informed lawyers" can disagree in good faith as to the proper result).

200. The principle of stare decisis, providing that once resolved the answer to a judicial question should not be lightly overturned on the ground that to do so would seriously undermine the settled expectations of those who have relied upon the answer to organize their lives and social relations, is a fundamental principle of law common to civilized societies. *See e.g. Planned Parenthood v. Casey*, 505 U.S. 833, 854-69 (1992) (refusing to overturn *Roe v. Wade*, 410 U.S. 113 (1973), in reliance on the principle of stare decisis and discussing the social importance of stare decisis). However, the gravitational force of precedent within contemporary positivism is diminished under certain circumstances, and several theories encourage deviation from earlier decisions when the social policies advanced by those decisions are no longer justifiable on moral or ethical grounds, a circumstances characterized as "institutional regret." *See* Dworkin, *supra* n. 163, at 1087-1101 (articulating a modified positivist theory justifying departures from stare decisis under certain delimited conditions to achieve fairness). Although few positivists are likely to embrace the realist position and reject the immutability of precedent case law in favor of the view that judges are empowered to employ judicial review to consider "the conflicting human values that are opposed in every controversy [and to] open the courtroom to all evidence that will bring light to [the] delicate practical task of social adjustment," the rigid fixation on stare decisis that marked earlier judicial eras is past. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 842 (1935).

Similarly, although the principle of legislative supremacy was arguably part of the constitutional design inasmuch as all legislative powers are granted to Congress in Article I and the Constitution makes no affirmative grant of judicial review, the political branches have long tolerated an expansive judicial role in the practical administration of government, and it has become an article of faith within the U.S. legal system that it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see also The Federalist* No. 48 (James Madison) (warning against the potential for legislative supremacy if the judicial branch did not have the power to review the acts of the legislative and executive branches).

201. *See e.g.* John Quincy Adams, *Argument before the Supreme Court in the Case of* U.S. v. Cinque (Feb. 24 & Mar. 1, 1841) (Adams appealed to natural legal principles to secure the liberty of Africans who regained their liberty after having been taken slaves: "I know of no law . . . no code, no treaty, applicable to the proceedings of the Executive or the Judiciary, except . . . the law of nature, and of Nature's God on which our fathers placed our own national existence.") (available at http://amistad.mysticseaport.org/library/court/supreme/1841.jqa.argument.1.html).

202. *See e.g. Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overturning, in regard to public education, the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

203. *See e.g. Plyler v. Doe*, 457 U.S. 202 (1982) (striking down policies of school boards denying to Hispanic immigrant children access to public education on the ground of the unlawful immigration status of their parents).

204. *See e.g. Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that the Constitution "does not prohibit the . . . narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body"). In other words, the U.S. legal system, through the exercise of judicial review, simultaneously promotes the responsiveness of the political branches to the collective interests of majorities while ensuring that the fundamental rights of minorities are protected against majoritarian incursions. *See generally* Ely, *supra* n. 50.

in other words, when interests conflict, minorities will not systematically lose to majorities, at least when fundamental rights are at stake.[205]

2. Overcoming Binary Thinking

Given the foregoing, it is understandable that the description as "evil" of a legal system that has evolved to simultaneously champion popular sovereignty and minority rights will strike many observers as incongruent with empirical reality. However, it is only upon examination of evidence drawn from a critical analysis of federal Indian law and its consequences that this characterization can be supported and a more holistic assessment of the relative goodness of the U.S. legal system can be made. Much of the discussion concerning the rights of racial minorities in the United States centers around African Americans to the exclusion of other groups, and this black-white paradigm, or "binary thinking"[206] in regard to the intersection of race and law, undernourishes thought and action with respect to Indian justice claims and impedes a more honest evaluation of the moral foundations of the U.S. legal system.[207] Challenging binary thinking is difficult: merely understanding that the status of Indian people as the most materially deprived,[208] politically and economically dependent, and legally exposed group in the nation[209] is an artifact of federal Indian law and policy requires broader and deeper engagement with considerations of race, law, and justice than most scholars have attempted. Recognizing that the perpetuation of Indian subordination may be a greater threat to the moral integrity of the United States

205. For a broader discussion and critique of liberal constitutionalism and the possibilities for harmonizing majoritarianism and minority rights, see generally Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 Ohio St. L.J. 411 (1981).

206. *See* Delgado, *supra* n. 195, at 294 (noting that "binary thinking" not only "conceal[s] the checkerboard of racial progress and retrenchment, [but also] hide[s] the way dominant society often casts minority groups against one another, to the detriment of both"); Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 Stan. L. Rev. 855, 899-900 (1995) (employing binary thinking: "[N]o other group compares to [blacks] in the confluence of the characteristics that argue for" racial remedies.).

207. By nominating African Americans as the primary victims of racial injury, "nonblack" claims are rendered dependent upon the subscription of the white establishment. *See* Vine Deloria, Jr., *Custer Died for Your Sins: An Indian Manifesto* 168 (Macmillan Co. 1969) ("By defining the problem as one of race and making race refer solely to black, Indians [a]re systematically excluded from consideration" for redress.); Steve Russell, *A Black and White Issue: The Invisibility of American Indians in Racial Policy Discourse*, 4 Geo. Pub. Policy Rev. 129 (1999).

208. Indian reservations remain among the most impoverished areas in the United States. Whereas between 8-14% of the U.S. population toils below the poverty line, the figure is 40% of all Indians, with some tribes faring worse. *See* Bradford, *supra* n. 7, at 14 n. 54. Indian unemployment hovers at 40%, eight times the national average, and the median Indian family income is less than half the national average. Anderson, *supra* n. 102, at 1. Underfunded reservation schools are some of the worst in the United States. Atkinson, *supra* n. 28, at 421. The socioeconomic status of "urban" Indians—the bulk of the Indian population—is no better. *See* Bradford, *supra* n. 7, at 14 n. 54. Unemployment, infant mortality, suicide, homicide, substance abuse, homelessness, and poor health are common: by every objective indicator Indians are the most disadvantaged group in the United States. Anaya, *supra* n. 17 at 108 (describing Indians as "the poorest of the poor"); Ward Churchill, *Fantasies of the Master Race: Literature, Cinema and the Colonization of American Indians* 7-8 (M. Annette Jaimes ed., Com. Courage Press 1992).

209. *See supra* at nn. 45-48, 56-58 (describing legal sources of Indian economic and political dependency and legal exposure, including the trust doctrine and plenary power).

than slavery—a far more profound indictment of the U.S. legal system—may still be beyond the ken of most legal scholars.

3. Federal Indian Law as an Instrument of Colonialism

If the word "law" in the phrase "federal Indian law" is intended to connote a set of nomological propositions that restrain the exercise of arbitrary power, or to deny that the elaboration, interpretation, and application of treaties, statutes, and judicial decisions governing U.S. relations with Indian tribes is a rule of man venture, then the very act of using the phrase "federal Indian law," a deliberate misnomer, may well be itself an act of colonialism. Discovery, although deeply woven into case law precedents, firmly fixed in the legal consciousness and behavior of many non-Indians,[210] and manifestly obvious in the facts on the ground, has long been consigned to the ashcan of legal history as nothing more than an extralegal justification for conquest.[211] Plenary power over Indian nations, even when tempered by a trust responsibility, is not merely lacking in any constitutional or international legal foundation;[212] rather, it is a claim to racial superiority intended to capitalize upon discovery, justify the unilateral abrogation of Indian treaty rights, and subordinate the expression of Indian human rights.[213]

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210. *See* Williams, *supra* n. 19, at 4 ("[T]hose of European descent, be they Imperialist or Marxist, rightist or leftist, still act upon the same historically conditioned consciousness that animated the New World conquests of their colonizing forefathers.").

211. *See e.g. Island of Palmas Case* (Neth. v. U.S.), 2 R.I.A.A. 829, 845-37 (Perm. Ct. Arb. 1925) (noting that although discovery was effective in granting exclusive rights to the discoverer relative to other "civilized" nations to impair the title of the discovered indigenous people, "international law underwent profound modifications between the end of the Middle-Ages and the end of the 19th century," and discovery had no legal force by the late 1800s); *see also* Robert A. Williams, Jr., *Columbus's Legacy: Law As an Instrument of Racial Discrimination against Indigenous Peoples' Rights of Self-Determination*, 8 Ariz. J. Intl. & Comp. L. 51, 75 (1991) (describing the discovery doctrine as a legacy of racial discrimination that "provides the 'apology' for the privileges of power and aggression [still] exercised by a race of colonizers over the colonized").

212. *See* Ward Churchill, *Struggle for the Land: Native North American Resistance to Genocide, Ecocide and Colonization* 61 (Common Courage Press 2002) ("[Chief Justice John] Marshall's interpretation stood the accepted meaning of international law squarely on its head" by discovering plenary power and applying the trust doctrine); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L.J. 113, 115-16 (2002) ("[T]he federal government has no legitimate claim to legal supremacy over Indian tribes."); Richard A. Epstein, *Property Rights Claims of Indigenous Populations: The View from the Common Law*, 31 U. Toledo L. Rev. 1, 4-5 (1999) (noting that "[n]othing is offered by way of justification" for the discovery doctrine and plenary power); Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 Harv. L. Rev. 1754, 1760 (1997) (stating that nothing in the Constitution renders "plenary power . . . legitimate"); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 Minn. L. Rev. 31, 43 (1996) [hereinafter Frickey, *Domesticating Federal Indian Law*] (observing that "the text of the Constitution lacks much of a hint of any plenary power"); McSloy, *supra* n. 129, at 225 (describing the arrogation by Congress of plenary power over Indian tribes as "both unconstitutional and in violation of international law"); Porter, *supra* n. 8, at 949 ("Neither the Constitution nor any Indian treaty provides that the [United States] shall have absolute power over the Indian nations . . . ."); *id.* at 950 ("As a proposition of legal authority, . . . [plenary power] is certainly inconsistent with the approach of both international and domestic constitutional law toward national power over domestic and foreign sovereigns . . . ."); Saikrishna Prakash, *Against Tribal Fungibility*, 89 Cornell L. Rev. 1069, 1081 (2004) ("One cannot read the power to regulate commerce with Indian tribes as a power to regulate the Indian tribes themselves.").

213. *See e.g.* Porter, *supra* n. 8, at 902 (concluding that "'federal Indian control law' . . . has the twofold mission of establishing the legal bases for American colonization of the continent and

The unholy *troika* of core doctrines has less to do with jurisprudence than with the exercise and legitimation of the physical power necessary to take and hold land and to defend the interest of the non-Indians who enter thereupon against the rights of preexisting and coequal, if militarily less potent, sovereigns who have never accepted the diminution of their sovereignty.[214] Simply put, "might makes right," the thinly-veiled principle around which federal Indian law has been constructed, is neither a legal argument nor the moral basis for a system of law.[215]

Compounding the foundational problem of federal Indian law is its incorrigibility. Although common law courts, in recognition of evolving constitutional, customary, or international legal and equitable principles, have some measure of freedom to break from, or at least read narrowly, precedential decisions, the remedial potential of a common law system does not often extend beyond the normative boundaries of the sociopolitical environment in which it is incubated. If the "common law can be expected to succeed only among peoples who share some common conception of the bases of social order,"[216] and if Indians and non-Indians cannot agree that the subordination of Indian sovereignty—the necessary precondition for the creation and maintenance of a settler-state upon prior Indian sovereigns—was and continues to be fundamentally unjust,[217] then legal relations between Indian and non-Indian peoples may be "unsuited to

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perpetuating American power and control over the Indian nations" (footnotes omitted)); Williams, *supra* n. 57, at 264-65 (criticizing plenary power as a racist doctrine employed by Congress and the judiciary to justify the unilateral abrogation of tribal treaty, property, and human rights).

214. *See* Williams, *supra* n. 20, at 312 (describing the primary task of federal Indian law as "merely to fill in the details and rationalize the fictions by which Europeans legitimated the denial of the Indians' rights in their acquisition of the Indians' America"); Porter, *supra* n. 8, at 999 (critiquing "federal Indian control law" as an instrument of colonialism).

215. *See* Resnik, *supra* n. 78, at 134 (describing "Federal Indian Law [as] an illegitimate exercise in power with no source of authority other than physical might"); *see also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 25 (2002) (describing federal Indian law, along with immigration law and aspects of national security law, as "deconstitutionalized zone[s]" in which power, rather than legal principles, governs). Although might makes right is not a normative principle, it has been, quite frequently in human history, an empirical fact:

> The question of conquest introduces a practical monkey-wrench into this tidy theoretical world. Your tribe or group takes over the territory of another; you kill their members or throw them off their traditional lands. What principle determines ownership if the question ever goes into litigation? The short answer is that God is on the side of the big battalions.

Epstein, *supra* n. 212, at 4.

216. Fuller, *supra* n. 181, at 109.

217. Attribution of savagery and inferiority to Indians as moral and legal justification for policies of conquest and expropriation and as grounds for denying obligations to afford redress for these policies date to the earliest foundations of the U.S. legal system and pervade the judiciary even up to the present. *See e.g. U.S. v. Sioux Nation*, 448 U.S. 371, 435-37 (1980) (Rehnquist, J., dissenting) (citing "cultural differences" of Plains Indians that "made conflict and brutal warfare inevitable" including that Indians "'lived only for the day, recognized no rights of property, robbed or killed anyone if they thought they could get away with it, inflicted cruelty without a qualm, and endured torture without flinching.'" (quoting Samuel Eliot Morison, *The Oxford History of the American People* 540 (Oxford U. Press 1965)); *M'Intosh*, 21 U.S. at 590 (describing Indians as "fierce savages, whose occupation was war" and with whom it was not possible for non-Indians to "mix"). Western legal thought continues to regard Indians are alien and inferior in comparison to Western sociopolitical organization and tacitly grounds perpetuation of hostile legal precedents on the basis of Indian inferiority.

regulation by the methods of the common law."[218] Although judicial review of federal Indian law, "a hodgepodge of statutes, cases, executive orders, and administrative regulations . . . embody[ing] a wide variety of divergent policies,"[219] presents, at least in theory, opportunities for courts to identify and champion expansive conceptions of Indian sovereignty and rights, empirical evidence suggests that judges in courts of the United States, no matter how sympathetic to the justice of Indian claims or how receptive to moral or natural legal principles contrary to positive law, are unwilling or unable to challenge the authority of their employer in its own courts.[220] In other words, the basic institutional arrangements of the U.S. political and legal order are closed to contestation over, let alone revision of, the normative foundations of federal Indian law.

In sum, the substance of federal Indian law reflects that the United States has not repudiated its presumptions of Indian inferiority or its sanguinary history of expropriation, genocide, and forcible denial of Indian self-determination, while the process reveals that judges in courts of the United States, with precious few exceptions, lack the wisdom, moral fiber, or the courage to indulge interstitial preferences for justice, denounce the preferences of their employer and defend Indian sovereign rights against majoritarianism. Although the post-Civil War U.S. legal system cannot fairly be described as "evil," the sub-regime of federal Indian "law," an artfully designed yet utterly positivist cloak that dresses military might in judicial garb, ensures that the "red man's entitlements"[221] are subordinated to and ultimately destroyed by non-Indian interests and institutions steeped in

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218. Fuller, *supra* n. 181, at 109.

219. Porter, *supra* n. 8, at 902.

220. For every *U.S. v. Sioux Nation*, there is a score of cases in which the Court declines to repudiate "old decisions that offend modern sensibilities." Royster, *supra* n. 107, at 66. *See e.g. Sioux Nation*, 448 U.S. 371 (overturning the presumption of congressional "good faith" in regards to the taking of Indian lands long presumed since *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)). Thus, an ever-burgeoning number of federal Indian law scholars are concluding that the judicial branch is structurally incapable of ever exercising judicial review in defense of Indian sovereignty. *See e.g.* Braveman, *supra* n. 11, at 116-17 ("The [judicial] slide down the sovereignty slope has gained momentum . . . ."). Although "jurisprudential intuitions" rooted in natural law or moral philosophy may fuel the impulse to afford justice to Indian tribes against the interests of the United States, judges are ultimately more sensitive to the contrary commitment to vocational security, and their legal decisions reflect their priorities:

> No judge sitting in a court, which is created by a particular sovereign, is allowed to challenge the legitimacy of the sovereign's act, which put him there in the first place. It is the triumph of the principle of positive over natural law; it is the force behind the command, not the soundness of the rule that generates the command, that matters. The judge who happens to work for the winner, when that winner arrived on the scene in second place, is never in a position to honor the [claim] of somebody who came first. Instead of appealing to principles of natural justice that were already accepted within his own system, the judge has to recognize who calls the shots, and dresses up his predicament with high sounding maxims, which go on to shape huge portions of the subsequent law.

Epstein, *supra* n. 212, at 5 (footnote omitted).

Even if a federal statutory provision can be interpreted to permit senior judges to refuse to take whole classes of cases in which unjust results are preordained, experience and insight into human nature suggest that there will always be another judge who will accept the federal Indian law case that his colleague refuses. *See* 28 U.S.C. §294(b) (2000) (permitting senior judges to assume "such judicial duties as [they are] willing and able to undertake").

221. Williams, *supra* n. 19, at 3.

colonialism and racism.[222] Only a systematic program of decolonization, to include the denunciation of discovery, plenary power, and the implied divestiture doctrine, can purify federal Indian law and salvage it from evil.[223]

Concluding that existing federal Indian law is indeed an evil legal system does not absolve the theorist from proposing an alternative theory of law to govern relations between Indian nations and the United States. Part V offers such a theory.

V. BEYOND FEDERAL INDIAN LAW: INDIAN SOVEREIGNTY WITHIN A NATURALIST THEORY OF INTERNATIONAL LAW

A. *From Sovereigns to Subordinates: Indigenous Peoples and the Rise and Fall of Naturalism in International Legal Theory*

From its earliest origins in the late Middle Ages through the early nineteenth century, international legal theory was dominated by naturalism,[224] and international legal scholars, notwithstanding gradually accreting examples of contrary practice, asserted that indigenous peoples had the same universal moral rights and duties under international law as non-indigenous peoples, including the right to be left in peace to enjoy the freedom with which they had been endowed by nature[225] and the duty to respect the territorial integrity and political independence of all other law-abiding nations.[226]

However, with the emergence of the modern state-based system after the Treaty of Westphalia in 1648, international law began a long, slow devolution that gradually displaced indigenous peoples from the pale of civilization. By substituting the will of the state as the ultimate source of all laws, international

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222. *See* Porter, *supra* n. 8, at 903 (attributing the "destruction of Indigenous culture and the eventual assimilation of Indian people into American society" to the pernicious effects of "federal Indian control law," a term employed to indicate normative rejection of federal Indian law).

223. *See id.* at 899, 991-98 (calling for the "decolonization" of "colonial federal Indian control law" through the formal recognition of the territorial jurisdiction of Indian nations over all civil and criminal matters unimpeded by states and the federal government and repeal of a welter of statutes burdening Indian sovereignty and land ownership).

224. *See e.g.* Thomas Hobbes, *De Cive* 47 (Howard Warrender ed., Clarendon Press 1983) (insisting that relations between men and nations were governed solely by the "Fundamental Law of Nature"); Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* (James Brown Scott ed., C.H. Oldfather & W.A. Oldfather trans., Oceana Publications 1964) (holding that natural law was the sole source of legally binding international norms and describing international law as a subset of natural law); Vattel, *supra* n. 33, at 4 (insisting that states are bound to obey the "Law of Nations," which is "that law which results from applying the natural law to Nations"); *Id.* at 116 ("Those ambitious European States which attacked the American Nations and subjected them to their avaricious rule, in order. . . to civilize them, and have them instructed in the true religion—those usurpers, I say, justified themselves by a pretext equally unjust and ridiculous.").

225. *See e.g.* Vattel, *supra* n. 33, at 57. For an examination of the natural legal heritage of indigenous rights, see Robert N. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 Ariz. L. Rev. 739 (1990).

226. *See* Janna Thompson, *Taking Responsibility for the Past* 32 (elaborating universal rights and duties recognized by naturalist international legal theory); *see also* Epstein, *supra* n. 212, at 12 (stressing that naturalist international legal theory is predicated upon the principle of voluntarism and the absence of coercion in interstate relations).

and domestic, and by granting states free rein to redefine the juridical status of indigenous nations from coequal sovereigns to subordinate groups subject to national laws or to positivist international legal principles such as the discovery doctrine,[227] positivism swept away the barricades defending the sovereignty of indigenous peoples. Without denying the binding force of natural law entirely, early positivist international legal theorists conflated Christianity and civilization and pronounced the existence of two separate and distinct international legal systems to reflect and legitimize the invasion of indigenous lands and the colonization of indigenous peoples.

The first, governed by natural law, was reserved to the community of "Christian nations of Europe" by virtue of the "vast superiority of their attainments in arts, and science, and commerce, as well as in policy and government."[228] The second, to which all non-Christian, non-European people were relegated by virtue of their alleged lack of civilization,[229] and in particular their supposed inability to "fully understand the Law of Nations and to take up an attitude which is in conformity with all the rules of law,"[230] was governed by the positive laws of Christian states under whose dominion they could lawfully be drawn in consequence of their barbarism.[231]

Over the course of the nineteenth century, the legal philosophy of positivism began to emerge as the regnant paradigm in international law, incrementally banishing the natural legal principle that manmade laws inconsistent with the dictates of reason deduced from observation of the divinely orchestrated natural world were of no legal force and substituting the manifested will of sovereign states as the exclusive source and form of international legal norms.[232] Because sovereignty, rather than nature, was now the source of international law, and

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227. *See M'Intosh*, 21 U.S. 543 (defining the discovery doctrine).

228. James Kent, *Commentaries on American Law* vol. 1, 3 (2d ed., O. Halsted 1832).

229. *See* Oppenheim, *supra* n. 33, at 35 (excluding Persia, Siam, China, Abyssinia, "and the like" from the realm of the natural international legal order because they had failed to "raise their civilization to the level of that of the Western" states).

230. L. Oppenheim, *International Law: A Treatise* vol. 1, at 148 (1st ed., 1905).

231. In other words, claims that non-Christian peoples were uncivilized became the philosophical as well as the legal basis for colonization:

> When people of European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former may carry on the complex life to which they have been accustomed in their homes . . . . Can the natives furnish such a government, or can it be looked for from the Europeans alone? In the answer to that question lies, for international law, the difference between civilisation and the want of it.
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> . . .
>
> Accordingly international law has to treat such natives as uncivilised.

John Westlake, *Chapters on the Principles of International Law* 141, 143 (Cambridge U. Press 1894).

232. *See e.g.* John E. Noyes, *Christianity and Theories of International Law in Nineteenth-Century Britain*, in *Religion and International Law* 235-58 (Mark W. Janis & Carolyn Evans eds., Martinus Nijhoff Publishers 1999) (describing mid-nineteenth century transition from naturalism to positivism as the reigning international legal paradigm); Oppenheim, *supra* n. 230, at 92 ("We know nowadays that a Law of nature does not exist. Just as the so-called Natural Philosophy had to give way to real natural science, so the Law of Nature had to give way to jurisprudence, or the philosophy of the positive law. Only a positive Law of Nations can be a branch of the science of law.").

because "civilized" states no longer regarded them as sovereign, indigenous nations were now, at least *de jure*, mere objects, rather than subjects, of international law.[233] Consequently, to the extent that indigenous peoples retained any rights whatsoever, the responsibility for the protection of these rights was "left to the conscience of the state within whose recognised territorial sovereignty they are comprised, the rules of the international society existing only for the purpose of regulating the mutual conduct of its members."[234] In short, positivist international legal scholars deliberately disfigured international law to ratify the invasion of foreign lands and the destruction of the de facto sovereignty of indigenous peoples.[235]

B. International Indigenous Rights Regimes: A False Promise

The philosophical changing of the guard from the justice-centered approach of natural law to sovereignty-centric positivism in the discipline of international law, along with the practice of states over the course of the last two centuries,[236] has not passed without remark. Critics of the erosion of natural law as the philosophical basis for international legal theory have excoriated the turn, wrought by positivism, away from the exercise of human reason and the participation of individuals possessed of inalienable rights in the (re)discovery of principles of eternal and immutable justice.[237] Naturalist international jurisprudence has enjoyed a revival of sorts since the middle of the twentieth century, as a number of scholars, particularly in the fields of human rights and international relations theory, began to demand that international law be reintroduced to justice and morality and reconfigured to provide a more secure

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233. *See e.g. Cayuga Indians Case* (Gr. Brit. v. U.S.), 6 R.I.A.A. 173, 176 (Perm. Ct. Arb. 1926). (holding that an Indian nation "is not a legal unit of international law"); Island of Palmas Case (Neth. v. U.S.), 2 R.I.A.A. 829, 858 (Perm. Ct. Arb. 1925) ("[C]ontracts between a State . . . and native princes or chiefs of peoples not recognized as members of the community of nations . . . are not, in the international law sense, treaties or conventions capable of creating rights and obligations . . . ." (emphasis omitted)). Some commentators, so enamored of positivism, extended it so far as to effectively revise history, claiming, contrary to well-settled fact, not only that Indian nations were no longer fully sovereign but that "American Indians have *never* been regarded as constituting persons or States of international law[.]" Oppenheim, *supra* n. 230, at 19 (emphasis added and citation omitted).

234. Westlake, *supra* n. 231, at 136.

235. *See* Anaya, *supra* n. 17, at 9-38 (evaluating the positivist legal justifications for European conquest of the Americas, Asia, and Africa).

236. The seventeenth-century French philosopher Blaise Pascal may have presaged the rise of positivism by more than a century in commenting that "[i]t is a singular thing to consider that there are people in the world who, having renounced all the laws of God and nature, have made laws for themselves which they strictly obey[.]" Blaise Pascal, *Pensées* 424 (Philippe Sellier ed., Pocket 2003). However, positivism did not displace natural law from its theoretical dominance in international law until the nineteenth century. *See* Frederick Pollock, *Essays in the Law* 63 (Macmillan & Co. 1922) (noting that "all authorities down to the end of the eighteenth century . . . have treated [international law] as a body of doctrine derived from and justified by the Law of Nature").

237. *See e.g.* Sherston Baker, *First Steps in International Law* 16-17 (Kegan Paul, Trench, Trübner & Co. 1899); John Westlake, *International Law* vol. 1, 14-15 (Cambridge U. Press 1910). It should be noted that not all critics of positivism in international law regard themselves as naturalists. *See* Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* 21 (Oxford U. Press 2004) ("[I]t is possible to develop a coherent, defensible, systematic, and practically useful view about how the international legal system ought to be, without embracing a naturalist view of what international law is.").

legal foundation for the expression and protection of inalienable rights, known alternatively as "natural rights" or "human rights."[238] For "new natural law" theorists, there are limits to lawmaking: states, although sovereign and the authors of domestic law, are no more at liberty to proclaim moral wrongs as legal obligations than they are to criminalize the exercise of human rights, and considerations of justice along with the application of practical reason to collective social problems, requiring the structuring of legal relationships between individuals, peoples, and states.[239] Indeed, this restructuring is ongoing, with indigenous peoples as participants: over the last half century, the International Bill of Rights[240] has progressively infused international law with a cultural and social character,[241] and the U.N. Draft Declaration on the Rights of Indigenous Peoples has restated a series of entitlements to self-determination, culture, and economic development inhering in indigenous peoples which indigenous groups claim limit state discretion and impose affirmative duties, independent of the recognition or contrary interests of states, as a matter of customary international law.[242]

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238. For an excellent analysis of "new natural law" scholarship, see for example, Robert P. George, *In Defense of Natural Law* (Oxford U. Press 1999). For examples of such scholarship, see for example, John Finnis, *Natural Law and Natural Rights* (Oxford U. Press 1980); Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 Am. J. Intl. L. 20 (1948); Fernando R. Tesón, *A Philosophy of International Law* (Westview Press 1998).

239. For a discussion of the invigoration of natural legal philosophy in the field of human rights, see Hall, *supra* n. 22, at 302 (explaining that the new natural law school challenges the theoretical foundations of the power of states to "hinder[] or prevent[] the enjoyment of . . . natural rights"). *But see* Matthew A. Ritter, *Universal Rights Talk/Plurality of Voices: A Philosophical-Theological Hearing*, in *Religion and International Law* 417, 426 (Mark W. Janis & Carolyn Evans eds., Martinus Nijhoff Publishers 1999) (querying "whether [human] rights talk is an appropriate language for speaking natural law").

240. The International Bill of Rights is the collective term for the various human rights legal instruments that have recognized individuals and in certain cases groups as endowed with a series of negative and affirmative rights legally enforceable against state and, arguably, nonstate actors. The primary components are the U.N. Charter arts. 55 and 56, which commit member-states to promote "conditions of economic and social progress and development . . . without distinction as to race, sex, language, or religion"; the Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948), which amplifies the Charter; the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1976), article 27 of which prohibits states from denying ethnic, religious, or linguistic minorities the "right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language"; and ICESCR, *supra* n. 15, at art. 1, which recognizes that "[a]ll peoples have the right of self-determination," to include the right to "freely pursue their economic, social and cultural development," that "[a]ll peoples may . . . freely dispose of their natural wealth and resources . . .," and that "[i]n no case may a people be deprived of its own means of subsistence."

241. *See* Suagee, *supra* n. 17, at 683 (describing the evolution of human rights in three generations, with the first the eighteenth-century diminution of state sovereignty permitting individuals to be subjects of international law endowed with civil and political rights, the second the post-World War II introduction of treaty-based civil and political rights secured by state nonintervention as well as the introduction of affirmative state obligations to ensure certain economic and social benefits, and the third the shift at the end of the twentieth century to international concern with the protection of collective rights and transnational interests).

242. Perhaps the most encompassing and contested provision of the Draft Declaration proclaims that "[i]ndigenous peoples have the right of self-determination" by virtue of which "they freely determine their political status and freely pursue their economic, social and cultural development." *Draft Declaration*, *supra* n. 15, at art. 3.

However, while rights discourses have expanded in recent years, and although a number of commentators and, more importantly, some states now accept in theory that indigenous peoples have the right to self-determine as distinct cultural, linguistic, and religious communities,[243] little meaningful, substantive redefinition of international law has transpired. Despite recognition and limited remediation of past depredations against their indigenous peoples by several liberal states, including Canada, New Zealand, Australia, and the United States,[244] recognition and enforcement of the rights of indigenous peoples, even in international fora, remains a largely aspirational undertaking,[245] and the destructive treatment of indigenous peoples remains a phenomenon too much with us.

That this is so represents a failure not of legal imagination but of political will: only paleopositivists and the basest of rogues—think Slobodan Milosevic and Saddam Hussein—would contest the claim that states are morally and legally obligated to exercise their sovereign powers in a manner compatible with the promotion and respect of basic human rights of all those within their territorial jurisdiction.[246] However, because indigenous peoples call into question the territorial legitimacy of their host states[247] and present competing culture- and resource-based claims, they pose political, economic, and social threats to the majority communities that wield legal power in the states now surrounding them. Thus, although the pendulum of international legal theory may once again be swinging toward naturalism, settler-states cling to positivism as a defensive tactic against the fundamental political and legal transformations demanded by indigenous peoples and deliberately preserve international law as inhospitable terrain for redress of claims brought by indigenous peoples for violations of their natural legal right to self-determine.[248]

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243. *See supra* n. 15 (defining self-determination under international law).

244. *See When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice* 3 (Roy L. Brooks ed., N.Y.U. Press 1999) (describing the recent efforts by a host of liberal states to recognize and remedy the gross human rights violations committed against their indigenous populations).

245. *See Western Sahara*, *supra* n. 15, at 86-87 (stating, in dictum, that, although it is not any longer an independent source of law, natural law "is . . . the concept which should be adopted today" to govern the relations between indigenous peoples and states).

246. *See* Buchanan, *supra* n. 237, at 247 (regarding this normative claim as the most fundamental and universal principle within the corpus of contemporary international law).

247. Richard Herz, *Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights*, 79 Va. L. Rev. 691, 691-92 (1993) (noting that indigenous groups "tend to undermine political and social stability by creating an orthodoxy in competition with that of the dominant culture" that "undermines the state's claim to territorial sovereignty as well as its status as the representative of all citizens").

248. So jealous are states of their sovereign prerogatives that they refused to permit the Draft Declaration—currently under discussion by United Nations Human Rights Commission—from reaching the General Assembly for a vote, even though that instrument is arguably designed to promote autonomy, rather than independence. *See* Erica I.A. Daes, *Dilemmas Posed by the UN Draft Declaration on the Rights of Indigenous Peoples and Autonomous Assembly of Indigenous Peoples*, 63 Nordic J. Intl. L. 205 (1994) (examining, in the context of drafting the Draft Declaration, the hostility of many state to the recognition of any rights whatsoever in their indigenous peoples).

C. *Reclamation of Indian Sovereignty: Toward A Naturalist International Legal Theory*

The following nine foundational postulates comprise a naturalist international legal theory of Indian sovereignty:

(1) Indian nations are fully sovereign, coequal members of the international legal system that predate the settler-state erected around them. As a consequence they are entitled to exercise sovereignty unbounded by the discretion of the states within which they have been subsumed and unlimited by any power or ideology on earth save for the fundamental norms of international law that restrict the sovereign prerogatives of all states through the operation of human rights regimes and humanitarian legal instruments.

(2) Indian nations enjoy the natural right to be left in peace to enjoy the freedom with which they had been endowed by nature, and they are impressed with the corresponding universal duty to respect the territorial integrity and political independence of all other law-abiding nations.

(3) Any theory of international law that embraces the primacy of the contemporary system of states to the injury of indigenous prior sovereigns, and in particular the legal authority of the United States over the affairs of Indian peoples within, thereby contravenes the natural legal rights of Indian peoples.

(4) Federal Indian law, an applied positivist theory of international law territorially limited by the boundaries of the United States[249] and designed to facilitate and ratify centuries of military and judicial assaults on indigenous sovereignty, has degenerated so far from its naturalist roots as to merit the brand of an evil legal system.

(5) As a matter of international law, Indian nations' sovereignty predates and trumps the sovereignty of the settler-state that now asserts power over them—notwithstanding the contrary pronouncements of the legislature or courts of their conqueror. Accordingly, recognition of the full international legal personality of Indian tribes requires simply the restoration of natural legal rights that predate the modern states system rather than a contemporary creation of international law or a delegation of power from other states.

(6) Indian sovereignty, as a natural legal entitlement, cannot be divested save for in an overt, voluntary, and mutually agreed-upon manner consistent with natural international legal principles, such as by a treaty procured without fraud or duress.[250] Forcible deprivation of Indian sovereignty, as well as judicial

249. Scholars have long recognized that federal Indian law is less a creature of the U.S. Constitution than a perversion of natural international legal theory. *See e.g.* Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 Geo. L.J. 1, 17 (1942) ("[O]ur Indian law originated, and can still be most clearly grasped, as a branch of international law . . . .").

250. Most of the treaties between the United States and Indian nations ceding lands and powers of sovereignty to the United States were secured through fraud and duress, and the terms of many others are patently unconscionable. *See generally* Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 Am. U. L. Rev. 753, 763-66 (1992) (describing the making of two such treaties); Stephen L. Pevar, *The Rights of Indians and Tribes: The Basic ACLU Guide to Indian and Tribal Rights*, 26 (2d ed., S. Ill. U. Press 1992) (same).

pronouncements of implied divestiture, are ineffective as a matter of domestic and international law.[251]

(7) As a logical consequence of the premise that Indian nations possess and are entitled to the unimpeded exercise and enjoyment of their sovereignty and full international legal personality, "nearly every law made by Congress and nearly every case decided by the Supreme Court over the last two centuries seeking to impose or sanctioning the imposition of power over [Indians] is invalid."[252]

(8) The United States has international legal duties to rescind and repudiate laws and judicial opinions purporting to impede the recognition and free exercise of Indian sovereignty and to recognize Indian nations as sovereigns.[253] For the breach of these duties, Indian nations are entitled to a remedy.[254]

(9) Should the United States refuse to voluntarily renounce its unilateral claims to govern Indian country without the consent of the governed,[255] secession and the declaration of formal legal and political independence is a lawful option for those Indian nations that should elect it.

The exposition of a naturalist international legal theory of Indian sovereignty is but the first step. Major legal and social transformations require not merely a "theoretical advance" but a "political event" that operationalizes thought and translates it into action.[256] The next part suggests the form such a political event might assume and responds to anticipated criticisms.

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251. Others have suggested that although early United States-Indian treaties are woven through with evidence of fraud, duress, and unconscionability, ensuring respect for Indian sovereignty need not require the total reconstruction of these treaties but rather that they simply be observed by the United States. *See* Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 Am. Bar Found. Research J. 1, 65 (1987) (calling upon the United States to reconstruct relations with Indian nations on the basis of the original treaties); Porter, *supra* n. 8, at 949-50 (stating that "[r]espect for tribal sovereignty and the right of self-determination dictates that the United States limit its authority over the Indian nations to the degree bargained for in the original treaties").

This article, building on the work of other scholars, proposes a more radical solution: Indian treaties should be subject to revisitation, reconstruction, and even renunciation as void. *See e.g.* Friedman, *supra* n. 49, at 559 (taking this position).

252. McSloy, *supra* n. 129, at 219.

253. Several scholars conclude that, as a matter of customary international law, states inhabited by indigenous peoples may have the obligation to recognize them as independent states where they possess specific territories, exercise governmental authority over those territories, and have the capacity to enter into international relations. *See* Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 Harv. Hum. Rights J. 33, 75 (1994) (suggesting obligations of the Draft Declaration on the Rights of Indigenous Peoples must be read to confer international legal personality upon indigenous peoples); Makau wa Matua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 Mich. J. Intl. L. 1113, 1125 (1995) (noting practice "favors the requirement that an entity be treated as a state if it attains the qualifications of statehood").

254. It is a general principle of law common to all legal systems that for every breach of a duty there is a remedy at law. *Marbury v. Madison*, 5 U.S. 137, 162-63 (1803).

255. One prominent scholar would allow the United States a last opportunity to "engage in one final colonial act," specifically the adoption of a "Decolonization Policy" that would result in the statutory repeal of major portions of federal Indian law, before approving of unilateral Indian action. Porter, *supra* n. 8, at 1000.

256. Roberto Mangabeira Unger, *Knowledge & Politics* 103 (Free Press 1975) (presenting a theory of political and legal transformation that proceeds in two stages: "theoretical advance" and "political event").

VI. DISSOLVING THE POLITICAL BANDS: AN AMERICAN INDIAN DECLARATION OF INDEPENDENCE

More than 228 years ago, the founding fathers of the United States concluded that King George III, by interfering with the legal sovereignty of various states and imposing alien rule by force,[257] perverting the independence of the judiciary,[258] immunizing the criminal depredations of aliens,[259] imposing absolute rule,[260] and declaring war,[261] had made it "necessary . . . to dissolve the Political Bands which . . . connected them with [Great Britain], and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature's God entitle[d] them."[262] Although, contrary to the pretensions of federal Indian law, Indian nations are not, as were the colonists, subjects of the power that has long visited upon them a train of abuses and usurpations, the deeply-entrenched presumptions of domestic dependency and plenary power, coupled with a litany of similarities between the founders' experience under British rule and the history of United States-Indian relations, invite comparative analysis.

As if by serendipity, *United States v. Lara* presents a near-perfect heuristic to examine the proposition that Indian nations find themselves in circumstances strikingly similar to those faced by American patriots in 1776. To wit, by depriving Indian nations of the authority to prosecute most aliens who commit crimes that threaten their sovereignty and physical well-being, and by threatening the potential deprivation of what jurisdiction remains with the specter of plenary power, federal Indian law, an alien construct built to justify and perpetuate colonial rule from afar, has shorn Indian nations of legal sovereignty just as effectively as British royal proclamations divested American colonists of theirs. Moreover, although the smoke of the Indian Wars has long cleared, just as in the run-up to the Revolutionary War, King George III ensured that British military power stood bristling, visibly prepared to deter and defeat American attempts to assert autonomy rights against the crushing force of British "law." U.S. military power lurks behind each and every one of the pronouncements of the courts of the conqueror—*M'Intosh, Cherokee Nation, Worcester, Oliphant, Lara*, and every

257. *See Declaration of Independence* [¶¶ 3, 10, 15, 23-24] (1776) (listing reasons for the decision to sever political association with Great Britain, including that King George III had "refused his Assent to Laws . . . necessary for the public Good," "obstructed the Administration of Justice," "combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation," "abolish[ed] our most valuable Laws, and alter[ed] fundamentally the Forms of our Governments," and "suspend[ed] our own Legislatures, and declar[ed] [himself] invested with Power to legislate for us in all Cases whatsoever").

258. *See id.* at [¶ 11] (complaining that King George III "has made Judges dependent on his Will alone").

259. *See id.* at [¶ 17] (complaining of the policy of "protecting [British subjects], by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States").

260. *See id.* at [¶ 22] (complaining that King George III had "establish[ed] [in the colonies] an arbitrary Government . . . [of] absolute Rule").

261. *See id.* at [¶ 25] (noting that King George III had "declar[ed] us out of his Protection and wag[ed] War against us").

262. *Declaration of Independence* at [¶ 1].

other federal Indian law case—and is poised to intervene to suppress Indian sovereignty by force should Indian nations ever cease playing their assigned roles in the held-over farce that is federal Indian law.

Accordingly, if the descendants of the political community that authored the U.S. Declaration of Independence and defended it by force of arms would have us understand that decision as the legitimate and necessary response of a subjugated people while stubbornly remaining "deaf to the [v]oice of [j]ustice[,]"[263] logic would suggest that Indian nations, in whom sovereignty was vested long before the arrival of Columbus and whose claim to independence thus does not require the division of a political community as did the claim advanced by the thirteen colonies, might well consider following suit and issuing their own American Indian Declaration of Independence ("AIDI").[264] Indian national delegates would gather to place their signatures upon a document that, out of "a decent Respect to the Opinions of Mankind" would "declare the causes which impel them to the Separation."[265] Delegates would "let Facts be submitted to a candid World"[266] in support of the AIDI, including a written recitation of the dishonorable history of United States-Indian relations, and in particular the litany of overt acts committed by the United States in derogation of the natural legal rights of Indian nations to exercise sovereignty. Having dissolved any political connections to the United States, delegates would have signed copies of the AIDI delivered to the President, to Congress, and to the Supreme Court, and Indian nations, once again fully sovereign and possessed of "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do,"[267] would stand prepared to "hold the rest of Mankind, Enemies in War, in Peace, Friends."[268] Thenceforth, all those who enter the territory of Indian nations, except for those with immunity under international law,[269] would be subject to the jurisdiction of Indian nations, and federal Indian law, from *M'Intosh to Lara*, will join *Dred Scott* in the pantheon of legal abominations.[270]

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263. *Id.* at [¶ 31].

264. At least one tribe has purported to declare independence and seek recognition of that independence from other states and international organizations. *See e.g.* Vine Deloria, Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* 77-78 (Delacorte Press 1974) (describing the declaration by Russell Means in 1973 that the Oglala Sioux Nation was independent from the United States, would defend its treaty-guaranteed borders, and would seek recognition). However, no broad-based, strategic effort by a consortium of tribes pursuing not merely military but political and legal avenues toward independence has ever been mustered.

265. *Declaration of Independence* at [¶ 1].

266. *Id.* at [¶ 2].

267. *Id.* at [¶ 32].

268. *Id.* at [¶ 31].

269. Under international law, certain classes of persons, most typically diplomatic personnel, are cloaked in immunity from the exercise of national jurisdiction, and would thus be immune from the exercise of Indian nations postindependence. *See Vienna Convention on Diplomatic Relations*, 59 Stat. 1031, 500 U.N.T.S. 95 (Apr. 18, 1961) (codifying in treaty form the customary international legal regime according immunity to diplomatic personnel).

270. The primary effect of AIDI is to restore political sovereignty and all the powers of self-government to those Indian tribes who sign it; because sovereignty is a political, more than a territorial,

VII. INCREMENTALISM, ACCOMMODATIONISM, AND ASSIMILATIONISM: ANTICIPATING AND RESPONDING TO THE ANTI-SECESSIONISTS

A. Anti-secessionism: Criticisms and Proposals

In the past decade alone, the international community has been presented with a series of crises, from Eritrea to Bosnia, Chechnya, Kosovo, Kurdistan, and Kashmir, wherein religious and ethnic minority groups respond to violent governmental repression of their aspirations to autonomy by attempting to secede from their states of nationality. While gross and systematic violations of the human rights of minority groups often catalyzes secessionism, few of these struggles have proven successful, for in the perennial conflict between the core values of justice and peace, there are those who, desirous of avoiding chaos and mayhem at any price, will always turn a blind eye to the former. Moreover, international law is notoriously conservative of the status quo, and although most commentators *circa* 2005 now accept in theory that the legitimacy of a government is a measure of the degree to which it represents the will of the governed[271] and that the era of unmitigated state sovereignty has been truncated by the emergence of the human rights regime, in practice few will countenance any challenges to the right of governments to exercise power within their borders,[272] and fewer still will bless the dissolution of states in the name of self-determination.[273]

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concept, the emphasis of AIDI is not on land dominion but rather on self-determination. Subsequent negotiations toward land claims settlements designed to restore to Indian sovereignty vast lands expropriated from Indian tribes would follow in due course. *See* Bradford, *supra* n. 196 (discussing the form and substance such negotiations might take).

271. *See* Buchanan, *supra* n. 237, at 234, 243 ("[T]he dominant view on the legitimacy of the state" is that it must represent the will of the governed and that it is the consent of the governed that "morally justifies the government in wielding political power."). For a deeper discussion of the question of political legitimacy, see Jurgen Habermas, *Legitimationsprobleme im Spätkapitalismus* [*The Legitimation Problem in Late Capitalism*] (Suhrkamp Verlag 1979).

272. The vigorous and acrimonious debates accompanying intervention in Kosovo and Iraq reveal that humanitarian intervention remains a very much contested principle in international law. *See e.g.* Symposium, *Agora: Future Implications of the Iraq Conflict*, 97 Am. J. Intl. L. 553-642 (2003) (presenting diverse opinions as to the lawfulness of intervention in Iraq). A minority of scholars, and at least one state supreme court, conclude that the right of secession, and the corresponding duty of other states to intervene in support of secession, should be recognized provided that a formal international arbitral body determines that the state of nationality is culpable for the gross and systematic rights violations at issue, that secession is the remedy of last resort, and that the beleaguered minority will govern democratically. *See e.g. Reference re: Secession of Quebec*, [1998] 37 I.L.M. 1340, 1369, 1372-73 (Can.) (holding that "International law contains neither a right of unilateral secession nor the explicit denial of such a right" but that the "territorial integrity of existing states" is a fundamental principle and that the right to secession can only accrue where "the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated"); Buchanan, *supra* n. 237, at 358-60 (elaborating a theory supporting the right to secession under international law). Clearly, the "total frustration" test poses a high threshold.

273. *See e.g.* Morton H. Halperin, David J. Scheffer & Patricia L. Small, *Self-Determination in the New World Order* 60 (Carnegie Endowment for Intl. Peace 1992) (noting general international distaste for secession); Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 Yale J. Intl. L. 177 (1991) (noting that secession only very rarely receives international legal support); Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 Stan. L. & Policy Rev. 191, 198 ("[T]o the extent that secession would threaten the stability of the international order . . ., the rights of peoples to self-determination are limited by the sovereignty of the nation-state.").

Notwithstanding recent declarations of an international duty to protect populations subjected to systematic rights violations through the unwillingness or inability of their states of nationality to protect them,[274] the principle of nonintervention enshrined in the United Nations Charter[275] and in customary international legal declarations[276] still, in practice, trumps any international duty to intervene or to recognize a countervailing right, arising out of state malfeasance or nonfeasance, to secede.[277] Thus, unilateral assertions of rights to withdraw territorially from the established public order, even when reinforced by evidence that secession is vital to the preservation of life, are born into an unfriendly international legal milieu and, particularly when advanced by groups claiming sovereignties that predate and challenge the settler-states erected around them, can expect little if any transnational support.[278]

Anti-secessionist opponents of the AIDI are likely to cluster into three broad camps: incrementalists, accommodationists, and assimilationists.

1. Incrementalism

Incrementalists are identified by their commitment to the principle that the legitimacy of social and legal arrangements does not require perfect justice and their devotion to the conclusion that self-determination implies the pragmatic promotion of liberty rather than an absolute right to upset international order and tranquility in their quest for independence. For incrementalists, the definition of sovereignty is susceptible of multiple interpretations and at least partly dependent upon situational and cultural context,[279] and a wide spectrum of possibilities,

274. *See* Indep. Intl. Commn. on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* 185-98 (Oxford U. Press 2000) (summarizing lessons learned from the Kosovo conflict and concluding that states have a duty to refrain from casting adverse votes in the UN Security Council in the setting of humanitarian interventions to prevent impending and grave threats to human life).

275. *See* U.N. Charter art. 2(4) (providing that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state"); *id.* at art. 2(7) ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.").

276. *See e.g. Friendly Relations Declaration*, *supra* n. 15, at 121, principle V (refusing to authorize or encourage "any action which would dismember or impair . . . [state] territorial integrity").

277. Buchanan, *supra* n. 237, at 430 (surveying practice and reaching the conclusion that the principle of nonintervention is as yet formally undented by any contrary principle).

278. Ideological conflicts over the right to secession are exacerbated by practical conflicts over the questions of entitlement to self-determination, the extent of the right, the process whereby the popular will is to be ascertained, and remedies available for denial of the right. *See e.g. An Agenda for Peace: Report of the Secretary-General,* U.N. GAOR, 47th Sess., U.N. Doc. A/47/277-S/24111, at ¶ 18 (1992) ("if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation"); Harold S. Johnson, *Self-Determination within the Community of Nations* 71-98 (A.W. Sijthoff 1967) (discussing difficulties in determining who is allowed to express self-determination and what forms self-determination may take). The assertion of Indian rights to self-determine invariably prompts contestation—political as well as theoretical—over the appropriate resolution of these issues. *See* Berkey, *supra* n. 30, at 78 ("To say that the right of self-determination is part of contemporary international law raises more questions than it answers for Indians . . . .").

279. *See* Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 Stan. L. Rev. 1311, 1346 (1993) (contending that the meaning of sovereignty "is not entirely shared across particular groups . . . or cultures" and is in practice "a function of interpretive acts by those who possess it and those who seek it").

including territorial autonomy, international guarantees of minority rights, and even forms of personal—as distinct from territorial—autonomy, are often appropriate substitutes for statehood.[280] The inherent tension between the sovereignty of existing states and the aspirational principle of self-determination of peoples can and should, according to exponents of an incremental approach, be tamed through institutional forms other than the proliferation of newly independent states.

In the context of Indian nations, incrementalists thus prefer to unhitch secessionism from the concept of self-determination in order to offer more limited forms of political and legal authority.[281] Conceiving of sovereignty as a substantive legal status and of self-determination as merely the procedure whereby peoples who meet certain qualifications choose from among various international legal statuses, of which sovereignty is but one,[282] incrementalists urge Indian tribes to abandon independent statehood and to instead select from a prescribed palette of internal sovereignty or intrastate autonomy alternatives the option that best permits the expression of "collective difference."[283]

a. Treaty-Based

The most expansive institutional arrangements for reconstructing the relationship of Indian tribes to the United States would allow Indian nations to exercise authority over all issue areas, save for defense and foreign policy,[284] to the

280. *See Katangese Peoples' Congress v. Zaire*, ACHPR/RPT/8th/Rev.1, Annex VI, Comm. 75/92, at 9 (1994-95) ("[S]elf-determination may be exercised [as] independence, self-government, local government, federalism, confederalism, [or] unitarism.") (available at http://www.hrni.org/files/case law/HRNi_EN_474.html); Anaya, *supra* n. 17, at 83-84 (noting redress of historical violations of self-determination rights of indigenous peoples does not necessarily require reversion to status quo ante or formation of new states); Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (U. Pa. Press 1990) (surveying and analyzing the various forms of autonomy and minority rights regimes that have been proposed as alternatives to secession and statehood); Tesón, *supra* n. 238, at 127-56 (contrasting justifications for indigenous rights to self-determine through statehood with liberal critiques).

281. Put somewhat more coarsely, answering the question of whether Indians and other indigenous people are entitled to international legal personality "does not call for a yes or no answer"; for incrementalists it is a matter of degree. *Are Indigenous Populations Entitled to International Juridical Personality?*, 79 Am. Socy. Intl. L. Procs. 189, 199 (1985) [hereinafter *Indigenous Populations*] (remarks of Robert T. Coulter).

282. *See e.g.* Coffey & Tsosie, *supra* n. 273, at 198 (differentiating sovereignty and self-determination on this basis (citing Anaya, *supra* n. 17, at 85)).

283. Macklem, *supra* n. 279, at 1348. Although they concede the injustice of the process whereby Indian sovereignty has been diminished, incrementalists are unwilling to conclude that Indian nations are by virtue of that injustice necessarily entitled to statehood. *See e.g. id.* at 1359 ("Nor does concluding that European nations violated the formal equality of Indian nations, and that indigenous peoples ought to occupy the position they would have occupied had no violation occurred, necessarily lead one down the path to the inevitable creation of independent states.").

284. *See* Buchanan, *supra* n. 237, at 416 (arguing that the legal foundation for Indian autonomy is "in basic principle no more problematic than the case for restoring sovereignty to states that have been unjustly annexed," such as Poland, Czechoslovakia, Austria, Kuwait, and the Baltics); Deloria, *supra* n. 264, at 161-86 (endorsing such a proposal); Rosen, *supra* n. 35, at 256 ("Just as nation-states like Sikkim, Monaco, and the Vatican have agreements by which their defense or foreign policy is contractually assigned to another state, so, too, encouragement could be given through international agencies to the apportionment of some sovereign powers among indigenous groups and surrounding states." (footnote omitted)); Maivân Clech Lâm, *At the Edge of the State: Indigenous Peoples and Self-*

limits of their territorial boundaries, and would commit the international community to monitoring compliance with and mediating disputes arising from such agreements.[285] So long as they refrain from asserting foreign or military policies at odds with the United States,[286] tribes, envisioned as protectorates of the United States or even as asymmetrical confederates under such autonomy arrangements, would be afforded international legal guarantees of security in their legal rights to govern no matter how normatively divergent from Anglo-American practice the substance or process of that governance.[287] Neither the substance nor process of Indian justice—criminal, civil, or regulatory—would be within the purview of the United States,[288] and non-Indians entering Indian territory would impliedly consent to Indian jurisdiction.[289]

Such guarantees might be negotiated and codified in treaty form,[290] simultaneously granting to tribes objective proof of their restoration to full international legal personality and ensuring their sovereignty against the states[291] while specifying procedures for the joint exploitation of natural resources and for cooperation in the exercise of transborder jurisdiction.[292] In other words, although tribes would surrender some of the sticks from the bundle of sovereign powers by accepting autonomy agreements, they would be guaranteed in the exercise of those that remain.

Determination 190 (Transnatl. Publishers 2000) (proposing an arrangement similar to the agreement between the Federated States of Micronesia and the United States).

285. Buchanan, *supra* n. 237, at 358.

286. Some incrementalists would permit Indian nations to directly engage international organizational fora, including the United Nations and arbitral tribunals, and solicit developmental assistance from states without U.S. mediation. *See e.g. Indigenous Populations*, *supra* n. 281, at 192 (remarks of Howard R. Berman).

287. *See* Carole Goldberg-Ambrose, *Tribal Governments and the Encounter*, in *The Unheard Voices: American Indian Responses to the Columbian Quincentenary 1492-1992*, at 157, 161-62 (Carole M. Gentry & Donald A. Grinde, Jr., eds., Edwards Bros. 1994) (advocating a strong theory of tribal autonomy that would guarantee tribal self-governance even against legal challenges brought by critics of the normative practices of tribal sovereigns). Of course, Indian tribes would be constrained by human rights regimes, including conceivably the United Nations Charter, and by norms of *jus cogens*.

288. *See* Kalt & Singer, *supra* n. 14, at 5 (describing Indian "self-rule," whether attained through treaty or statute or some other process, as complete legal and economic autonomy).

289. In the unlikely event the United States should determine that the assertion of Indian jurisdiction over non-Indians is politically unacceptable, Congress might enact, or update, the series of non-intercourse acts criminalizing non-Indian entry into Indian country. *See e.g. Indian Non-Intercourse Act of 1790*, 1 Stat. 137, 138 (codified in contemporary form at 25 U.S.C. § 177 (2000)) (establishing a licensing system for U.S. citizens desiring to enter Indian lands and trade with Indian tribes and criminalizing unlicensed entries and trading).

290. Resumption of treaty-making with Indian nations would require the repeal of a federal statute. *See* 25 U.S.C. § 71 (2000) (providing that "[n]o Indian nation or tribe . . . shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty").

291. Because the power to make treaties is delegated expressly to the federal government, the Supremacy Clause of the Constitution forbids states from interfering with the authority of the United States to make and enforce treaties and any necessary legislation implementing treaties. *Mo. v. Holland*, 252 U.S. 416 (1920). Treaties between the United States and Indian nations would thus create a domain reserve expressly denying states any power over Indian affairs.

292. *See* Rosen, *supra* n. 35, at 256 (describing such arrangements as a form of "contractual sovereignty").

b. Legislative

Legislative incrementalists suggest that less expansive autonomy agreements ceding defense and foreign affairs powers to the United States and reserving most, but not all, of the other concomitants of sovereignty to Indian tribes might be constructed not by treaty but rather through the U.S. domestic political process, albeit with symmetrical Indian participation. Under federal law, the borders of Indian nations would be guaranteed by a statute that would further guarantee Indian real property against uncompensated takings and expressly create robust, judicially-enforceable remedies for violations of the trust doctrine;[293] in exchange, Indian nations, as the price of official entry into the U.S. federalist system, might agree to afford certain due process guarantees to non-Indians in Indian courts.[294] The United States would remain in a trust relationship with Indian nations but would no longer possess plenary power over Indian internal affairs and would be obligated by its contractual agreements to exercise its powers as trustee and its foreign affairs and defense powers for the benefit of Indian sovereigns.[295]

2. Accommodationism

Accommodationists concede that while Indian sovereignty, even in the form of independent states, is not without moral and even legal justification, "what ultimately matters is . . . the *de facto* exercise of sovereign powers[,]"[296] and because U.S. domestic political considerations will likely prevent the sort of major legal transformations necessary to effectuate autonomy, let alone independence, Indian nations should recalibrate their sights and accept the best of all possible worlds. Simply put, Indian nations can never be like Canada or Mexico: they are domestic dependent, rather than sovereign, nations,[297] and all they can hope for is to preserve their cultural, religious, and spiritual heritage while influencing the

293. Deloria, *supra* n. 264, at 252-58; Cross, *supra* n. 50, at 373 (identifying an independent, judicially-monitored, and enforceable trust doctrine as a primary objective of the quest for Indian self-determination).

294. A federalist proposal to associate tribes with the United States and the states similar to what legislative incrementalists suggest was considered in an early treaty between the Delaware Tribe and the United States that would have created a state, with representation in Congress, populated by one or more tribes. *See Treaty with Delawares* (Sept. 17, 1778), 7 Stat. 13, at art. VI:

> And it is further agreed on between the contracting parties should it for the future be found conducive for the mutual interest of both parties to invite any other tribes who have been friends to the interest of the United States, to join the present confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation in Congress.

295. *See e.g.* Frickey, *Domesticating Federal Indian Law*, *supra* n. 212, at 75-80 (proposing the substitution of a negotiated relationship between the United States and tribes in which the United States abandons the plenary power doctrine but continues to exercise external powers of sovereignty for the present legal regime).

296. Kalt & Singer, *supra* n. 14, at 6 (emphasis in original) (distinguishing between *de recto*, *de jure*, and de facto sovereignty and arguing that, because of U.S. domestic political considerations, Indian nations can realistically attain only the latter).

297. *See* Prakash, *supra* n. 212, at 1071-72 (finding that plenary power defeats the claims of most Indian tribes to independence from the United States).

exertion of plenary power.[298] Despite the normative issues it raises, the history of United States-Indian relations has acquired a life and logic of its own, rendering the "disentanglement" of Indian nations from the United States a practical impossibility.[299] For accommodationists, plenary power has morphed into more than a judicial justification for congressional practice; it is an insoluble glue that binds Indian nations to the United States, and Indian nations must learn to live with and adapt to it.[300]

An accommodationist program would thus steer clear from questions of high politics to center instead upon the protection of Indian rights to language, religion, and internal self-governance against assimilative pressures and against abrogation of reserved rights to engage in traditional Indian cultural practices.[301] Congress would exercise its plenary power to pass legislation permitting enforcement of the American Indian Religious Freedom Act in federal courts,[302] creating additional trust-based programs to nurture and protect Indian culture and language,[303] and overturning case law interfering with the authority of Indian tribes to exercise those aspects of civil and criminal jurisdiction necessary to protect their cultural patrimony (potentially requiring not merely a *Duro* fix but *Oliphant* and *Montana*

298. *See* Cross, *supra* n. 50, at 371-72 (encouraging Indian nations to accept domestic dependent status but to invest this status with claims to U.S. protection of Indian cultural and social differences); *see also* Coffey & Tsosie, *supra* n. 273, at 195-96 (calling for a "reappraisal of the tribal sovereignty doctrine" that deemphasizes political independence in favor of the defense of "cultural sovereignty" against a "multitude of forces that threaten the cultural survival of Indian nations" (emphasis omitted)).

299. Resnik, *supra* n. 78, at 134; *see also* Frickey, *supra* n. 109, at 11 ("The United States resulted from a colonial process that cannot be undone at this late date, no matter the normative concerns that might be raised about it.").

300. *See* Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams'* Algebra, 30 Ariz. L. Rev. 413, 437 (1988) (stating that "I can live with the plenary power").

301. Coffey & Tsosie, *supra* n. 273, at 196; *see also* Philip S. Deloria, *The Era of Indian Self-Determination: An Overview*, in *Indian Self-Rule: First Hand Accounts of Indian-White Relations from Roosevelt to Reagan* 191 (Kenneth R. Philp ed., Howe Bros. 1986) (positing Indian cultural uniqueness, and the defense of Indian cultures, as the primary justification for the preservation of a distinct political and legal status for Indian nations).

302. The American Indian Religious Freedom Act, passed "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise . . . traditional religions," lacks any enforcement mechanisms, and Indian plaintiffs have never won an AIRFA case. Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified in part at 42 U.S.C. § 1996 (2000)). Consequently, Indian tribes and individuals are burdened in the exercise of their religion when such exercise involves the use of controlled substances or the hunting of charismatic fauna. *See e.g. Empl. Div., Or. Dept. of Human Resources v. Smith*, 494 U.S. 872, 888-90 (1990) (refusing to apply the compelling state interest test to a state general prohibition on the use of peyote by members of the Native American Church and subjecting Indian religion to the "political process"); *U.S. v. Dion*, 476 U.S. 734 (1986) (finding in the legislative history and text of a federal criminal statute extending protection to eagles clear evidence of congressional intent to exercise plenary power and abrogate the reserved right of the Yankton Sioux to hunt eagles); *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000) (interpreting procedural requirements of U.S. environmental legislation narrowly to divest the Makah Tribe of their reserved right to take whales).

303. Several trust-based federal programs already afford Indian culture and religion some support. *See e.g. Native American Languages Act*, 25 U.S.C. §§ 2901-2906 (2000); *Native American Graves Protection and Repatriation Act*, 25 U.S.C. §§ 3001-3013 (2000); *American Indian Religious Freedom Act*, 42 U.S.C. § 1996.

fixes as well).[304] Enhanced tribal powers to exercise jurisdiction to protect their culture and their internal powers of self-governance against external threats would not come without cost: in exchange, Indian tribes would accept federal judicial review of the exercise of their jurisdiction[305] along with the obligation to explain and justify their decisions,[306] and defendants in Indian courts would be entitled to the writ of habeas corpus in federal courts to challenge violations of the entire panoply of constitutional protections.[307]

Still, for accommodationists the embrace of plenary power is an unobjectionable, if somewhat ironic, necessity to the preservation of Indian culture. Plenary power is not absolute, and federal judges do not treat federal Indian law as a "deconstitutionalized" genre "wall[ed] off . . . from mainstream constitutional discourse."[308] Rather, accommodationists maintain that federal judges, even when sitting in review of federal Indian law cases, can and do restrain the exercise of congressional and executive power over Indian tribes by remaining faithful to the spirit of the institutional role carved out of the constitutional text by Chief Justice Marshall in *Marbury v. Madison*.[309] Although judicial robes do not invariably drape their wearers in wisdom or moral judgment, because the judiciary is "structurally distinct from [and] potentially able to sit in judgment of and to impose limits in the name of law"[310] on the political branches, judges, even as they pay proper homage to congressional plenary power, can identify and implement principles indigenous to the U.S. legal system, as well as those born of the human rights movement and incorporated in domestic law, that are more respectful of

304. *See e.g.* Braveman, *supra* n. 11, at 114 (suggesting specific legislation to expressly expand inherent tribal civil and regulatory jurisdiction); Resnik, *supra* n. 78, at 90 (advocating congressional legislation to restore authority to Indian tribes to prosecute all persons, to the extent of tribal territorial jurisdiction, with caveats and limitations). The specific question of whether this latter category of legislation would restore, or delegate, power to Indian tribes, although essential to the holding in *Lara*, is of minor import to accommodationists. *See e.g.* Coffey & Tsosie, *supra* n. 273, at 194 (noting that many accommodationists counsel Indian nations to lobby Congress for affirmative delegations of the jurisdictional powers courts have withheld).

305. *See* Resnik, *supra* n. 78, at 127 (demanding that the federal "judicial role as arbiter of constitutional boundaries affecting individual liberties" be applied generally to the review of tribal court proceedings).

306. *See e.g.* Rosen, *supra* n. 35, at 254 (requiring, if Indian courts are to be "allow[ed] . . . to develop," that they "articulate the reasons for their decisions").

307. The Indian Civil Rights Act ("ICRA") limits tribal powers to define and punish offenses and imposes substantive due process provisions of Article III and the Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments of the Constitution upon tribal governments. 25 U.S.C. § 1301-1303 (2000). Accommodationists call for amendments to ICRA, as well as a federal habeas corpus statute that reaches tribes, to further limit the law enforcement powers of tribal governments. *See e.g.* Prakash, *supra* n. 212, at 1118 (insisting that Congress may exercise plenary power to prevent Indian nations from ""oppress[ing]" nonmembers); Resnik, *supra* n. 78, at 91-92 (demanding the "ability of the national government to create law enforcement regimes that override local judgments by . . . tribes . . . and the insistence on respect for individual liberty" and a "federal law of habeas corpus" that allows individuals detained by Indian tribes to object to the legality of their confinements).

308. Resnik, *supra* n. 78, at 83.

309. *Id.*; *Hodel v. Irving*, 481 U.S. 704, 717-18 (1987) (finding parts of Indian Land Consolidation Act to pose an unconstitutional taking of private property without compensation in violation of the Fifth Amendment)); *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977) (holding in dictum that the "'power of Congress over Indian affairs may be of a plenary nature; but it is not absolute'" (quoting *U.S. v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946)).

310. Resnik, *supra* n. 78, at 84-85.

tribal self-governance and that preserve to tribes a meaningful quantum of sovereignty.[311]

To promote their program, accommodationists urge Indian nations to view themselves as parties in an interdependent, rather than a subordinate, relationship, in which the senior partner can be encouraged to afford them a heightened level of respect.[312] Indeed, the United States has already blessed "internal self-determination," defined as the power of Indian nations to "make their own decisions on a range of issues from taxation to education to land resources management[,]" as a proposal with which it is "quite comfortable."[313] Through a dialogic, or even a reconciliatory process, it may be possible to secure the legislative reforms necessary to harness plenary power and the trust doctrine in service to Indian cultural sovereignty.[314] To push for a broader "re-order[ing] [of] international relationships within a sovereign democratic [United States],"[315] however, will drop Indian sovereigntists a bridge too far into contested legal and political terrain, with devastating consequences as soon as their opponents unlimber plenary power and counterattack.[316]

3. Assimilationism

For over a century, federal Indian law and policy has promoted assimilation to facilitate the seizure of tribal lands and resources, eliminate contending governmental entities, and eradicate alien modes of economic development and worship.[317] For assimilationists, the solution to the Indian problem is not to bow

311. *See e.g.* Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 Ariz. St. L.J. 889 (2003) (crediting the federal judiciary with the capacity to mitigate plenary power on behalf of tribes); Student Author, *International Law as an Interpretive Force in Federal Indian Law*, 116 Harv. L. Rev. 1751, 1751 (2003) (suggesting that federal Indian law is sufficiently nebulous that federal judges can successfully import principles and doctrines from international human rights law as interpretive norms and policy guidelines without giving the political branches offense).

312. *See* Resnik, *supra* n. 78, at 134 ("[A] more cheerful thought is to locate all these [Indian] nations as inter-dependent sovereigns.").

313. *UN Commission on Human Rights, Remarks by U.S. Delegate Luiz Zuniga, Item 15: Indigenous Issues*, http://www.treatycouncil.org/section_2114171121611.htm (Apr. 8, 2004).

314. For a discussion of the transformative potential of a process of reconciliation between the United States and Indian nations, see William Bradford, *Beyond Reparations: Justice as Indigenism*, 23 Hum. Rights Rev. ___ (forthcoming 2005).

315. *Id.*

316. The phrase "a bridge too far" is a reference to Operation Market Garden, a plan intended to capture the Arnhem River and thereby liberate Holland from the Nazis during World War II which failed, with extremely heavy casualties, because overly optimistic Allied military planners miscalculated and dropped airborne forces too deep—precisely "a bridge too far"—behind enemy lines. *See* Cornelius Ryan, *A Bridge Too Far* (Simon & Schuster 1974).

317. Two such policies deserve specific mention. The first, House Concurrent Resolution 108, exercised plenary power to "make the Indians . . . subject to the same laws and . . . responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards." 83d Cong. (1953) (reprinted in 67 Stat. B132) (repealed 1988) (authorizing administrative and congressional action to terminate tribes in California, Florida, New York, and Texas). Termination ended the U.S. trust relationship with over 100 selected tribes, curtailed federal services, dissolved tribal governments, and distributed former tribal lands on a per capita basis. Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 Am. Indian L. Rev. 139, 140, 151 (1977) (identifying 109 terminated tribes). Termination has been partially reversed: thirty-one previously terminated tribes have been reinstated to federally-recognized status. *See e.g. Oklahoma Indians Restoration Act of*

to Indian claims to self-determine but to resume and accelerate the integration of Indians within the U.S. body politic.

Although they accept in theory that individuals have the basic human need to belong to groups "united by some common links—especially language, collective memories, continuous life upon the same soil," and perhaps "race, blood, religion, [and] a sense of common mission,"[318] assimilationists reject Indian nations as mere "partisans of small-scale community"[319] lacking in any entitlement to "special support or assistance or to extraordinary provision or forbearance"[320] from the United States. Rather than encourage an "artificial" commitment to tribalism, assimilationists would require Indian cultures to "wither away," to "amalgamate with other cultures," and to "adapt themselves to geographical or demographic necessity."[321] This "'mongrelization' of [Indian] identity" will, for assimilationists, serve a cosmopolitan vision that broadens the scope of individual life possibilities and serves as a "more authentic response to the world in which we live,"[322] and the loss of Indian culture and the right to self-govern as discrete and insular communities are at worst of trivial moral or legal consequence and at best

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1977, 25 U.S.C. § 861 (2000). However, many tribes remain terminated or unreconstituted, and their members are now divested not only of primary sources of political allegiance and economic sustenance but of sacred sites and other fonts of cultural renewal.

Predicated upon the misapprehension that the emerging Indian problem was rooted in segregation and parochialism rather than a cascade of assimilative legislation, the second policy, "Relocation," directed federal agencies to relocate individual Indians to urban industrial centers. Pub. L. No. 959, ch. 930, 70 Stat. 986 (1956). At a time when reservations were increasingly unable to provide material necessities, Relocation, by portraying "contented Indian[s] working at good jobs and sitting beside televisions and refrigerators [in Northern cities,]" induced an exodus to magnet urban areas. Larry W. Burt, *Tribalism in Crisis: Federal Indian Policy, 1953-1961*, at 78 (U. N.M. Press 1982) (identifying Indians with leadership skills as targets of Relocation). More than 35,000 were relocated after signing an agreement that they would never reestablish residence on reservations. Atkinson, *supra* n. 28, at 409. Relocation proved to be a cruel assimilative hoax: a generation of the Indian best and brightest were dumped into substandard housing and menial employment. *See* Robert Burnette & John Koster, *The Road to Wounded Knee* 182 (Bantam Bks. 1974) (noting institutionalized housing discrimination against urban Indians). Because off-reservation Indians who do not enroll as tribal members are, for reasons of physical and social distance, unable to participate in the languages, lifestyles, and communities constituting Indian identity, many relocated Indians were quickly subsumed in the American melting pot. Wells, *supra* n. 50, at 5-6.

As with many other dimensions of U.S. Indian policy, many assimilationists attach benign purposes to their proposals: "friends of the Indian" suggest assimilation is promotive of racial and ethnic harmony. *See e.g.* Arthur M. Schlesinger, Jr., *The Disuniting of America* (Whittle Direct Bks. 1991); J. Harvie Wilkinson III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 Stan. L. Rev. 993 (1995). This "benign assimilationism" flies in the face of culturally deprived, economically dependent urban Indians, who, as a consequence of their inability to participate meaningfully in either traditional tribal or majoritarian societies, suffer physical and mental ills. *See* Laurence Armand French, *The Winds of Injustice: American Indians and the U.S. Government* xvi (Garland Publg. 1994) (discussing challenges facing assimilated urban Indians); Wells, *supra* n. 50, at 61 (correlating increased incidence of Indian social pathology with assimilationist policies that divided kinship groups and divested Indians of culture).

318. Isaiah Berlin, *Benjamin Disraeli, Karl Marx and the Search for Identity*, in *Against the Current: Essays in the History of Ideas* 252, 257 (Henry Hardy ed., Hogarth Press 1980).

319. Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. Mich. J.L. Reform 751, 778 (1992).

320. *Id.* at 762.

321. *Id.* at 787-88.

322. *Id.* at 788 (quoting Salman Rushdie, *In Good Faith*, in *Imaginary Homelands* 393, 394 (Granta Bks. 1991).

are even promotive of the individual rights and life possibilities of individual Indians. Accordingly, assimilationists totally reject the notion that Indian nations are entitled to self-determine in any fashion, let alone as independent states, and the trajectory upon which Congress and the Court have set federal Indian law, particularly over the last quarter century, is, although hostile to Indian sovereignty, for that reason to be applauded rather than challenged.

B. Responses

1. Incrementalism

Anti-secessionists may well be correct in pointing out that "[g]iven the changes forced upon Indian people during the last 200 years, there has been a commensurate change in the native conception of sovereignty."[323] Colonization has "transformed tribal conceptions of self-government," and "some Indian nations may simply have no idea what it means to assume greater authority over their own affairs."[324] There is no greater degree of similarity as between any two Indian tribes than there is between two members of the European Union: theorists of Indian sovereignty must not make the error of treating tribes as if they are fungible.[325] Moreover, there is no hard evidence that, given a choice, independence and all that status entails will be the preferred end-state of each of the more than 550 Indian nations,[326] and self-determination is, after all, about the right to make free and independent choices.[327]

Nevertheless, incrementalism places too much faith in the honor of the United States. While the prospect of the resumption of treaty-making might well herald a new era of mutual respect and fair dealings, the United States has honored none of the hundreds of treaties it entered into with Indian parties, and there is little reason to believe that in regard to any autonomy agreements the past will prove other than prologue. Moreover, the political question doctrine will surely deny Indian parties any remedies in U.S. courts in the event of future breaches of autonomy treaties,[328] and international law has not yet developed to the point where remedies unavailable in domestic courts would be assured in

323. Porter, *supra* n. 8, at 1001.

324. *Id.*

325. *See* Prakash, *supra* n. 212, at 1109 (describing the treatment of tribes as if they were fungible as a primary error committed by scholars of federal Indian law).

326. In fact, empirical evidence indicates that most indigenous peoples prefer autonomy to independence. Suagee, *supra* n. 17, at 692 ("Most indigenous peoples do not seek recognition as independent states, but rather seek to establish . . . autonomy within their traditional territories." (citation omitted)).

327. One renowned Indian scholar envisions, as part of the translation of self-determination rights from theory into practice, that Indian nations be permitted to choose either the preservation of the status quo—domestic dependency, plenary power, and a judicially-unenforceable trust—or an arrangement that affords a greater measure of sovereignty. *See* Porter, *supra* n. 8, at 1000.

328. *See e.g. Dion*, 476 U.S. 734 (upholding congressional plenary power to abrogate an Indian treaty by express intent); *Goldwater v. Carter*, 444 U.S. 996 (1979) (Powell, J., concurring) (dismissing suit challenging presidential power to abrogate a treaty absent congressional participation as a nonjusticiable political question).

international fora.[329] Legislative autonomy arrangements offer Indian nations even less security in the enjoyment of sovereign rights, for congressional plenary power always looms large over the exercise of those vestiges of sovereignty that survive such agreements. In sum, as seductive as autonomy might be to Indian nations denied the right to self-determine for many generations, neither renewed treaty-making nor its legislative equivalent will completely withdraw Indian sovereign rights from the U.S. political process.[330]

2. Accommodationism

Asking Indian tribes to shelve their dreams of coequal sovereignty and trust Congress and the courts to be more judicious in the exercise and review of plenary power, as accommodationists do, is akin to inviting them to a bad bargain with the Devil, with their souls as consideration for the fleeting fortune of unmolested internal self-governance. Congress, and the courts, are flummoxed by the *sui generis* status of semisovereign entities within U.S. national borders and cannot devise any legal or moral theory whereby to comprehensively resolve this "Indian problem." Consequently, such an arrangement will last only so long as Congress and the Court deign to maintain it; once it becomes too expensive, or too uncomfortable, or too inconvenient, plenary power will cut it down like wheat before a scythe.

In fact, such an arrangement will surely have a short half-life. The application of Indian law over Indian territory, an essential aspect of the Indian culture accommodationists purport to hold dear,[331] will remain a point of conflict between Indians and accommodationists, who openly envision a role for federal judges in the "ongoing process of negotiating and renegotiating what the [United States] will and will not tolerate."[332] If Indians are so desperate to exercise internal powers of self-governance that they will concede that whether they maintain a matrilineal or patrilineal culture[333] or employ banishment to discipline

329. Several scholars have articulated that a right to autonomy has crystallized within the international legal corpus, and the Draft Declaration does support the right of indigenous peoples to "freely pursue their economic, social, and cultural development." *Draft Declaration*, *supra* n. 15, at art. 3; *see also* Ruth Lapidoth, *Autonomy: Flexible Solutions to Ethnic Conflicts* 177 (U.S. Inst. Peace Press 1996) (describing various theories operationalizing a right to autonomy under international law). However, although international law is in transition, conventional sources do not yet provide clear support for such a right, let alone procedures for determining when the exercise of the right is appropriate and what groups may exercise it. *See* Benedict Kingsbury, *Sovereignty and Inequality*, 9 Eur. J. Intl. L. 599 (1998) (concluding that international law is only very gradually and very generally coming to acknowledge that some peoples may be legally entitled to benefit from intrastate autonomy agreements).

330. *See* Wildenthal, *supra* n. 154, at 145 (warning that Indians are "wise not to rely on [either] approach alone").

331. *See generally* William C. Bradford, *Reclaiming Indigenous Legal Autonomy on the Path to Peaceful Coexistence: The Theory, Practice, and Limitations of Tribal Peacemaking in Indian Dispute Resolution*, 76 N.D. L. Rev. 551 (2000) (theorizing that tribal legal systems are an essential aspect of Indian culture that functions to maintain social adhesion and prevent conflict within Indian communities).

332. Resnik, *supra* n. 78, at 132.

333. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (refusing to interpret ICRA to authorize suit against a tribe or its officers seeking to enjoin the enforcement of a tribal ordinance denying

juvenile offenders[334] is any legitimate business of federal judges, they will have misunderstood the true meaning of sovereignty. If they subject their culture to the normative evaluations of the majority of another sovereign, they will have kicked open the door to its destruction.

The reasons for these assertions are perhaps less than obvious but easily revealed. Contrary to the central tenet of legal liberalism upon which accommodationists rest their theory, the legal and political interests of Indians are distinct from other racial and ethnic groups: Indians do not seek opportunities to integrate with the majority but rather the right to opt out the better to conserve their culture and their sovereignty.[335] Experience teaches that when "pervasively dissimilar cultures are yoked together" within a liberal nation-state, minority cultures, particularly where organized along communitarian rather than individualist principles, as are Indian nations, systematically lose legal rights to self-determination.[336] By dint of numbers, majorities dissatisfied with Indian internal self-government need only tap into the political process to stifle what troubles them.[337] In essence, liberal law and politics, and in particular the synergy of plenary power and majoritarianism, account for the systematic suppression of Indian self-governance and the persistent legal disabilities attached to the expression of Indian culture.

In sum, accommodationists fail to realize that Congress and the courts cannot be permitted the power to define the boundaries of Indian sovereignty

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membership in the tribe to children of female members who marry outside the tribe but extending membership to children of male members who marry externally).

334. *See State v. Roberts*, 894 P.2d 1340 (Wash. App. Div. 1 1995) (refusing to delay sentencing for a battery conviction to permit tribal elders to use banishment—a traditional punishment—for rehabilitative purposes).

335. As U.S. Senator and Northern Cheyenne Ben Nighthorse Campbell explains, "Indians are totally different [from other minority communities]. They [have] everything to lose [from assimilationism]. The primary driving force of American Indians is not to gain what the majority culture has. The primary driving force is not to lose any more than they've already lost." *"A Long Time Coming": Prominent American Indians Reflect on Their Peoples, Their Past, Their Humor—And Their New Museum*, Smithsonian Mag. 59 (Sept. 2004) (available at http://www.smithsonianmag.si.edu/smithsonian/issues04/sep04/nmai-history.html).

In other words, the principle of Indian self-determination is in unresolvable tension with the integrationism informing the civil rights movement and liberal law. Although some minority groups claim rights to a separate cultural identity, only Indians can claim the right to political autonomy by virtue of their status as indigenous peoples—a distinct political classification that under international law recognizes rights transcending those that inhere in "mere" minorities even if U.S. policymakers conflate the boundary as a matter of domestic law. *See* Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. Rev. 1615, 1649-51 (2000) (comparing superior rights of indigenous peoples with rights of minorities under international law).

336. *See generally* Lawrence Rosen, *The Right to Be Different: Indigenous Peoples and the Quest for a Unified Theory*, 107 Yale L.J. 227 (1997).

337. When contested social and political issues cannot be resolved through the marketplace of ideas, "modern democratic societies provide the last ditch solution of a majority vote." Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* vol. I, 667 (tentative ed., Cambridge 1958). However, minority groups, unless they can induce a significant number of outsiders to adopt their political preferences, systematically lose in democracies. *See generally* Ely, *supra* n. 50, at 135-79 (discussing the "majoritarian problem" inherent in democracies and advocating constitutional government and judicial review as necessary institutions for the defense of the fundamental rights of minorities). Federal Indian law ensures that, despite constitutional government and judicial review, Indians remain subordinated to the political will of the U.S. majority.

without becoming the font of that sovereignty. The very existence of plenary power is a perpetual threat to Indian sovereignty. Congress has repeatedly invoked plenary power to foist one "solution" after another upon Indian nations, including land tenure programs that pulverized Indian landholdings,[338] tribal constitutions that shattered Indian legal culture,[339] and termination statutes that legally eliminated Indians.[340] Either Indian nations are sovereign or they are not. Tribes can no more be a little sovereign than women can be a little pregnant. To pretend that Indian nations still subject to plenary power are sovereign on the ground that Congress and the courts *du jour* are willing to tolerate all those aspects of Indian culture that do not offend opinion elites within the United States is to warp the meaning of the word beyond recognition. Even worse, it gives offense to the natural legal principles upon which the founders of the United States rested their claim to independence while breathing life into the colonialist and racist presumptions undergirding the foundations of federal Indian law.

3. Assimilationism

Assimilationism is the abnegation of Indianism and a very thinly veiled recipe for ethnocide.[341] As an abject rejection, rather than a thoughtful critique, of Indian independence, assimilationism merits little herein by way of a response other than to note that its principle instruments—plenary power and judicial review—are identical to those of accommodationism but that its normative vision, unlike that of accommodationism, is manifestly hostile to Indian culture. Consequently, assimilationism cannot fairly be treated as a theory of Indian self-government but must rather be regarded as an aspect of liberal universalism at best and of ethnopolitical antipathy, and even racial hatred, at worst.

VIII. CONCLUSIONS

Many will question whether a call to an American Indian Declaration of Independence is prudent, or indicated under the circumstances, or whether Indian nations want independence as opposed to other potential legal and political transformations that might better suit their specific circumstances and interests. Various incrementalist and accommodationist alternatives situate *Lara* under a far

338. *See* 24 Stat. 388 (codified as amended at scattered sections of 26 U.S.C. § ___). This act dismembered tribal land masses and abolished Indian reservations as autonomous and integral sociopolitical entities, resulting in the reduction of Indian acreage from 155 million to 48 million in less than a half century. For a discussion of this act and its effects, see Atkinson, *supra* n. 28, at 397-399.

339. *See Act of June 18, 1934*, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-79 (2000)) ["Indian Reorganization Act"]. The Indian Reorganization Act ("IRA") imposed federally-drafted constitutions on tribes that imported U.S. substantive law and a regime of individual rights hostile to traditional Indian legal systems while at the same time subjecting tribal governments to majority rule principles and granting the Secretary of the Interior veto power over almost all important tribal decisions, thereby subverting Indian legal sovereignty. For an analysis of IRA, see Burnette & Koster, *supra* n. 317, at 183-85.

340. *See supra* n. 61.

341. *See San Jose Declaration*, *supra* n. 105 (coining the term "ethnocide" to describe actions with the effect of destroying indigenous peoples as distinct societies, irrespective of intent).

gentler light that seems to reveal transformative possibilities within the regimes of federal Indian law and international human rights that might offer Indians terms of association with the United States more favorable than the present.

Regrettably, however, not all that glitters is gold.[342] *Lara* does indeed sparkle in the warm light of the moment—after all, the power to make and enforce law is at the very essence of sovereignty—but upon reflection it is made of the same base metals—the discovery doctrine, plenary power, and stare decisis—from which the entire corpus of federal Indian law has been conjured. The most skilled legal alchemists cannot transmute the decision into the sign of hope for which Indian sovereigntists have long been waiting,[343] and to imagine that decisions rendered within an evil legal system can ever yield up the philosopher's stone that will revitalize Indian nations and set them on a course to self-determination is yet further evidence of our misguided psychological dependence upon the law and moral judgments of their conqueror.[344] What Congress or the courts offer with one hand they can, and likely will, withdraw with the other when the temptations of wealth or the moral judgments of a normatively divergent majority become irresistible, and no amalgam of Western liberal jurisprudence and international legal positivism yields any substance capable of shielding Indian nations against the crushing force of plenary power unleashed. Because Indian sovereignty and plenary power are even less compatible than American self-government and the royal prerogatives of King George III, Indian sovereigntists can no more accept continued political association with the United States tempered by a modest return to the principles and ethos of *Worcester* as their end-state than the colonists could hope to mold British-American policy by securing a limited form of representation in Parliament. In short, independence is both the cure for colonialism and the necessary condition for self-determination, and Indians must summon the courage to "shuck off the red man's burden"[345] and stake their claim to it as a natural legal right.

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342. All that is gold does not glitter,
Not all those who wander are lost;
The old that is strong does not wither,
Deep roots are not reached by the frost.
J.R.R. Tolkien, *The Lord of the Rings* 167 (Houghton Mifflin Co. 1994).

343. *See* Resnik, *supra* n. 78, at 133 (describing federal Indian law decisions that impose limitations on the political branches as "signs of hope").

344. As Professors Coffey & Tsosie remind us, "Our continued acceptance of the idea that [Indians'] legal rights depend upon recognition by the very government that has attempted to divest Indian nations of their sovereignty exemplifies a psychological mode of dependence in which Indian peoples' reality is contingent upon that of the exterior society." *Supra* n. 273, at 209.

345. Rudyard Kipling, *The White Man's Burden* (1899), written in response to the U.S. capture of the Phillippine Islands in the Spanish American War of 1898 and warning of the perils of imperialism to the imperial power:
Take up the White Man's burden—
Send forth the best ye breed—
Go.bind your sons to exile
To serve your captives' need;
To wait in heavy harness,
On fluttered folk and wild—

Admittedly, the AIDI might "strik[e] most Americans as either radical or ridiculous."[346] The act of re-envisioning Indians as citizens of sovereign nations on a formal legal par with the United States outstrips the capacity of most non-Indians.[347] Over the past two centuries, non-Indians have grown accustomed to thinking of Indians as non-sovereigns, and many even believe that the Indians "all went away and died" a long time ago now.[348] However, Indian sovereignty enjoys an existence independent of American popular understandings against which ignorance has no effect: indeed, Indian sovereignty "is never extinguished . . . Just as a woman retains an absolute right not to be raped even as she is subjected to it, [Indian] nation[s] continue to possess [their] full range of sovereign rights even as their violation occurs."[349]

The American Indian Declaration of Independence is not a declaration of war. It is a plea for justice with honor, offered in peace, and it need not and should not be interpreted in such a manner as to provoke conflict between peoples. If United States-Indian relationships come to advance on the basis of a recognition of, and respect for, mutual and coequal sovereignties, with disputes resolved not by coercion and domination but by negotiation and harmonization, a new era of just peace, worthy of emulation and export to all the corners of the earth, will follow. The AIDI is pregnant with transformative possibilities if only the United States will accept the sovereignty of Indian nations and simply stop enforcing limitations in the exercise thereof.

Still, it is conceivable that the United States might respond to the AIDI with military force, as it did during the Civil War, when once before it perceived its territorial integrity to be at risk, to bring Indian nations to heel.[350] Certainly, risks attend the act of declaring independence.[351] However, the AIDI is not intended to

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Your new-caught, sullen peoples,
Half-devil and half-child.

My use of the phrase "red man's burden" is a parody intended to suggest that the struggle to self-determine under the yoke of plenary power—a "red man's burden"—is at least as burdensome as the costs of colonialism, and that it is has its roots in the same racial policies that motivated Europeans to impose their law upon the non-Europeans they encountered.

346. Deloria, *supra* n. 264, at 161.

347. *Id.* at 163.

348. John T. McCutcheon, *Injun Summer*, Chicago Tribune, http://www.tkinter.smig.net/Chicago/InjunSummer (Sept. 30, 1907).

349. Churchill, *supra* n. 205, at 39.

350. At least one contemporary constitutional scholar unabashedly references the continued role of military force as an instrument of federal Indian policy. *See e.g.* Prakash, *supra* n. 212, at 1118 (warning Indian tribes that if they offend or otherwise threaten U.S. political interests, the United States "always has the military power to intervene and restore order"). Many states currently respond with military force to the demands by their indigenous peoples for recognition of their rights to self-determine. *See Suagee, supra* n. 17, at 674 (surveying government policies regarding indigenous self-determination and noting the prevalence of military responses); *see e.g.* CNN, *Indians Scuffle with Police in New York*, http://www.cnn.com/US/9704/20/briefs.pm/indian.taxes/index.html (Apr. 21, 1997).

351. Perhaps the risks are overstated. One Indian elder, borrowing liberally from the plot of the novel and film *The Mouse That Roared* (1959), advised the author, only half in jest, that the best strategy for Indian nations might be to declare war on the United States, immediately surrender, and then demand foreign aid for reconstruction and development. Although the likelihood of general war with the United States is minuscule, Indian nations have already suffered too much from wars with the United States, and all the economic assistance in the world would not necessarily yield sovereignty.

challenge the sovereignty, legitimacy, or the military power of the United States, or to launch the overthrow of a lawfully constituted government in Indian country, but rather to light the path to an escape from the adverse moral and material effects of an evil legal regime and to the restoration of sovereignty to peoples entitled, under naturalist conceptions of international law, to self-determine. If the time for independence is not yet upon us, then until the day dawns when once again Indians are fully sovereign, we must be prepared to scratch the surface of victories such as *Lara* to find what lurks beneath and brave enough to resist the devaluation of the gold of sovereignty into the pyrite of plenary power wearing a human face.