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A PROPOSAL TO THE *HANODAGANYAS* TO DECOLONIZE FEDERAL INDIAN CONTROL LAW†

Robert B. Porter*

In this Article, cast in the form of a letter to President William Jefferson Clinton, Professor Porter argues for the decolonization of federal Indian control law. After detailing the religious and colonialist roots of early Supreme Court decisions dealing with the Indian nations and giving an overview of the evolution of federal Indian policy, Professor Porter argues for the decolonization of federal Indian control law on several grounds: 1. the world community has rejected colonialism policies; 2. federal Indian control law denies basic human rights of self-determination; 3. colonization has partially succeeded in destroying the Indian nations; and 4. decolonization is an efficient use of federal resources. Professor Porter then describes recent reform efforts in this field of law and explains why they have not been as successful as their proponents might have hoped. He concludes by outlining a proposal to decolonize federal Indian control law through several means: 1. defining all aspects of the federal-tribal relationship by agreement; 2. implementing Bureau of Indian Affairs (BIA) reform; 3. repealing colonial federal Indian control law; and 4. abandoning the colonial foundation of federal Indian control doctrine.

Honorable William J. Clinton
President of the United States of America
The White House
Washington, D.C.

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GREETINGS *HANODAGANYAS*:¹

For over 200 years, the Seneca Nation² has maintained a peaceful relationship with the United States in accordance with the Treaty of Canandaigua.³ While it is true that both of our nations have benefited from this Treaty, mine has sacrificed greatly: because of the American people's colonization, we have lost almost all of our aboriginal lands and much of our traditional way of life.⁴ These losses resulted from federal and state governmental actions over the generations⁵ that violated

1. *Hanodaganyas* means "Town destroyer" or "He who raids villages" in the Seneca language. See TITLE VII EDUC. BILINGUAL PROGRAM, GOWANDA CENT. SCH. DIST., SENECA LANGUAGE TOPIC REFERENCE GUIDE (1987). This name for the American president derives from George Washington's 1779 order to General John Sullivan and his army to engage the Six Nations of the Iroquois Confederacy, or *Haudenosaunee*, and, despite the absence of significant military conflict, to burn Seneca villages and the winter food stores. See DONALD A. GRINDE, JR., IROQUOIS AND FOUNDING OF AMERICAN NATION 111-13 (1977); LEWIS H. MORGAN, LEAGUE OF THE HO-DE-NO SAU-NEE OR IROQUOIS 27 (1954); GREGORY SCHAAF, WAMPUM BELTS AND PEACE TREES 202 (1990); EDMUND WILSON, APOLOGIES TO THE IROQUOIS 83-84 (1959). Since then, *Hanodaganyas* has been the name used by Senecas to refer to all subsequent American presidents. See SCHAAF, *supra*, at 202; WILSON, *supra*, at 84.

2. Originally a member of the *Haudenosaunee*, the Seneca Nation of Indians is a representative democracy that was formed in 1848 and is now a nation politically separate from the Iroquois Confederacy, recognized as such by the United States. See Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 60 Fed. Reg. 9249, 9253 (1995) [hereinafter Indian Entities Recognized]. See generally SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 97-118 (1989). The Seneca Nation is comprised of approximately 5,400 members, approximately half of whom live on the Allegany, Cattaraugus, and Oil Springs Reservations in western New York State (together constituting approximately 52,000 acres). See O'BRIEN, *supra*, at 97. See generally Thomas S. Ablor & Elisabeth Tooker, *Seneca*, in HANDBOOK OF NORTH AMERICAN INDIANS 505, 505-17 (William C. Sturtevant ed., 1978) [hereinafter HANDBOOK]. Seneca People who did not pursue the constitutional form of government in 1848 remain part of the Confederacy and are known as the "Tonawanda Band of Seneca Indians of New York." See Indian Entities Recognized, *supra*, at 9254. See generally Ablor & Tooker, *supra*, at 511-12. Other Senecas who moved from aboriginal Seneca territory to the Indian territory in the nineteenth century are known as the "Seneca-Cayuga Tribe of Oklahoma." See Indian Entities Recognized, *supra*, at 9253. See generally William C. Sturtevant, *Oklahoma Seneca-Cayuga*, in HANDBOOK, *supra*, at 537-43. There are also Senecas residing on the Grand River Reserve in Ontario, Canada. See Sally M. Weaver, *Six Nations of the Grand River, Ontario*, in HANDBOOK, *supra*, at 525.

3. See Treaty with the Six Nations, Nov. 11, 1794, U.S.-Six Nations, in 2 INDIAN AFFAIRS: LAWS AND TREATIES 34, 34-37 (Charles J. Kappler ed., 1904).

4. See discussion *infra* Parts II.A.2-3, 5, 7; III.C.

5. See *id.*

the letter and spirit of our Treaty and that interfered with our sovereign right of self-determination.⁶

While I realize that you are not directly responsible for this state of affairs, you are the head of the government that made solemn promises of noninterference and respect to my Nation⁷ and to the other Indigenous nations located within the United States.⁸ The effect of these violations on our ability to survive as distinct peoples has been dramatic. Indeed, because of what America and its colonizing predecessors have done to deny us the opportunity to choose our own future, it is my belief that Indigenous people are in grave danger of becoming extinct.

Despite this history and the effect that it has had on us, I remain committed to the belief that we can revitalize our sovereignty and thus ensure the survival of our future generations. In order to do so, we must find ways to generate economic opportunity for all of our people, to preserve our unique languages and cultures, and to develop vibrant tribal governments. Perhaps as never before, some of us currently have resources that might allow us to accomplish these goals and to cast off the hardship associated with the last few hundred years. While we know that much of the blame for our condition can be placed at the feet of your Nation, we fully accept that the burden of safeguarding our future rests on our own shoulders.

Nevertheless, no matter how much responsibility we assume for the redevelopment of our sovereignty, the United States remains a barrier to our forward progress. America, because of its geography, its people, its culture, and its media, is an overwhelming influence on the Indigenous nations located within its borders.⁹ As a result, tremendous forces inhibit the preservation and strengthening of the unique fabric of our nations and thus form considerable obstacles to our redevelopment.¹⁰

One of the most significant barriers to our redevelopment lies in the body of American law. Since its founding, the United States has developed an extensive body of law—so-called

6. The Treaty with the Six Nations promises that the United States, in order to remove "all causes of complaint" from the Six Nations, establishes perpetual "[p]eace and friendship" with them, and promises that the United States will never claim their lands or "disturb them . . . in the free use and enjoyment thereof." Treaty with the Six Nations, *supra* note 3, at 34–35.

7. *Id.*

8. See generally 2 INDIAN AFFAIRS: LAWS AND TREATIES, *supra* note 3 (providing the texts of dozens of U.S.-Indian treaties).

9. See discussion *infra* Part III.C.

10. See *infra* Part II.B.

“federal Indian law”—to define and regulate its relationship with the Indian nations remaining within its borders.¹¹ While this law may seem to have a neutral purpose, it would be more accurate to say that “federal Indian law” is really “federal Indian control law” because it has the twofold mission of establishing the legal bases for American colonization of the continent¹² and perpetuating American power and control over the Indian nations.¹³ Unfortunately, in addition to this foundational problem, the law itself is not simple or uniform. Federal Indian control law is a hodgepodge of statutes, cases, executive orders, and administrative regulations that embody a wide variety of divergent policies towards the Indian nations since the time the United States was established.¹⁴ Because old laws reflecting these old policies have rarely been repealed when new ones reflecting new policies have been adopted,¹⁵ any efforts that might be taken by the Indian nations and the federal government to strengthen Indian self-determination must first cut through the legal muck created by over 200 years of prior federal efforts to accomplish precisely the opposite result.

As I see it, this legal minefield profoundly effects tribal sovereignty. For example, conflicting federal laws—such as those that provide for the federal government’s protective trust responsibility over Indian affairs¹⁶ and those that allow federal,

11. See generally 25 U.S.C. (1994) (the title of the United States Code devoted to federal Indian law); ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW* (3d ed. 1991); FELIX S. COHEN’S *HANDBOOK OF FEDERAL INDIAN LAW* (Rennard Strickland et al. eds., 1982).

12. See *infra* notes 79–89 and accompanying text.

13. See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 326 (1990) [hereinafter WILLIAMS, *WESTERN LEGAL THOUGHT*].

14. See Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1754 (1997). Frickey notes:

More than any other field of public law, federal Indian law is characterized by doctrinal incoherence and doleful incidents. Its principles aggregate into competing clusters of inconsistent norms, and its practical effect has been to legitimate the colonization of this continent—the displacement of its native peoples—by the descendants of Europeans.

Id. (footnotes omitted). Perhaps unsurprisingly, the leading treatise on federal Indian control law fundamentally ignores this illicit purpose and marginalizes the significance of “real” Indian law—the law of the Indians—in the conceptualization of this area of law. See FELIX S. COHEN’S *HANDBOOK OF FEDERAL INDIAN LAW*, *supra* note 11, at 1 (“Although tribal laws and state laws sometimes play important roles, Indian law is primarily a body of federal law.”).

15. See DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW* 1–2 (3d ed. 1993).

16. See discussion *infra* Parts I.B, III.B.3.

state, and private interests to interfere with tribal self-government¹⁷—make it impossible for the Indian nations to exercise fully their sovereign right of self-determination. As past efforts to destroy our sovereign existence continue to have their corrosive effect, so too, in my view, does the natural result of those efforts: the destruction of Indigenous culture and the eventual assimilation of Indian people into American society.¹⁸ Inevitably, in the absence of any affirmative efforts to decolonize both the Indian nations and federal Indian control law, I believe that our distinct native identity will continue to erode, and with it, the existence of our nations.

I am writing to you to request your assistance in decolonizing federal Indian control law in order to ensure the preservation and strengthening of the Seneca Nation and all of the other Indian nations located within the United States.¹⁹ Have no doubt that I believe that the primary responsibility for the protection and strengthening of our nations rests with our people and our leaders. Unfortunately, however, American colonization has inflicted a heavy toll on our capacity for self-determination.²⁰ We are weak from the efforts taken by Americans before you to transform our tribal societies and way of life by force.²¹ Accordingly, your help is needed to make changes over those matters that are within your control.²²

I realize that the challenge of revitalizing tribal sovereignty is a difficult one and that this problem is unlikely to be resolved quickly. Even if desired, several hundred years' worth of colonizing influence will never be totally undone; to the extent that it can be undone, it will not be undone easily. The most reasonable and prudent course for our Indigenous nations to pursue is to attempt to harmonize the good things that have been forced upon us by others with the good things that are

17. See discussion *infra* Parts II.A, III.B.4–5, IV.B.2.

18. See discussion *infra* Part II.A.7.

19. This proposal is sent to you solely in my capacity as a member of an Indian nation located within the United States; I have no official authority to speak on behalf of any nation with regard to these matters.

20. See discussion *infra* Part II.A.

21. See *id.*

22. My request is consistent with my belief that the spirit of our treaties with the United States requires that we first approach the problem of your government's historic disregard for our right of self-determination through diplomacy, the tool of government-to-government relations, and that we simply request your help in making changes within your own law and government. If you do what is requested, the most that could be accomplished would be to lift your government's restrictions on our self-determination. We would then be able to continue more freely the difficult work of redeveloping our nations on our own.

unique to and traditional within our own societies. Our common problem, however—the interference and restrictions associated with federal Indian control law—must be minimized in our lives if this process is to take place.

This proposal contains several parts. Part I highlights the colonial foundation of modern federal Indian control law and policy. Part II is a brief history of federal Indian control law and policy since the establishment of the United States, including a discussion of the difficulties associated with developing a coherent federal policy towards the Indian nations. Part III sets forth in greater detail the argument for decolonizing federal Indian control law. Part IV analyzes recent policy efforts by Congress and your Administration to reform federal Indian control law by providing greater support for tribal sovereignty and explains why such policies are not likely to succeed. Finally, Part V sets forth my proposal for you to adopt a federal Indian decolonization policy consistent with the vision of federal-tribal relations defined by the treaties between our nations made over 200 years ago²³ and to lead the effort to repeal much of America's Indian control law.

I. THE COLONIAL FOUNDATION OF FEDERAL INDIAN CONTROL LAW

[C]olonialism can be understood to consist of the *involuntary* exploitation of or annexation of lands and resources previously belonging to another people, often of a different race or ethnicity, or the *involuntary* expansion of political hegemony over them, often displacing, partially or completely, their prior political organization.²⁴

The primary reason why federal Indian control law is a significant barrier to the greater assertion of tribal sovereignty is because the United States originally approached relations with the Indian nations from a singular, self-interested perspective—how to achieve the complete colonization of the American continent and the “civilization” of the Indigenous

23. See discussion *infra* Part II.A.1; *supra* note 3 and accompanying text.

24. Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 86 (1993).

peoples.²⁵ The colonization of the "New World" raised the possibility that at some point the colonists would have to generate a legal basis for taking lands that were already occupied. The failure of disease to exterminate the Indigenous population by the time of the American Revolution²⁶ ensured that the United States would be required to develop a body of law to rationalize its continued expansion and assertion of hegemony over those lands and peoples.

The architect of modern federal Indian control law was U.S. Supreme Court Chief Justice John Marshall.²⁷ In a series of opinions that he wrote during the early nineteenth century, *Johnson v. M'Intosh*,²⁸ *Cherokee Nation v. Georgia*,²⁹ and *Worcester v. Georgia*,³⁰ Marshall laid out the analytical framework for how American law would address the quandary of the Indian nations.

A. *Johnson v. M'Intosh*, the "Doctrine of Discovery," and the "Heathen Subjugation" Theory

In *Johnson v. M'Intosh*, the Supreme Court was called upon to decide whether the Piankeshaw Indians could pass land title to private individual colonists, and thus to address the fundamental question of how the United States originally gained legal title to the land upon which it rested.³¹ Writing for the court, Marshall concluded that America, as a colonizing nation, had the superior right over other nations to extinguish Indian titles "either by purchase or by conquest."³² This principle—which is called the "doctrine of discovery"—meant that under federal Indian control law, the Indian nations "had no theoretical, independent right to sovereignty that a European discoverer might be required to recognize under Europe's Law

25. See BERNARD W. SHEEHAN, SEEDS OF EXTINCTION: JEFFERSONIAN PHILANTHROPY AND THE AMERICAN INDIAN 4 (1973).

26. See THOMAS A. BAILEY, THE AMERICAN PAGEANT: A HISTORY OF THE REPUBLIC 70 (1956) (noting that "[p]lagues were a constant nightmare" in pre-Revolution America).

27. See *infra* notes 28–115 and accompanying text.

28. 21 U.S. (8 Wheat.) 543 (1823).

29. 30 U.S. (5 Pet.) 1 (1831).

30. 31 U.S. (6 Pet.) 515 (1832).

31. See *Johnson*, 21 U.S. (8 Wheat.) at 572.

32. *Id.* at 587.

of Nations.³³ Marshall further reasoned that because the Indian nations did not possess the full panoply of inherent sovereign powers vis-à-vis the colonizing nation, they were thus only vested with a permanent “right of occupancy” to their aboriginal lands.³⁴ Therefore, the Indians could not pass good title to non-Indians because they had no title to pass in the first place.³⁵

Since he was writing without the benefit of much domestic precedent on this issue,³⁶ one might wonder where Marshall got the idea that the Indians should be divested of legal title to their lands solely by virtue of being “discovered” by the Anglo-European colonists. Steven Paul McSloy writes that Marshall’s adoption of the Discovery Doctrine “was merely the latest invocation of a concept that had been born at the very beginning of the Judeo-Christian tradition, on the first page of the Bible, in the Book of Genesis.”³⁷ In explaining how this might be true, McSloy recounts the travails of Abraham, who, at the beginning of “the long march of civilization,” left Ur of the Chaldees

33. 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, 254–55 [hereinafter Williams, *Algebra*].

34. See *Johnson*, 21 U.S. (8 Wheat.) at 574.

35. See *id.* at 573–74.

36. Marshall cites his earlier opinion in the case of *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 142–43 (1810), for the limited proposition that the nature of Indian title to land, which Marshall admitted existed until it was “legitimately extinguished,” is paradoxically not “absolutely repugnant to seisin in fee” being held in the very same land at the very same time by a state. *Johnson*, 21 U.S. (8 Wheat.) at 592 (citing *Fletcher*, 10 U.S. (6 Cranch) at 142–43). Marshall’s colleague, Justice William Johnson, dissented in *Fletcher* on this issue, arguing that the state of Georgia could not hold seisin to a fee simple in land held by the Indians. See *Fletcher*, 10 U.S. (6 Cranch) at 146–47 (Johnson, J., dissenting). What makes this briefly-stated disagreement significant is that the *pleadings*, if not the opinions, in *Fletcher* directly promote the “right of occupancy” theory at length: “What is the Indian title? It is a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. It is not a true and legal possession.” *Id.* at 121 (citations omitted). Marshall had also briefly considered issues touching on Indian title to land in *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164, 165–68 (1812) (concerning whether land that the state had purchased for Indians pursuant to an agreement and to which it had given tax-free status would necessarily keep that tax-free status when sold by the Indians in the face of legislative enactments to the contrary).

37. Steven Paul McSloy, “*Because the Bible Tells Me So: Manifest Destiny and American Indians*,” 9 ST. THOMAS L. REV. 38 (1996); see also Steven T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery*, *Johnson v. McIntosh*, and *Plenary Power*, 20 N.Y.U. REV. L. & SOC. CHANGE 303, 309 (1993) (“Indian nations have been denied their most basic rights to sovereignty and territorial integrity simply because, at the time of Christendom’s arrival in the Americas, they did not believe in the God of the Bible, and did not believe that Jesus Christ was the true Messiah.”).

and proceeded west across the River Jordan to Canaan.³⁸ Abraham had a problem, however: like Marshall, he had to figure out a way to dispossess the native inhabitants, the Canaanites.³⁹ His justification, somewhat like Marshall's, was that "God had given the land to Abraham's people."⁴⁰ McSloy asserts that the *Bible* sanctioned "wars of extermination . . . against local inhabitants who stood in the way of the 'chosen people.'"⁴¹ These wars, McSloy writes, "were justified on the grounds that the indigenous inhabitants were idolaters, cannibals, and human sacrificers, neither civilized nor of the true faith."⁴²

Several biblical passages cited by McSloy lend themselves to appropriation by those seeking a biblical justification for colonization. *Genesis* 17:8 details God's promise to Abraham: "And I will give unto thee, and to thy seed after thee, the land wherein thou art a stranger, all the land of Canaan, for an everlasting possession; and I will be their God."⁴³ Other biblical passages treat similar themes. To the first humans created, God's charge is to have power and dominion over the earth and every living thing upon it.⁴⁴ Even before creating humans, God envisions them as dominant.⁴⁵ One of the *Psalms* has God say: "Ask of me, and I will make the nations your heritage, and the ends of the earth your possession."⁴⁶ These biblical passages have the ring of what much later in the American context would be called "manifest destiny"—the belief that the United States was destined by God to overrun its continent.⁴⁷

To understand how the colonizing implications of these biblical passages were disseminated over the generations down to the time of John Marshall, it is important to realize that all

38. See McSloy, *supra* note 37, at 39.

39. See *id.*

40. *Id.*

41. *Id.* at 40.

42. *Id.* McSloy also states: "Some ancient Hebrew apologists also advanced *terra nullius* arguments, claiming that Canaan was uninhabited; that is, that the land of Canaan had no Canaanites. Others claimed that the Canaanites had stolen the land from ancestors of the Hebrews, and thus that the Hebrews were the original occupants." *Id.* (citing ROBERT L. WILKEN, *THE LAND CALLED HOLY: PALESTINE IN CHRISTIAN HISTORY AND THOUGHT* 5, 31–32 (1992)).

43. *Genesis* 17:8.

44. See McSloy, *supra* note 37, at 40 (citing *Genesis* 1:28 ("Be fruitful and multiply, and fill the earth and subdue it; and have dominion . . . over every living thing.")).

45. See McSloy, *supra* note 37, at 40 (citing *Genesis* 1:26 ("Let us make man . . . and let them have dominion over . . . all the earth.")).

46. *Psalms* 2:8.

47. See BAILEY, *supra* note 26, at 280, 289 (noting the earliest known use of the phrase "manifest destiny" in 1845).

three of the Old World religions that engaged in colonizing behavior—Judaism, Christianity, and Islam—linked themselves to this colonizing tradition through religious genealogies that connected them to Abraham.⁴⁸ With respect to Christianity, Robert A. Williams, Jr. has traced what might be called a “heathen subjugation” theory from its biblical origins to the medieval roots of the Anglo-American legal tradition.⁴⁹ In so doing, he exposes the fundamental justifications for the marginalization of Indian people under American law and, ultimately, why modern federal Indian control law is fundamentally a tool for rationalizing American colonization.⁵⁰

Williams writes that the central premise of modern federal Indian control law has its roots in the thousand-year-old legal tradition defining the relationship between the Christian Europeans and the various “divergent” peoples with whom they had from time to time come into contact.⁵¹ This tradition was based upon two ethnocentric assumptions: first, that the European world view was preeminent; second, that it was therefore right and necessary to subjugate and assimilate other peoples to that world view.⁵² As I have discussed above, these beliefs are derived from the basic teachings of the Judeo-Christian tradition, particularly as refined and applied by the Roman Catholic Church.⁵³

Williams recounts the efforts of the leading Christian lawyer-theologian of the thirteenth century, Pope Innocent IV, who engaged in a serious effort to convert the Mongols to Christianity in an attempt to avoid the inevitable Mongol raid on the Christian empire.⁵⁴ It was through Pope Innocent’s writings to the Great Khan of the Mongols that the Christian foundation of the “heathen subjugation” theory was developed, which later served as the basis for the Crusades and all subsequent relations with non-Christian peoples.⁵⁵ Williams states:

48. See McSloy, *supra* note 37, at 41.

49. See, e.g., WILLIAMS, WESTERN LEGAL THOUGHT, *supra* note 13, at 13–50; 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, 11–99 (1983).

50. See *infra* notes 53–89 and accompanying text.

51. See Williams, *Algebra*, *supra* note 33, at 229.

52. See *id.*

53. See *id.* at 231. Williams concludes that by the time the Middle Ages passed, there developed a “hierarchical universalized mythology of the papacy’s divine origin and unquestionable mandate,” which encouraged the natural development of legal principles to justify “broad papal jurisdictional powers.” *Id.*

54. See *id.* at 226–29, 236–39.

55. See *id.* at 232. In a later commentary, Innocent asked: “[I]s it licit to invade a land that infidels possess, or which belongs to them?” *Id.* at 233 (quoting INNOCENT IV,

According to Innocent his office required him to call upon Christian princes to raise armies to punish serious violations of natural law, and to order those armies to accompany missionaries to heathen lands for purposes of conversion. “[I]f the infidels do not obey, they ought to be compelled by the secular arm and war may be declared against them by the Pope and not by anybody else.”⁵⁶

This “heathen subjugation” theory was later incorporated and reiterated in papal bulls issued during the fifteenth century to rationalize colonial expansion in the “New World.”⁵⁷ In 1455, Pope Nicholas V authorized the Portuguese King Alfonso V “to invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies,”⁵⁸ to put them in perpetual slavery, and to take all their possessions and property.⁵⁹ Later, in 1493, Pope Alexander VI granted Spain any lands that Christopher Columbus had discovered, and any that the Spanish might discover in the future, provided they were “not previously possessed by any Christian owner.”⁶⁰ These papal bulls provided the moral and legal sanction for the subjugation of any non-Christian peoples.

This theory was eventually adopted by the English and incorporated into the common law.⁶¹ The earliest references to

COMMENT[A]RIA DOCTRISIMA IN QUINQUE LIBROS DECRETALIU, *reprinted in part in translation in THE EXPANSION OF EUROPE: THE FIRST PHASE 191–92* (J. Muldoon ed., 1977)). Williams notes:

As vicar of Christ’s universal commonwealth, the Pope had been entrusted by Christ through Peter with the care of the spiritual well-being of these nations. Therefore, Innocent reasoned, the papal office necessarily reserved an indirect right of intervention in the secular affairs of all the Church’s subjects, actual and potential. Christ’s command to Peter to “feed my sheep” was obvious proof that the Pope’s Petrine mandate necessarily included non-believers. According to Innocent, these people “belong to Christ’s flock by virtue of their creation, although the infidels do not belong to the sheepfold of the flock of [the] Church.” Therefore, “the Pope has jurisdiction over all men and power over them in law but not in fact.”

Id. (citation omitted).

56. *Id.* at 235 (quoting INNOCENT IV, *supra* note 55, at 192 (emphasis added)).

57. See *infra* notes 58–60 and accompanying text.

58. EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1648, at 23 (Frances Gardiner Davenport ed., 1917) [hereinafter EUROPEAN TREATIES].

59. See Newcomb, *supra* note 37, at 310.

60. EUROPEAN TREATIES, *supra* note 58, at 56.

61. See *infra* notes 62–72 and accompanying text.

the theory in English law relate to the charter granted to John Cabot. Steven Newcomb writes:

The Cabot charter, issued to John Cabot and his sons in March of 1493 by King Henry VII of England, imitated the language of papal bulls, and gave Cabot the authorization to “seek out, discover, and find whatsoever islands, countries, regions[,] or provinces of the heathens and infidels, whatsoever they be, and in what part of the world soever they be, which before this time have been unknown to all Christians.” Cabot was also instructed to “subdue, occupy[,] and possess” the discovered lands “as our vassals and lieutenants, getting unto us the rule, title, and jurisdiction of the same.” Cabot was given this authority because it was “at that time accepted as a fundamental law of Christendom that all Christians were in a state of war with all infidels.”⁶²

Williams writes that the “heathen subjugation” theory was incorporated into seventeenth-century English law through the adoption of laws preventing “aliens,” or non-citizens, from maintaining actions in the English courts.⁶³ The primary sponsor of the theory during this era was Lord Chief Justice Edward Coke.⁶⁴ In his analytical works, Coke concluded that non-Christian “infidels” must be denied the rights and status of an “alien friend,” such as “a German, a Frenchman, a Spaniard,” because they were subjects of “the devils” in “perpetual hostility” with Christians.⁶⁵

To Coke, not only were “aliens” to be denied certain rights in the English legal system, but they were also to be subject to even greater deprivations of liberty and territory because of their non-Christian status.⁶⁶ Coke theorized:

But if a Christian King should conquer a kingdom of an infidel, and bring them [sic] under his subjection, there

62. Newcomb, *supra* note 37, at 311 (noting that the Cabot charter “imitated the language of [the] papal bulls”).

63. See Williams, *Algebra*, *supra* note 33, at 239–40.

64. See *id.* at 240.

65. See *id.* (quoting Calvin’s Case, 77 Eng. Rep. 377, 397 (K.B. 1608) (“All infidels are in law *perpetui inimici*, perpetual enemies (for the law presumes not that they will be converted, that being *remota potentia*, a remote possibility) for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace.”)).

66. See *id.*

ipso facto the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the decalogue; and in that case, until certain laws be established amongst them, the King by himself, and such Judges as he shall appoint, shall judge them and their causes according to natural equity, in such sort as Kinds in ancient time did with their kingdoms, before any certain municipal laws were given, as before hath been said.⁶⁷

Lord Coke was a central figure in English jurisprudence,⁶⁸ and he influenced the process by which the “infidels” of the American continent—the Indians—were too to be deprived of their liberty and territory.⁶⁹ As Williams recounts, “Coke as attorney general to James I, applied his jurisprudential views on infidel status and rights to England’s colonial enterprise in the New World. In 1609, Coke drew up the Second Charter of Virginia.”⁷⁰ This charter, which confirmed the rights of the colonizers of Jamestown,⁷¹ recited the terms of the First Charter of Virginia, a document which set forth in the most explicit terms the legal mechanism for the colonization of the entire American continent:

We, greatly commending, and graciously accepting of, their Desires for the Furtherance of so noble a Work, which may, by the Providence of Almighty God, hereafter tend to the Glory of his Divine Majesty, *in propagating of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages, living in those Parts, to human Civility, and to a settled and quiet Government; Do, by these our Letters*

67. Calvin’s Case, 77 Eng. Rep. 377, 398 (K.B. 1608); see also Williams, *Algebra*, *supra* note 33, at 239–40.

68. See EDWARD FOSS, A BIOGRAPHICAL DICTIONARY OF THE JUDGES OF ENGLAND FROM THE CONQUEST TO THE PRESENT TIME: 1066–1870, at 178 (London, John Murray 1870) (“[D]uring the twelve years that he held [the office of Attorney General] he raised it to an importance it had never before acquired, and which it has ever since preserved.”).

69. See *infra* notes 70–71 and accompanying text.

70. Williams, *Algebra*, *supra* note 33, at 245 (mis-citing Frederic William Maitland, *English Law and the Renaissance*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 203 (1907)). Williams is correct, however, that the second charter dates from 1609. See HENRY STEELE COMMAGER, DOCUMENTS OF AMERICAN HISTORY 10 (1949).

71. See Williams, *Algebra*, *supra* note 33, at 245.

Patents, graciously accept of, and agree to, their humble and well-intended Desires.⁷²

While the need for land and resources makes it clear that the colonists were not interested in the "New World" merely to "save" the Indians, the "heathen subjugation" theory suggests that there was a constant ideological strain supporting the colonization of "other" non-Christian peoples and their lands. Even those heretic scholars who rejected notions that there was a divine right to claim lands in the Western Hemisphere nonetheless concluded that the failure of the Indians to allow foreigners to "preach the gospel" was a sufficient basis for waging a "just" war to effectuate their conquest.⁷³ As a result, by the time John Marshall was called upon to address questions relating to the legal status of Indigenous peoples under American law, he had the benefit of several centuries of jurisprudence supporting the suppression of their inherent rights

72. *Id.* at 246 (emphasis added) (quoting First Charter of Virginia (April 10, 1606), reprinted in COMMAGER, *supra* note 70, at 8). The Second Charter of Virginia, "after reciting the grant of 1606," COMMAGER, *supra* note 70, at 10, continues in a similar vein: "[B]ecause the principal Effect which we can desire or expect of this Action, is the Conversion and Reduction of the People in those Parts unto the true Worship of God and Christian Religion, we do hereby [require voyagers to the colony to swear allegiance to the Church of England.]" Second Charter of Virginia (May 23, 1609), reprinted in *id.* at 12.

73. See S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective*, in 1989 HARVARD INDIAN LAW SYMPOSIUM 191, 193-95 (1990) (discussing the work of Francisco de Vitoria (1480-1546)). De Vitoria adopted the radical assumption that the Indians possessed the rationality necessary to possess and exercise "dominion." See FRANCISCUS DE VICTORIA [sic], DE INDIS ET DE I[U]RE BELLII RELECTIONES 127-28 (Ernest Nys ed., John Pawley Bate trans., Classics of Int'l Law ed. 1906) (1565) (based on lectures given in 1532), cited in Anaya, *supra*, at 194. De Vitoria said:

[The Indians] are not of unsound mind, but have, according to their kind, the use of reason. This is clear, because there is a certain method in their affairs, for they have polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws, and workshops, and a system of exchange, all of which call for the use of reason; they also have a kind of religion.

DE VICTORIA, *supra*, at 127, quoted in Anaya, *supra*, at 194-95 n.15.

De Vitoria concluded, however, that the Indians were obligated to follow the Roman *ius gentium* (Law of Nations), and thus "were bound to allow foreigners to travel to their lands, trade among them, and preach the gospel." Anaya, *supra*, at 195 (citing DE VICTORIA, *supra*, at 151-59). Failure to allow the Spaniards to carry out these activities could lead to a "just" war and conquest by the Spaniards. See *id.* (citing DE VICTORIA, *supra*, at 155, 158).

to life, liberty, and property simply by virtue of their status as “uncivilized” non-Christian peoples.⁷⁴

Marshall’s opinion in *Johnson v. M’Intosh*, then, represents the American incorporation of the mediievally-derived “heathen subjugation” theory.⁷⁵ This was a view shared commonly by the Founding Fathers.⁷⁶ Thus, in accordance with his perspective, Marshall had little choice but to vanquish the Indian nations under American law—either they owned the land or the United States did. This was truly a monumental problem; ruling that the Indians actually owned their own land would have up-ended the entire American land tenure system⁷⁷ and might have bankrupted the new nation’s already weakened federal treasury⁷⁸ if compensation had to be paid for the illegal takings accomplished to date. Viewed this way, the *Johnson* decision might simply be understood as nothing more than the perfect political compromise. Affording the Indians a permanent “right of occupancy” under federal law eliminated the difficult problem associated with actually having to remove them.

But Marshall, in concluding that the Indian nations had been “conquered” and thus divested of title to the land,⁷⁹ went beyond mere political compromise and incorporated fully the “heathen subjugation” theory that had been used for centuries to justify the domination of non-Christian peoples and their lands. In describing the manner in which American colonization had occurred, Marshall observed:

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. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might

74. See *supra* notes 54–73 and accompanying text.

75. See WILLIAMS, WESTERN LEGAL THOUGHT, *supra* note 13, at 231.

76. At the turn of the century, the Jeffersonian-inspired “philanthropic plan” for the Indians “required that [they] abandon the hunter-warrior culture, the tribal order, and the communal ownership of land. It commanded him to become civilized by adopting a variety of manners and artifacts and, most important, by choosing to live according to the white man’s individualist ideology.” SHEEHAN, *supra* note 25, at 10.

77. See Newcomb, *supra* note 37, at 320–21.

78. See BAILEY, *supra* note 26, at 223, 227–28 (noting the treasury’s weakness after the War of 1812 and the Panic of 1819).

79. See *Johnson*, 21 U.S. (8 Wheat.) at 589.

claim an ascendancy. *The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.*⁸⁰

As a result, Great Britain's successor, the United States, as a nation of "civilized inhabitants," acceded to its land title pursuant to the rule that "discovery gave an exclusive right to extinguish the Indian title of occupancy."⁸¹

In some respects, Marshall suggested that he might not agree with the conclusion that he "must" draw: that "[c]onquest gives a title which the Courts of the conqueror cannot deny."⁸² Nonetheless, while he professed not "to engage in the defence of those principles which Europeans have applied to Indian title," he did find justification "in the character and habits of the people whose rights have been wrested from them."⁸³ In so doing, Marshall accepted the basic tenets of Western colonization theory, and thus incorporated them into the foundation of federal law dealing with the Indian nations by describing how colonization is "supposed" to work. He explained:

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. *The new and old members of the*

80. *Id.* at 572-73 (emphasis added).

81. *Id.* at 587.

82. *Id.* at 588. Marshall's "tortured" journey in reaching this conclusion is reflected in his assessment that deciding that the Indian nations are "incapable of transferring the absolute title to others . . . may be opposed to natural right, and to the usages of civilized nations." *Id.* at 591. Nonetheless, he believed that this conclusion is defensible if it is "indispensable to that system under which the country has been settled, and [is] adapted to the actual condition of the two people [sic]." *Id.* at 591. Then, he concludes, "it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice." *Id.* at 592.

83. *Id.* at 589.

*society mingle with each other; the distinction between them is gradually lost, and they make one people.*⁸⁴

But Marshall did acknowledge a problem, perhaps unique, associated with dealing with America's Indigenous people:

[T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.⁸⁵

As a result, Marshall concluded that this "law which regulates, and ought to regulate in general,"⁸⁶ the relationship with the Indians could not be applied. Thus, Marshall acknowledged that no "conquest" had actually occurred,⁸⁷ but concluded that the United States had no recourse but to leave the Indians in possession of the land and to preserve the possibility that the United States' legal claim to the land could be perfected in the future.⁸⁸ While this appears to be an honest conclusion, it nonetheless rests on the weak assumption that the United States has no legitimate right to its land other than by virtue of its self-proclaimed status over the Indians. According to Steven Newcomb, Marshall's belief in the "superiority" of the United States was rooted in the Christian nationalism that served as the basis for American colonization.⁸⁹

84. *Id.* (emphasis added).

85. *Id.* at 590.

86. *Id.* at 591.

87. *See id.* Marshall states:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.

Id.

88. *See id.*

89. *See Newcomb, supra* note 37, at 325–27. Newcomb observes: "In Marshall's view, rights of dominion belonged to the first Christian people to discover a region of heathen lands." *Id.* at 327.

In much of the *Johnson* opinion, as well as in later opinions, the Court minimized explicit references to Christian nationalism,⁹⁰ most likely because they were no longer necessary. Marshall had drawn upon Christianity to subjugate the Indians, and as a legal matter, after the subjugation had occurred, there was no further reason to draw upon the source of the subjugation.⁹¹ As a result of this transition, many scholars and commentators have viewed American colonization and consequent legal development in secular, rather than religious, terms by focusing on "European" rather than "Christian" motivations.⁹² In doing so, however, "the relationship between the origins of federal Indian law and Christianity is secularized and obscured."⁹³

B. Cherokee Nation v. Georgia and the "Domestic Dependent Nation" Theory

Marshall continued to expand upon his overall theory of colonization in *Cherokee Nation v. Georgia*,⁹⁴ in which the Supreme Court was called upon to decide whether the Cherokee Nation could invoke the original jurisdiction of the Supreme Court on the ground that it was a foreign nation.⁹⁵ Marshall concluded that the Court could not exercise original

90. See *id.* at 332-34.

91. See *id.* at 333 ("Once the principle of Christian discovery and dominion became United States law as a result of the *Johnson* decision, the religious aspect of the original discovery doctrine was no longer needed.")

92. See *id.* at 307. Newcomb notes:

Many scholars today also characterize dealings between Europeans and indigenous peoples during the early colonial period as having been governed by international law principles existing at the time. . . . But when the term "international law" is employed to refer to the discoveries made by the monarchies or nations of Western Europe during the fifteenth and sixteenth centuries, what is actually being referred to is Christian international law.

Id. at 307-08; see also Joyotpaul Chaudhuri, *American Indian Policy: An Overview, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY* 15, 25 (Vine Deloria, Jr. ed. 1985) (ascribing Marshall's decision to "politics rather than 'reason'"); Robert T. Coulter & Steven M. Tullberg, *Indian Land Rights, in THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880S* 185, 190 (Sandra L. Cadwalader & Vine Deloria, Jr. eds. 1984); CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 39 (1987).

93. Newcomb, *supra* note 37, at 308.

94. 30 U.S. (5 Pet.) 1 (1831).

95. See *id.* at 15-17.

jurisdiction in the case because the Cherokee Nation was not a foreign nation or state, but only a "domestic dependent nation."⁹⁶ Simply by declaring this proposition, Marshall eliminated under American law the independent sovereign status not only of the Cherokees, but also of all Indian nations.

While this conclusion was based significantly upon a textual reading of the Constitution,⁹⁷ Marshall expanded his analysis in dicta to address the precise nature of the federal-tribal relationship.⁹⁸ In so doing, he developed the most important and longstanding mechanism utilized by the United States for exercising control over the lives and lands of Indian people: the federal government's trust responsibility.⁹⁹

In denying the Cherokee Nation the status of a foreign nation with the right to invoke the Supreme Court's original jurisdiction,¹⁰⁰ Marshall memorialized in federal law the self-interested determination that the Indians were a subservient people dependent upon the United States. It is not a far stretch to conclude from this opinion that Marshall continued to perceive the aboriginal inhabitants of the continent as uncivilized heathens. Indians "in a state of pupillage" could never be thought to appeal to "an American court of justice for an assertion of right or a redress of wrong"—"[t]heir appeal was to the tomahawk, or to the government."¹⁰¹ Marshall's opinion in *Cherokee Nation* furthered the rationalization of American colonization by concluding that the Indian nations are merely "domestic dependent nations"¹⁰² and thus are barred from exercising the rights of self-determination inherent in all free peoples.

96. *See id.* at 16–17.

97. *See id.* at 18–19.

98. *See id.* at 16.

99. *See id.* at 17. Marshall stated:

[The Indians] are in a state of pupillage. 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 [sic] their wants; and address the president as their great father.

Id.

100. *See id.* at 16–17, 19–20.

101. *Id.* at 17–18.

102. *Id.* at 17.

C. *Worcester v. Georgia and Federal-Indian Relations*

The last of the foundational federal Indian control law decisions written by Marshall was *Worcester v. Georgia*.¹⁰³ *Worcester* addressed whether a state could extend its legislative authority to regulate the conduct of non-Indians within Indian territory.¹⁰⁴ Marshall concluded that the State of Georgia had no authority to enforce its laws within Cherokee territory because relations with Indian nations were an exclusively federal matter.¹⁰⁵

In obvious respects, Marshall's reasoning in *Worcester* diverged significantly from the reasoning contained in *Johnson and Cherokee Nation*. He analyzed in great detail the sovereign existence of the Cherokee Nation, mainly utilizing the Treaty of Hopewell between the Cherokees and the United States as his vehicle.¹⁰⁶ He concluded that while the Treaty provides that the Cherokees shall be under the protection of the United States, such a provision should not be construed as a relinquishment of Cherokee sovereignty: "Protection does not imply the destruction of the protected."¹⁰⁷ Indeed, his reasoning in this regard seems almost totally at odds with his reasoning in *Cherokee Nation*.¹⁰⁸

Despite this apparent departure from his prior practice of suppressing the Indian nations within American law, Marshall's *Worcester* opinion can easily be read as consistent with *Johnson and Cherokee Nation* if it is viewed as another instance in which federal power is deemed paramount in the face of a competing interest—in this case, the interest of a State. Thus despite his hearty acknowledgment of Cherokee

103. 31 U.S. (6 Pet.) 515 (1832).

104. *See id.* at 548–61.

105. *See id.* at 560.

106. *See id.* at 540.

107. *Id.* at 552.

108. In *Worcester*, Marshall states:

The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians as we have applied them to the other nations of the earth. They are applied to all in the same sense.

Id. at 559–60; cf. *Cherokee Nation*, 30 U.S. (5 Pet.) at 18–19 (arguing that the language of the Commerce Clause mandates distinguishing Indian tribes from foreign nations).

sovereignty in *Worcester*, much of Marshall's reasoning defending and rationalizing colonization from his earlier opinions remained in the decision.¹⁰⁹

In many ways, *Worcester*, through its majority and concurring opinions, revealed the tension between competing theories—accommodation *versus* colonization—of how America should deal with the Indian nations. Nonetheless, in deciding *Johnson* and *Cherokee Nation*, the Supreme Court was called upon to address fundamental questions associated with Indian relations that were tied critically to the future development of the United States.¹¹⁰ Viewed from this simple perspective, it can perhaps be rationalized that the actions taken by the United States to deal with the Indians in the early years of the Republic—such as warfare, forced removal, and outright stealing of Indian lands—were simply a matter of perceived necessity. But the reality is that Indian peoples and lands were colonized in order to remove a barrier to the pursuit of wealth, territory, and freedom for the colonizing people. In the course of Western colonization of “heathen” peoples, demonizing, devaluing, and degrading those who are to be colonized all have been tools to facilitate total subjugation.

Marshall drew upon these theories in addressing how the nascent United States would deal with the aboriginal inhabitants of the American continent: in writing *Johnson* and *Cherokee Nation*, he perpetuated the “just colonization” theory laid down in the *Bible*.¹¹¹ *Worcester* was no exception.¹¹² While

109. It would appear that Marshall's earlier decisions were beginning to have an impact on his colleagues on the Supreme Court. In a concurring opinion, Justice McLean laid out an alternative rationale for deciding *Worcester*. See *Worcester*, 31 U.S. (6 Pet.) at 562–95 (McLean, J., concurring). He viewed the displacement of state power as a temporary condition, only to be restrained so long as the Indians remained a distinct community. See *id.* at 592–93 (McLean, J., concurring). McLean noted:

If a tribe of Indians shall become so degraded or reduced in numbers, as to lose the power of self-government, the protection of the local law, of necessity, must be extended over them. . . . The exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary. . . . [A] sound national policy does require that the Indian tribes within our states should exchange their territories, upon equitable principles, or eventually consent to become amalgamated in our political communities.

Id. at 592–93 (McLean, J., concurring).

110. See discussion *supra* Part I.A–B (discussing the “doctrine of discovery” and the “domestic dependent nation” theory).

111. See discussion *supra* Part I.A–B.

112. See *Worcester*, 31 U.S. (6 Pet.) at 543 (“[P]ower, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend.”).

Marshall revealed in *Worcester* that he may have thought his prior conclusions about federal authority over Indian affairs overreached,¹¹³ and therefore sought to distance himself from them, it is significant that only after he had established the legal justification for American colonial policies designed to secure wealth, resources, and opportunity for the emerging nation, did he find it comfortable to defend the sovereignty of the Indian nations.¹¹⁴ Marshall, like all leaders, had choices to make when he wrote these important cases. Ultimately, he chose to follow the “underlying mediievally-derived ideology—that normatively divergent ‘savage’ peoples could be denied equal rights and status accorded to the civilized nations of Europe.”¹¹⁵ In so doing, he embedded this ideology firmly within the fabric of the American law dealing with the Indian nations.

II. THE EVOLUTION OF FEDERAL INDIAN POLICY: THE DIFFERENT FACES OF COLONIZATION

A. A Brief History

Most scholars of federal Indian control law and policy hold the view that the United States has never successfully developed and carried out an effective policy for dealing with the Indian nations located within its borders.¹¹⁶ This view holds that throughout the 222 years of United States history, every conceivable policy objective has been attempted, ranging from the pursuit of peaceful coexistence—through the Treaty, Reorganization, and Self-Determination policies—to outright

113. See *Worcester*, 31 U.S. (6 Pet.) at 552. Marshall noted:

The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that protection, without involving the surrender of their national character.

Id.

114. See Clinton, *supra* note 24, at 97.

115. Williams, *Algebra*, *supra* note 33, at 256.

116. See CLINTON ET AL., *supra* note 11, at vi–vii; GETCHES ET AL., *supra* note 15, at 30; EMMA R. GROSS, CONTEMPORARY FEDERAL POLICY TOWARD AMERICAN INDIANS 11–12 (1989).

genocide—through the Warfare, Removal, Reservation, Allotment, and Termination policies.¹¹⁷ On its face, the historical record makes it easy to conclude that the United States has had a cyclical and inconsistent policy in Indian affairs.¹¹⁸

I hold a contrary view. Looking at the same evidence and apparent policy fluctuations as others, it is clear to me that American policy toward the Indians has always revolved around the same central theme: to wit; how can “we,” the superior, enlightened, Christian people, help/destroy “them,” the inferior, uncivilized, pagan people; in such a way as to eliminate our/their problem with them/us.¹¹⁹ It is obvious that policies such as Warfare, Allotment, and Termination¹²⁰ had the clear intent of simply eliminating Indian people as members of distinct societies. But even the so-called “benevolent” policies, like Reorganization,¹²¹ ended up achieving the same objective as the most destructive policies.¹²² In their efforts to help Indian people, the reformers, usually motivated by Christian and Western values, have supported policies that have had the direct and indirect effect of assimilating Indian people into the American way of life.¹²³ Indeed, as Francis Paul Prucha has observed, every “new” policy initiative dealing with Indian affairs has been followed by a “newer” initiative that, ironically, draws upon the same reform rhetoric as the previous one.¹²⁴

117. See discussion *infra* Part II.A.1–8.

118. See generally Vine Deloria, Jr., *The Evolution of Federal Indian Policy Making*, in *AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY* 239 (Vine Deloria, Jr. ed., 1985) [hereinafter Deloria, *Evolution*].

119. Jo Carrillo has echoed this theme:

Scholars often write that federal Indian law is characterized by pendulum-like shifts in federal policy toward Native American peoples. What is not so often said is that these swings occur along a single trajectory, one that denies the value of indigenous ways as well as the possibility of the United States respecting tribal societies enough to co-create with them a pluralistic American government. Each of the major eras in federal Indian law illustrates this point. They show that at critical moments in history, the United States has consistently chosen oppression and dispossession over embrace or real understanding.

See Jo Carrillo, *Tribal Governance/Gender*, in *READINGS IN AMERICAN INDIAN LAW: RECALLING THE RHYTHM OF SURVIVAL* 205 (Jo Carrillo ed. 1998).

120. See discussion *infra* Part II.A.4–5, 7.

121. See discussion *infra* Part II.A.6.

122. See, e.g., *infra* note 180 and accompanying text.

123. See discussion *infra* Parts II.A.5, III.C.

124. See FRANCIS PAUL PRUCHA, *INDIAN POLICY IN THE UNITED STATES* 36, 36–37 (1981) [hereinafter PRUCHA, *INDIAN POLICY*].

1. *The Treaty Policy*—In the early years of the American Republic, Indian affairs management focused on securing the neutrality of the Indian nations to allow for stability and growth in the new nation.¹²⁵

American officials relied upon negotiation and treaty-making in dealing with the Indians.¹²⁶ The primary reason for relying on these methods was the fact that the Indian nations were militarily powerful and still a threat to the young United States.¹²⁷ Moreover, the Articles of Confederation supported a state role in managing Indian affairs and left the federal government with little power other than the ability to enter into treaties.¹²⁸ Given the weakness associated with the federal government of the new United States, diplomacy and treaty making were the only viable options for addressing Indian affairs.¹²⁹

Upon the Constitution's adoption and ratification, all questions concerning the states' role in managing Indian affairs were resolved in favor of the federal government. The Commerce Clause vested full and exclusive authority in the United States to regulate "Commerce . . . with the Indian tribes."¹³⁰ Accordingly, the first Congress asserted this new authority by enacting the Indian Trade and Intercourse Act of 1790, which prohibited any purchase of Indian land by individuals or states without federal approval.¹³¹ Until the early part of the nine-

125. See KIRKE KICKINGBIRD ET AL., *INDIAN TREATIES* 1^o (1980).

126. See *id.* at 10–12.

127. See *id.* at 10. One of the United States' most aggressive Indian fighters, Andrew Jackson, thought that it was "absurd" that the Indian nations were sovereigns with which the United States should enter into treaties. See PRUCHA, *INDIAN POLICY*, *supra* note 124, at 144. Prucha states: "That the United States in fact [had entered into such treaties], Jackson argued, was a historical fact which resulted from the feeble position of the new American government when it first faced the Indians during and immediately after the Revolution." *Id.*

128. See ART. OF CONFED. art. II (1781); see also *Oneida Indian Nation v. New York*, 860 F.2d 1145, 1159 (2d Cir. 1988) (holding that the Articles of Confederation preserved a state role over Indian affairs sufficient to extinguish Indian title to land).

129. Cf. KIRKE KICKINGBIRD ET AL., *supra* note 125, at 10 (noting the early United States government's weakness, "both politically and militarily," and noting the founding fathers' concern "for maintaining peace and friendly relations with the Indian nations").

130. U.S. CONST. art. 1, § 8, cl. 3; see also CLINTON ET AL., *supra* note 11, at 142.

131. See Trade and Intercourse Act of 1790, 1 Stat. 137 (effectively repealed by Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729, 730–31 (effectively designating the Department of Indian Affairs as the federal approval authority)); see also FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790–1834*, at 264 (Bison Book 1970) (1962) [hereinafter PRUCHA, *TRADE AND INTERCOURSE ACTS*].

teenth century, federal Indian policy and legislation was mostly limited to managing Indian trade relations.¹³²

2. *The Removal Policy*—After the turn of the nineteenth century, as the United States established its military superiority over the Indian nations, it developed an alternative to diplomacy for dealing with Indian affairs—physical removal of the Indians to western lands.¹³³ American colonization through settlement and economic development generated tremendous conflict between the Indian nations and the states: the most famous of these disputes involved the State of Georgia's efforts to eradicate Cherokee sovereignty through its own legislation,¹³⁴ precipitating a constitutional crisis in 1832 due to President Jackson's refusal to enforce the Supreme Court's decision in *Worcester v. Georgia*.¹³⁵

The conflict between the Indian nations and the nascent United States presented a policy quandary that allowed for several possibilities. Prucha, in his apology for Jackson's aggressive Indian policies, writes that Removal was the only viable policy option for a man who "was genuinely concerned for the well-being of the Indians and for their civilization."¹³⁶ Other policy options available to Jackson at the time included simply killing the Indians off, assimilating them rapidly, or "protecting" them on their "ancestral lands in the East."¹³⁷ All were rejected.¹³⁸ Outright killing of the Indians was not seriously considered (although it was the policy of "aggressive frontiersmen"), most likely because it was thought too inhumane and not politically salable.¹³⁹ Rapid assimilation was rejected as unworkable, despite the Jeffersonian-inspired belief that the Indians could be absorbed into American society within a generation.¹⁴⁰ The retention of aboriginal reservations—the

132. See PRUCHA, TRADE AND INTERCOURSE ACTS, *supra* note 131, at 50.

133. See KICKINGBIRD ET AL., *supra* note 125, at 13–14.

134. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 2 (1831).

135. 31 U.S. (6 Pet.) 515. In a letter to a Georgia state congressman offering support for Georgia's illegal actions described in the *Worcester* opinion, President-elect Jackson counseled, "Build a fire under them. When it gets hot enough, they'll move." JOHN EHLE, TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION 220 (1988).

136. PRUCHA, INDIAN POLICY, *supra* note 124, at 146.

137. *Id.* at 147.

138. See *id.* at 147–48.

139. See *id.* at 147.

140. See *id.* Prucha writes that rapid assimilation "was not a feasible solution. Indian culture has a viability that continually impresses anthropologists, and to become white men was not the goal of the Indians." *Id.*

preferred policy of Jackson's critics¹⁴¹—was rejected because the United States simply did not have the political or military ability to defend Indian territory from encroaching white society.¹⁴² Given those options, Jackson chose Removal.¹⁴³

Having made his choice,¹⁴⁴ Jackson initiated a Removal policy¹⁴⁵ that confiscated Indian land without adequate compensation and cost the lives of scores of Indian people.¹⁴⁶ Jackson forcibly removed the Cherokees, among others, (such as in the infamous "Trail of Tears" in which many Cherokee died) to the so-called "Indian Territory" located west of the Mississippi.¹⁴⁷ While Jackson initiated, in his view, a liberal policy and entered into treaties with the Cherokees and other

141. *See id.* at 148. A noted "friend of the Indian," Thomas L. McKenney, the first head of the Bureau of Indian Affairs (BIA), *see id.* at 22, initially engaged in a variety of private and public efforts "to educate the Indians and to teach them the white man's social and economic patterns." *Id.* When assimilation did not quickly occur, McKenney believed that removal of the Eastern Indians to the West would be the only way for them to "escape the pressures and the vices of the white society surrounding them." *Id.* at 22–23. McKenney wrote:

Seeing as I do the condition of these people, and that they are bordering on destruction, I would, were I empowered, take them *firmly*, but *kindly* by the hand, and tell them they must go; and I would do this, on the same principle that I would take my own children by the hand, firmly, but kindly and lead them from a district of Country in which the plague was raging.

Id. at 23 (citing Letter from Thomas L. McKenney to Eli Baldwin (Oct. 28, 1829), Records of the Office of Indian Affairs, 6 LETTERS SENT 140, available at National Archives, Record Group 75).

142. *See id.* at 148.

143. *See id.* at 149. Prucha notes:

To Jackson, [removal] seemed the only answer. Since neither adequate protection nor quick assimilation of the Indians was possible, it seemed reasonable and necessary to move the Indians to some area where they would not be disturbed by federal-state jurisdictional disputes or by encroachments of white settlers, where they could develop on the road to civilization at their own pace, or, if they so desired, preserve their own culture.

Id.

144. Prucha notes: "President Jackson, himself a veteran Indian fighter, wasted little sympathy on the paint-bedaubed 'varmints.' He accepted fully the brutal creed of his fellow Westerners that 'the only good Indian is a dead Indian.'" *Id.* at 143, n.18 (citing THOMAS A. BAILEY, *THE AMERICAN PAGEANT: A HISTORY OF THE REPUBLIC* 269 (1956)).

145. *See* EHLE, *supra* note 135, at 224.

146. *See id.* at 390 (estimating the number of Indian deaths to be between 800 and 4,000).

147. *See* GETCHES ET AL., *supra* note 15, at 152–54 (quoting D'ARCY MCNICKEL, *THEY CAME HERE FIRST* 199–200 (rev. ed. 1975); RENNARD STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT* 65–67 (1975)).

Indian nations to secure them new lands in the west,¹⁴⁸ the forced nature of the removal process¹⁴⁹ was physically and emotionally destructive and weakened the Indian nations dramatically.¹⁵⁰ Nonetheless, throughout this period, the federal Indian control law reflected in the opinions of Jackson's ideological opponent, John Marshall, continued to recognize that the Indian nations had a measure of inherent sovereignty over their members and their remaining territory.¹⁵¹

3. *The Reservation Policy*—Inevitably, the pace of American colonization and expansion made the Removal Policy unworkable by itself. By the mid-nineteenth century, an alternative plan to establish formal reservations for the Indians within the various states and territories had evolved.¹⁵² Using treaties,¹⁵³ statutes,¹⁵⁴ and executive orders¹⁵⁵ supported by force,¹⁵⁶ starvation,¹⁵⁷ and disease,¹⁵⁸ the United States secured peace with and obtained land title from the Indian nations, reserving significantly reduced tracts for Indian occupation and use. Accordingly, states were required to relinquish all claims to authority over Indian territories located within their borders.¹⁵⁹

The policies formulated during the middle and late nineteenth century were heavily influenced by the Christian nationalism that had rationalized American colonization in the

148. See PRUCHA, INDIAN POLICY, *supra* note 124, at 149.

149. See FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 11, at 91-92.

150. See EHLE, *supra* note 135, at 389.

151. See, e.g., *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 756 (1866).

152. See KICKINGBIRD ET AL., *supra* note 125, at 14-15.

153. See, e.g., Treaty with the Winnebago, April 5, 1859, U.S.-Winnebago, 12 Stat. 1101 reprinted in 2 INDIAN AFFAIRS: LAWS AND TREATIES, *supra* note 3, at 790; Treaty with the Menominee, May 12, 1854, U.S.-Menominee, 10 Stat. 1064, reprinted in 2 INDIAN AFFAIRS: LAWS AND TREATIES, *supra* note 3, at 626.

154. See, e.g., Act of Jan. 29, 1861, ch. 20, § 1, 12 Stat. 126, 126-27 (1861) (admitting Kansas as a state, while excluding Indian territory from U.S. jurisdiction).

155. Presidents established Indian reservations through executive orders during the period from 1855 to 1919. See GETCHES ET AL., *supra* note 15, at 179, 299. See generally *id.* at 295-300.

156. See *id.* at 170 (stating that the U.S. military was employed to drive out Indians who would not voluntarily go to the reservations).

157. See *id.* at 171 (stating that buffalo, which were the mainstay of the Plains Indians' diet, disappeared from the region when railroad builders began killing them for meat and for their hides, and when wealthy Europeans began killing them for sport).

158. See, e.g., EHLE, *supra* note 135, at 389-90; Scott Morrison & LeAnn Howe, *The Sewage of Foreigners*, 39 FED. B. NEWS & J. 370, 371-73 (1992).

159. See, e.g., Act of Jan. 29, 1861, ch. 20, § 1, 12 Stat. 126, 126-27 (1861).

first place.¹⁶⁰ Although federal Indian policy during most of this period was still affected by the sentiment that the Indian nations were the “enemy,”¹⁶¹ the social reformers and “friends of the Indian” were singularly focused on resolving the “Indian problem” by converting the Indians to Christianity and assimilating them into the American way of life.¹⁶²

4. *The Peace Policy*—With the end of the Civil War, President Ulysses S. Grant initiated what became known as the “Peace Policy,” which funded missionary expeditions among the Indians and used religious groups to nominate government agents to deal with federal Indian affairs.¹⁶³ Although Congress had appropriated funds to establish missions among the Indians as early as 1776, the Peace Policy represented a formal adoption of government funding and support for religious groups to deal with the “problem” of the Indian nations.¹⁶⁴ Alli-

160. See discussion *supra* Part I.A.

161. Management of Indian affairs was vested in the War Department in 1834. See Act of June 30, 1834, ch. 162, § 7, 4 Stat. 735, 736–37 (providing for the organization of the Department of Indian Affairs) (repealed in part). Management of Indian affairs was transferred to the Interior Department in 1849. See Act of Mar. 3, 1849, ch. 108, § 5, 9 Stat. 395, 395 (repealed in part 1953, superseded in part 1966) (formerly codified at 19 U.S.C. § 42 (1952) and scattered sections of 5 U.S.C. (1964)) (codified in scattered sections of 5, 31, 43 U.S.C.); Clinton, *supra* note 24, at 135.

162. See AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE FRIENDS OF THE INDIAN 1880–1900, at 1 (Francis Paul Prucha, ed. 1973) [hereinafter PRUCHA, FRIENDS OF THE INDIAN]; PRUCHA, INDIAN POLICY, *supra* note 124, at 20–35. Prucha writes that in 1849, the Commissioner of Indian Affairs, Orlando Brown, reported to Congress:

“The dark clouds of ignorance and superstition in which these people have so long been enveloped . . . seem at length in the case of many of them to be breaking away, and the light of Christianity and general knowledge to be dawning upon their moral and intellectual darkness.” [Brown] gave credit for the change to the government’s policy of directing the Indians toward an agricultural existence, the introduction of the manual labor schools, and instruction by the missionaries in “the best of all knowledge, religious truth—their duty towards God and their fellow beings.” The result was “a great moral and social revolution” among some of the tribes, which he predicted would be spread to others by adoption of the same measures. . . . In the end he expected a large measure of success to “crown the philanthropic efforts of the government and of individuals to civilize and to christianize the Indian tribes.”

PRUCHA, INDIAN POLICY, *supra* note 124, at 25–26 (citing ORLANDO BROWN, H.R. EXEC. DOC. NO. 31-5, ser. 570, at 956–57 (1849)).

163. 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, 778 (1997). Dussias notes: “Grant committed his administration to ‘any course . . . which tends to [Indian] civilization and ultimate citizenship.’” *Id.* (quoting ROBERT H. KELLER, JR., AMERICAN PROTESTANTISM AND UNITED STATES INDIAN POLICY, 1869–82, at 16 (1983)).

164. See *id.* at 776–77.

son Dussias concludes: "In short, under the Peace Policy, the federal government turned to religious groups and religious men to formulate and administer Indian policy, in effect abdicating much of its responsibility in Indian affairs."¹⁶⁵

Ironically, the Peace Policy was implemented concurrently with the United States' heavy involvement in warfare with the Plains Indians.¹⁶⁶ Indeed, the violent conflicts between the military, the settlers, and the Indians, especially after Custer's defeat at Little Big Horn, precipitated the demise of the Peace Policy in favor of a more aggressive military approach.¹⁶⁷ Eventually, however, the United States succeeded in eliminating any Indian military threat to further American colonization, and Congress formally ended Indian treaty-making in 1871.¹⁶⁸

5. *The Allotment Policy*—Federal Indian policy between 1871 and 1934 reflected America's continuing belief that it had an "Indian problem" and that efforts should be focused on assimilating the Indians into American life by destroying their tribal identity.¹⁶⁹ Reflecting the still-dominant American view that American society and culture were superior to Indian society and culture, the social reformers acted in concert with the speculators, who were eager to appropriate the remaining Indian land base by urging Congress to privatize Indian lands and eradicate the traditional tribal lifestyle.¹⁷⁰ Indeed, the "Americanization" of the Indians "became the all-embracing goal of the reformers in the last two decades of the century."¹⁷¹

These reformers, led by groups like the Indian Rights Association and the Women's National Indian Association, drew upon the common refrain that the Indians should be converted to Christianity,¹⁷² but added a twist by focusing on the destruction of tribal Indian life:

165. *Id.* at 779. Dussias explains that "[t]he most important structural components of the policy were the creation of a Board of Indian Commissioners and the allotment of Indian agencies to religious groups. In addition, federal aid to Indian schools and missions was greatly expanded." *Id.*

166. See KELLER, *supra* note 163, at 188–89.

167. See Dussias, *supra* note 163, at 782.

168. See Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (1994)); see also GETCHES ET AL., *supra* note 15, at 179 (detailing the power struggle between the House of Representatives and the Senate over the control of Indian affairs that led to the end of Indian treaty-making).

169. See Clinton, *supra* note 24, at 147–52.

170. See FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 11, at 128.

171. PRUCHA, INDIAN POLICY, *supra* note 124, at 29.

172. See *id.* at 26–27.

[I]f civilization, education and Christianity are to do their work, they must get at the individual. They must lay hold of men and women and children, one by one. The deadening sway of tribal custom must be interfered with. The sad uniformity of savage tribal life must be broken up! Individuality must be cultivated. . . . At last, as a nation, we are coming to recognize the great truth that if we would do justice to the Indians, we must get at them, one by one, with American ideals, American schools, American laws, the privileges and the pressure of American rights and duties.¹⁷³

The means for facilitating this transformation was the allotment of the remaining tribal land base to individual Indian ownership.¹⁷⁴ With support from the speculators and settlers eager for new lands to colonize, the government focused on "educating" the Indians.¹⁷⁵ In 1887, Congress passed the Indian General Allotment Act,¹⁷⁶ which established a mechanism for converting tribal land to private Indian ownership.¹⁷⁷ The reformers were no doubt elated because they believed that:

173. Merrill E. Gates, *Opening Address*, 18 PROC. ANN. MEETING LAKE MOHONK CONF. FRIENDS INDIAN 14 (1900).

174. See *infra* notes 176–78.

175. The federal government continued to fund religious groups to operate schools for Indians until the 1890s. After questions were raised about the constitutionality of government funding of religious groups, the government's solution was not to ban such funding thereafter, but to provide religious instruction in the government's Indian schools on a non-denominational basis. See Dussias, *supra* note 163, at 784–87. In addition to funding religious education, the government also banned traditional Indian ceremonial dances—such as the Ghost Dance of the Lakota Sioux and the Pueblo dances—that officials believed inhibited the acceptance of Christianity and a civilized lifestyle. See *id.* at 787–805.

176. Indian General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331–358 (1994)).

177. See Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 10 (1995). Royster notes:

The central feature of the General Allotment Act was the allotment of the reservations in severalty. Under the Act, individual Indians received a certain number of acres of reservation land. In recognition of prior failed attempts to allot Indian lands in fee, however, Congress provided that allotted lands would be held in trust for the individual allottee for a period of twenty-five years. During that time, the allottee was expected to assimilate to agriculture, to Christianity, and to citizenship. At the end of the twenty-five year transition period, the individual would receive a patent in fee, free of encumbrance and fully alienable. With the acquisition of a fee patent, the allottee would also be subject to the civil and criminal laws of the state.

[land allotment] is a mighty pulverizing engine for breaking up the tribal mass. It has nothing to say to the tribe, nothing to do with the tribe. It breaks up that vast "bulk of things" which the tribal life sought to keep unchanged. It finds its way straight to the family and to the individual.¹⁷⁸

Over the next fifty years, the Allotment Act had just such an effect on many reservation Indians.¹⁷⁹ The fee patent program and the surplus lands program served as the vehicles for transferring eighty-seven million acres—approximately 65% of all Indian land—to white owners.¹⁸⁰

At the same time that the Allotment Act was being implemented, Congress and the Supreme Court were involved in other efforts to further solidify legal and political hegemony over the Indian nations.¹⁸¹ Much of this development came after 1883, when the Court held in *Ex parte Crow Dog* that federal criminal jurisdiction did not extend to the murder of one Indian by another in Indian territory.¹⁸² This decision was reluctantly given effect by officials in the Bureau of Indian Affairs (BIA), who thought that this recognition of tribal sovereignty only frustrated their assimilation policies.¹⁸³ As a result, they initiated a campaign to have Congress grant such jurisdiction to the federal courts.¹⁸⁴ In 1885, Congress acceded to this request and enacted the Indian Major Crimes Act,¹⁸⁵ one of the most important federal laws granting federal authority to interfere with internal Indian affairs.¹⁸⁶ In

178. Gates, *supra* note 173, at 16.

179. See Royster, *supra* note 177, at 6 (discussing the goals and effects of the General Allotment Act).

180. See *id.* at 13. Royster notes:

Despite the devastating effect of fee patents, the 27 million patented acres lost to non-Indians represented only about one-third of the tribal losses during the allotment era. More than twice as much land—some 60 million acres—was lost under the surplus lands program . . . [which provided that] "surplus" lands could, at the discretion of the President, be opened to non-Indian settlement.

Id.

181. See *infra* notes 180–93 and accompanying text.

182. See *Ex parte Crow Dog*, 109 U.S. 556, 571–72 (1883).

183. See SIDNEY L. HARRING, *CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* 133–34 (1994).

184. See *id.* at 134–41.

185. Ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153) (1988).

186. See FELIX S. COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW*, *supra* note 11, at 290 n.73. See generally *id.* at 282–86 (on the application of general federal laws to Indians); HARRING, *supra* note 183, at 134–41 (on the genesis of the Act).

addition, Congress granted the Secretary of the Interior sweeping administrative authority to establish a wide variety of assimilating institutions within Indian reservation communities, such as Western judicial and law enforcement systems, boarding schools, and mission schools.¹⁸⁷

As Congress was asserting federal law and power over the internal affairs of the Indian nations, the Supreme Court was providing the legal rationale for doing so. In *U.S. v. Kagama*,¹⁸⁸ the Court upheld the constitutionality of the Indian Major Crimes Act merely upon the grounds that the United States had a "duty of protection" of the Indians and that the "Indian tribes are the wards of the nation."¹⁸⁹ And in *Lone Wolf v. Hitchcock*,¹⁹⁰ the Court upheld the abrogation of Indian treaties on the grounds that the courts did not have any power to interfere with Congress' "plenary authority" over Indian affairs.¹⁹¹ Thus, by the early twentieth century, John Marshall's early understanding of federal-tribal relations—that the United States had "conquered" the Indian nations¹⁹²—had become a reality under American law.¹⁹³

Efforts to appropriate Indian land¹⁹⁴ and otherwise destroy Indian tribal life were extremely successful.¹⁹⁵ The Indian

187. See Henry M. Teller, *Courts of Indian Offenses*, in PRUCHA, FRIENDS OF THE INDIAN, *supra* note 162, at 295–99 (stating that Henry M. Teller, Secretary of the Interior, established Courts of Indian Offenses for the specific purpose of destroying Indian customs and traditions). For a description of the establishment of early Indian schools, see SAMUEL CARTER III, *CHEROKEE SUNSET: A NATION BETRAYED* 41–52 (1976).

188. 118 U.S. 375 (1886).

189. *Id.* at 383.

190. 187 U.S. 553 (1903).

191. See *id.* at 565–68.

192. See discussion *supra* Part I.A.

193. Despite the constancy of federal legal and judicial efforts to subjugate the Indian nations and acquire Indian lands, the Supreme Court periodically would remain true to the other competing doctrinal formulation that had been laid down by John Marshall—that the Indian nations were "domestic dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16–17 (1831). In instances where there was no clear federal interest or concern, the Court did continue to recognize that the Indian nations were possessed of an inherent sovereignty not derived from federal sources. Thus, in *Talton v. Mayes*, 163 U.S. 376 (1896), the Court refused to vacate a Cherokee murder conviction on the ground that Cherokee authority "existed prior to the Constitution" and thus operated independently of it. *Id.* at 384–85.

194. See Arrell M. Gibson, *Indian Land Transfers*, in 4 HANDBOOK, *supra* note 2, at 211, 227 ("27,000 acres were passed from Indian allottees by sale and an additional 60,000 acres were ceded outright to non-Indians as 'surplus' lands."); see also FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 11, at 138 (describing reduction in Indian land holdings from 138,000,000 acres in 1887 to 48,000,000 in 1934).

195. Prucha writes of the devastating effect of the Allotment Act:

nations had been stripped of most of their aboriginal lands and deprived of their traditional governmental, social, and cultural institutions.¹⁹⁶ As a result, Indian economies were destroyed and many Indian people were thrown into poverty, which, in some cases, made them heavily dependent upon the federal government and its distributions for survival.¹⁹⁷ The failure of the Allotment Policy was documented in the tremendously influential Meriam Report, which was issued in 1928.¹⁹⁸ Given their obvious effects, it was generally accepted that the Allotment and Assimilation Policies had failed and that a new approach toward Indian affairs should be taken.¹⁹⁹

6. *The Reorganization Policy*—In 1933, a new Commissioner of Indian Affairs, John Collier, was appointed, and the United States initiated changes in its Indian policy.²⁰⁰ At Collier's

The allotment of land in severalty under the Dawes Act and the subsequent loss of many of these lands by the Indians eliminated the economic base upon which viable Indian societies depended. The educational and Americanization programs destroyed the Indians' pride and their cultural heritage without completely substituting anything in their place, until the Indians became, in large part, a demoralized people with economic, educational, and health problems that seemed to grow steadily worse instead of better.

PRUCHA, INDIAN POLICY, *supra* note 124, at 43.

196. See *supra* note 195 and accompanying text; *infra* Part III.C.

197. See Laurence M. Hauptman, *The Indian Reorganization Act*, in *THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880S*, *supra* note 92, at 131, 135 (describing the Meriam Report's assessment of the Allotment Act's effect on Indian Society).

198. See INSTITUTE FOR GOV'T RESEARCH, *THE PROBLEM OF INDIAN ADMINISTRATION* (Lewis Meriam et al. eds., 1928). See generally GETCHES ET AL., *supra* note 15, at 217–18; Clinton, *supra* note 24, at 104.

199. See Clinton, *supra* note 24, at 152.

200. See PRUCHA, INDIAN POLICY, *supra* note 124, at 33. Prior to his appointment, Collier was the spokesman for the American Indian Defense Association. See *id.* He had seven basic principles that shaped his approach to Indian affairs:

1. Indian societies must and can be discovered in their continuing existence, or regenerated, or set into being *de novo* and made use of.
2. The Indian societies, whether ancient, regenerated or created anew, must be given status, responsibility and power.
3. The land, held, used and cherished in the way the particular Indian group desires, is fundamental in any lifesaving program.
4. Each and all of the freedoms should be extended to Indians, and in the most convincing and dramatic manner possible. [There must be] proclamation and enforcement of cultural liberty, religious liberty, and unimpeded relationships of the generations.
5. Positive means must be used to ensure freedom—credit, education (of a broad and technical sort), and grants of responsibility.

urging,²⁰¹ Congress passed the Indian Reorganization Act (IRA) in 1934.²⁰² The IRA ended allotment and provided a mechanism for tribes to revitalize themselves by adopting written tribal constitutions and business charters.²⁰³ In doing so, Congress had apparently reversed its Indian policy from one intent on destroying tribal sovereignty and self-government to one in favor of supporting both of these ideals.

While some have heralded the IRA as a good thing for the Indian nations,²⁰⁴ it is easy to see that even this "beneficial"²⁰⁵ initiative could not be totally divorced from the colonial foundations common to all of the previous federal Indian policies. While the IRA did acknowledge that the Indian nations were separate sovereigns,²⁰⁶ it nonetheless provided that their governmental reorganization could only occur pursuant to federal law and only in accordance with a written constitution and/or a business corporation.²⁰⁷ As a result, the IRA heavily

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6. The experience of responsible democracy, is, of all experience, the most therapeutic, the most disciplinary, the most dynamogenic and the most productive of efficiency. In this one affirmation we, the workers who knew so well the diversity of the Indian situation and its recalcitrancy toward monistic programs, were prepared to be unreserved, absolute, even at the risk of blunders and of turmoil. We tried to extend to the tribes a self-governing self-determination without any limit beyond the need to advance by stages to the goal.
 7. That research and then more research is essential to the program, that in the ethnic field research can be made a tool of action essential to all the other tools, indeed, that it ought to be the master tool.

Id. at 33–34 (paraphrasing JOHN COLLIER, INDIANS OF THE AMERICAS: THE LONG HOPE 261–64 (1947)).

201. See Clinton, *supra* note 24, at 104, 136.

202. Act of June 18, 1934, ch. 576, §§ 1–19, 48 Stat. 984, 984–88 (codified as amended at 25 U.S.C. §§ 461–479 (1994)).

203. See 25 U.S.C. §§ 476–478 (1994).

204. See, e.g., PRUCHA, INDIAN POLICY, *supra* note 124, at 44; Paul H. Stuart, *Organizing for Self-Determination: Federal and Tribal Bureaucracies in an Era of Social and Policy Change*, in AMERICAN INDIANS: SOCIAL JUSTICE AND PUBLIC POLICY 83, 88 (Donald E. Green & Thomas V. Tonnesen eds. 1991) (calling the IRA's system of indirect administration "more beneficial than not for American Indians," while acknowledging the failings of the Indian New Deal); Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 979 (1972).

205. Stuart, *supra* note 204, at 88.

206. See 25 U.S.C. §§ 476–478 (1998).

207. See *id.*

“embodied elements of the very colonialism it sought to end,”²⁰⁸ and thus has only received qualified praise from historians.²⁰⁹

Furthermore, the colonizing foundation of the IRA can be seen in the effort made by BIA officials to preserve federal power over tribal lawmaking:

Tribal constitutions were often drafted from models provided by a BIA whose bureaucratic hold on the governance of Indian country was directly threatened by the emergence of strong, autonomous Indian tribal governments. As much as [Commissioner of Indian Affairs] Collier wanted to do away with the BIA, the BIA bureaucrats were determined to keep their jobs and their power. Thus, they drafted into many tribal constitutions provisions requiring most or all tribal law making or resource management decisions to be directly approved by the Secretary of the Interior (through the BIA, of course).²¹⁰

Despite these flaws, which ensured that the federal government would perpetuate its colonial authority, some measure of the IRA’s detrimental effect was offset by the fact that it was the first federal Indian policy in over 100 years that did not have the explicit purpose of undermining the status of the Indian nations.²¹¹

7. *The Termination Policy*—The Reorganization Policy, however, was short-lived. In the 1940s, likely as a result of the nationalism associated with America’s successful participation in World War II, Congress responded to the deficiency in Indian “Americanization”²¹² by abandoning its effort to protect and strengthen tribal self-government.²¹³ In a dramatic and

208. Clinton, *supra* note 24, at 104.

209. See Hauptman, *supra* note 197, at 132 (“Recent assessments condemn more than they praise the IRA and the Indian New Deal.”).

210. Clinton, *supra* note 24, at 104–05.

211. See Hauptman, *supra* note 197, at 133 (“Much of the commentary on the IRA has ignored a central fact: that it was largely an administrative reorganization following a century of mismanagement and mistaken policies that had seriously depleted Indian resources and reduced the Indian population to subsistence.”).

212. While various allotment-era acts had provided for the granting of citizenship to most Indians by this time, all Indians were granted American citizenship in 1924. See Citizenship Act of 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b) (1994)); GETCHES ET AL., *supra* note 15, at 738.

213. See *Wheeler-Howard Act—Exempt Certain Indians: Hearings on S. 2103 Before the House Comm. on Indian Affairs*, 76th Cong. (1940) (proposing the repeal of parts of the Wheeler-Howard Act). Attached to the Senate Bill was a Senate Report, which concluded:

direct assault on the Indian nations, Congress began to implement a policy of relinquishing federal "supervision" over certain aspects of Indian relations to the states.²¹⁴ Thus, in the 1940s, Congress acted initially to vest certain states with criminal and civil jurisdiction over the Indian territories located within their boundaries.²¹⁵ Eventually, it authorized a standing mechanism for any state to do so when it enacted Public Law 280.²¹⁶

The Termination Policy was formally conceived in 1953 when Congress adopted House Concurrent Resolution 108.²¹⁷ Eventually, 109 tribes and bands were terminated, that is, denied recognition as separate political entities, in furtherance of this policy.²¹⁸ Tribal lands were allotted, tribal funds were distributed, and tribal governments were effectively disbanded.²¹⁹

Fundamentally the so-called Wheeler-Howard Act attempts to set up a state or a nation within a nation[,] which is contrary to the intents and purposes of the American Republic. No doubt but that the Indians should be helped and given every assistance possible[,] but in no way should they be set up as a governing power within the United States of America.

Id. at 7 (quoting S. REP. NO. 76-1047, at 4 (1939)).

214. See FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 11, at 152-53.

215. See, e.g., Act of June 8, 1940, ch. 276, § 1, 54 Stat. 249, 249 (codified as amended at 18 U.S.C. § 3243 (1985)) (Kansas); Act of Sept. 13, 1950, ch. 947, § 1, 64 Stat. 845, 845 (codified at 25 U.S.C. § 233 (1994)) (New York).

216. Act of Aug. 15, 1953, ch. 505, §§ 2, 4, 67 Stat. 588, 588-89 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1994)).

217. H.R. Con. Res. 108, 83d Cong. (1953) (enacted). The resolution reads, in part:

[I]t is the policy of Congress, as rapidly as possible to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, and to grant them all the rights and prerogatives pertaining to American citizenship.

Id., quoted in Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 150 (1977).

218. See Wilkinson & Biggs, *supra* note 217, at 151.

219. See *id.* at 152-54. Wilkinson and Biggs write that the administrative plans associated with the Termination Policy had the following effects on tribes and their members:

1. Fundamental changes in land ownership patterns were made. . . .
2. The trust relationship was ended. . . .
3. State legislative jurisdiction was imposed. . . .
4. State judicial authority was imposed. . . .
5. All exemptions from state taxing authority were ended. . . .
6. All special federal programs to tribes were discontinued. . . .

Consistent with its radical assimilationist purposes, the BIA even set up a relocation program to move Indians to the cities, which significantly increased the urban Indian population.²²⁰

As the Reorganization Era faded and the most dramatic colonization policy of all, Termination, began to take effect, the father of modern federal Indian control law, Felix S. Cohen, was moved to write in 1951:

Having started our national existence as a nation by repudiating colonial status, and having repudiated the role of empire with equal vigor, at least during the first 122 years of our national existence, we are not accustomed to the high moral talk by which great empires "aid" and "protect" backward peoples out of their independence, and impose a dependent status and a dependent psychology upon people who once managed their own affairs in a self-reliant way. Only in obscure places in the Indian country . . . can we see what happens to our own Government experts when they are not responsible to the people they are governing or aiding.²²¹

Fortunately, like all previous federal Indian policies, the Termination Policy failed,²²² because separating Indian people from their tribal lands and tribal way of life did not dramatically improve their condition, as had been predicted.²²³ Many Indian nations, like the Menominee of Wisconsin, never gave up the fight for recognition of their sovereignty and eventually were "restored" to federal recognition.²²⁴ Moreover, many states began to feel the brunt of assuming social service responsibility

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7. All special federal programs to individuals were discontinued. . . .
Tribal sovereignty was effectively ended. . . .

Id. (emphasis removed).

220. See CLINTON ET AL., *supra* note 11, at 15; JOANE NAGEL, AMERICAN INDIAN ETHNIC RENEWAL 120 (1996).

221. Felix S. Cohen, *Colonialism: U.S. Style*, THE PROGRESSIVE, Feb. 1951, at 16, 17.

222. See GROSS, *supra* note 116, at xv; discussion *supra* Part II.A.1-6.

223. See TASK FORCE ON CONSOLIDATION, REVISION, AND CODIFICATION OF FED. INDIAN LAW, AMERICAN INDIAN POLICY REVIEW COMM'N, 93D CONG., FINAL REPORT 29 (1976) (proposing congressional findings that "the policy of withdrawal of federal services and termination of federal recognition reflected in H.C.R. 108 of 1953 and the various termination Acts enacted pursuant to that policy was an ill conceived policy which has caused irreparable harm to those affected by its application").

224. See, e.g., Act of Dec. 22, 1973, Pub. L. No. 93-197, §§ 1-8, 87 Stat. 770, 770-73 (codified at 25 U.S.C. § 903 (1994)) (granting federal recognition to the Menominee Tribe of Wisconsin).

for former reservation communities.²²⁵ These factors, combined with criticism of the federal government's haste and a lack of Indian input in implementing the policy, led to the abandonment in practice of the Termination Policy in the early 1960s.²²⁶

In 1968, Congress again focused on the Indian nations and, as was the national tenor at the time, on the treatment of minorities by the federal government. Acting on the basis of information alleging rights abuses by tribal governments,²²⁷ Congress passed the Indian Civil Rights Act (ICRA),²²⁸ which was designed to apply most of the provisions of the Bill of Rights to the actions of tribal government.²²⁹ Here again, Congress professed to support tribal government. But the ICRA, by imposing on tribal governments external standards of appropriate governmental conduct, was clearly more federal intrusion into tribal government affairs.²³⁰ In its effort to "help" the situation, Congress again undermined tribal sovereignty because it could only see a solution to the problem of individual Indian rights abuses in terms that it could understand and with which it was familiar—a declaration of individual rights through law.²³¹

8. The Self-Determination Policy—It is generally believed that the Termination Era formally ended and the Self-Determination Era began when President Nixon notified Congress that he intended to help the Indian nations achieve self-sufficiency.²³² Nixon's policy statement marked the formal end of the Termination Policy and was the most significant improvement in the revitalization of tribal self-government in

225. See GETCHES ET AL., *supra* note 15, at 252 (citing STEPHEN CORNELL, *THE RETURN OF THE NATIVE* 123–24 (1988)).

226. See FELIX S. COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW*, *supra* note 11, at 180–86.

227. *See id.*

228. Pub. L. No. 90-284, 82 Stat. 77 (1968) (codified in part at 25 U.S.C. §§ 1301–1303 (1994)).

229. Other than the right to bear arms, the prohibitions against the establishment of religion, the quartering of soldiers, and the right to counsel at the state's expense, the ICRA copied all other provisions of the Bill of Rights. Compare 25 U.S.C. § 1302 (1994) with U.S. CONST. amend. I–X (showing that the ICRA copies most, but not all, of the provisions in the Bill of Rights.).

230. *See* Clinton, *supra* note 24, at 123–24.

231. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978) (analyzing Congress's two "distinct and competing" objectives in the ICRA—tribal self-determination and the protection of individual rights).

232. Special Message to the Congress on Indian Affairs, PUB. PAPERS 564, 567 (July 8, 1970) (President Richard M. Nixon) [hereinafter Nixon Message to Congress]; *see, e.g.*, GROSS, *supra* note 116, at 34.

American history.²³³ Nixon's message to Congress showed that the change in policy was unmistakable:

For years we have talked about encouraging Indians to exercise greater self-determination, but our progress has never been commensurate with our promises. Part of the reason for this situation has been the threat of termination. But another reason is the fact that when a decision is made as to whether a Federal program will be turned over to Indian administration, it is the Federal authorities and not the Indian people who finally make that decision.

This situation should be reversed. In my judgment, it should be up to the Indian tribe to determine whether it is willing to assume administrative responsibility for a service program which is presently administered by a Federal agency.²³⁴

In 1975, Congress passed the Indian Self-Determination and Education Assistance Act,²³⁵ which provided a mechanism to assist the Indian nations financially in their revitalization efforts.²³⁶ In 1976, the American Indian Policy Review Commission issued its report supporting greater federal support for tribal sovereignty and self-government.²³⁷ And in 1978, Congress passed the Indian Child Welfare Act,²³⁸ which protected Indian children against removal from Indian homes by state and county social services for culturally-biased reasons.²³⁹ Various acts were also passed to restore the federally-recognized status of Indian nations that had earlier been terminated.²⁴⁰

233. See GROSS, *supra* note 116, at 34–38; see also Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1261–62 (1995).

234. Nixon Message to Congress, *supra* note 232, at 567.

235. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, §§ 1–209, 88 Stat. 2203, 2203–17 (1975) (codified as amended at 25 U.S.C. §§ 450a–450n (1994) and elsewhere in scattered sections of titles 5, 25, 42, and 50)).

236. See 25 U.S.C. §§ 450a to 450i.

237. TASK FORCE ON CONSOLIDATION, REVISION, AND CODIFICATION OF FED. INDIAN LAW, AMERICAN INDIAN POLICY REVIEW COMM'N, 93D CONG., FINAL REPORT (1976); see also GROSS, *supra* note 116, at 40–44.

238. Pub. L. No. 95-608, §§ 1–403, 92 Stat. 3069, 3069–78 (1978) (codified as amended at 25 U.S.C. §§ 1901–1963 (1994)).

239. See 25 U.S.C. § 1902.

240. See, e.g., Menominee Restoration Act, Pub. L. No. 93-197, §§ 1–8, 87 Stat. 770, 770–73 (1973) (codified as amended at 25 U.S.C. §§ 903–903f (1994)); Siletz Indian

Throughout this period, the Supreme Court began to address Indian issues in earnest. The "modern" era in federal Indian control law generally is thought to have begun in 1959 when the Court decided the case of *Williams v. Lee*.²⁴¹ *Williams* reaffirmed the residual doctrinal foundations of *Worcester*, holding that the state courts did not have jurisdiction over a case arising out of an on-reservation transaction involving an Indian and a non-Indian.²⁴² Since 1959, the Supreme Court has continued to address Indian law cases in disproportionate significance.²⁴³ It has not, however, retreated from the fundamental covenants that affirm federal power and control over the Indian nations.²⁴⁴

9. *Federal Indian Policy as Colonization*—Because of its deep foundation, colonization remains firmly embedded in the body of modern federal Indian control law and policy. This observation should be of little surprise, because all federal policies for dealing with the Indian nations—the Removal Policy, the Reservation Policy, the Peace Policy, the Allotment Policy, the Reorganization Policy, the Termination Policy—and the "archaic, European-derived law" supporting them have been "ultimately genocidal in both practice and intent."²⁴⁵ Only since the ushering in of the Self-Determination Policy in the early 1970s, has the United States avoided using the language of subjugation and assimilation in creating and carrying out its policy toward the Indian nations.

This state of affairs has led Robert Clinton to write that "[c]olonialist roots . . . are entrenched deeply in the body of

Tribe Restoration Act, Pub. L. No. 95-195, §§ 1-8, 91 Stat. 1415, 1415-19 (1977) (codified as amended at 25 U.S.C. §§ 711-711f (1994)).

241. 358 U.S. 217 (1959); see Fred L. Ragsdale, Jr., *The Deception of Geography*, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY, *supra* note 118, at 63, 63 ("To a great degree, contemporary federal Indian law is modern law beginning in 1959."); CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 1-3 (1987).

242. See *Williams*, 358 U.S. at 223.

243. See WILKINSON, *supra* note 241, at 2.

244. See *infra* note 277 (listing recent Supreme Court cases that still rely on doctrine laid down in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), and *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831)). The Court has, however, taken some steps to make assertions of federal power subject to judicial review. See *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977) (overruling the part of *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903), holding that Congressional action involving Indian affairs was unreviewable). The Court has also allowed tribes to sue the United States for breach of trust. See *United States v. Mitchell*, 463 U.S. 206, 212 (1983); *United States v. Mitchell*, 445 U.S. 535, 538-39 (1980).

245. *Williams*, *Algebra*, *supra* note 33, at 265.

modern federal Indian law. Vestiges of the law's historic colonial role in legitimating conquest and expropriation remain imbedded in the doctrines employed today[,] allegedly to protect Indian interests."²⁴⁶ So long as the United States preserves the colonial foundation of its Indian law, it will be unable to formulate an effective and mutually beneficial policy for dealing with the Indian nations.

B. The Challenges in Developing a Successful Federal Indian Policy

Scholars generally concur with the assessment that federal Indian policy has been a failure.²⁴⁷ Why has it been so difficult for the United States to achieve a successful policy for dealing with the Indians?

Foremost are the obstacles associated with the illegitimate premises on which all but the most recent federal Indian policies are based. With the exception of the Reorganization and Self-Determination policies, federal Indian policy has always been driven by greed, avarice, and the pursuit of manifest destiny.²⁴⁸ Taking and exploiting Indian lands and resources is a paradigm requirement for America's economic system—capitalism—and the Indian nations have been powerless to defend themselves against it.²⁴⁹ This thirst has destabilized federal-Indian relations in the way that a fox eating chickens destabilizes henhouse relations.

Moreover, federal Indian policy has been based upon a paternalistic ethnocentrism that has never viewed Indigenous people as capable of determining our own future. American policymakers have assumed that *their* way of life was superior and worth emulating, that *their* society was in a superior position to safeguard Indian interests, and that *their* opinions

246. Clinton, *supra* note 24, at 109.

247. See GROSS, *supra* note 116, at xv ("Scholars have long been of the opinion that American Indian-federal relations are a study in the failure of democratic processes to protect and enhance the interests and well-being of American Indian tribes and communities.")

248. See *id.* at 11 (noting scholars' assessments of federal Indian policy as partially rooted in the goal of manifest destiny). But see PRUCHA, INDIAN POLICY, *supra* note 124, at 146–47 (flatly denying such ignoble motives in the case of Andrew Jackson).

249. See GROSS, *supra* note 116 at 2 (describing how "colonial dependency theory . . . explains Indian policy in Marxist or neo-Marxist terms . . .").

about the future of Indian people were the correct ones. These faulty assumptions have been a constant throughout America's dealings with the Indian nations.²⁵⁰ Indeed, the degree to which this paternalistic ethnocentrism has infiltrated even the most "beneficial" federal Indian policies raises the possibility that these beliefs are defining characteristics of what it means to be an American.²⁵¹ This imbalance of perspectives has undermined the development of stable relations between the Indian nations and the United States.

Aside from these fundamental flaws in federal Indian policymaking, other defects are related to the unique nature of Indian affairs within the American policymaking arena. Federal Indian control law incorporates a unique tension between satisfying federal interests, as reflected by the Plenary Power Doctrine,²⁵² and accommodating tribal interests, as reflected by the trust responsibility.²⁵³ These concepts, especially the trust responsibility, are difficult concepts to define and reflect in legislation. Federal Indian policymaking is, therefore, a mandated exercise that "is as much a state of mind or moral attitude as it is a complex body of Indian law stemming from Congress' constitutional authority to regulate Indian affairs."²⁵⁴

As a result, ideology plays an important and unpredictable role in how federal Indian policy is developed. Regardless of the time period, "the question of how the Indians' political status will be defined is, implicitly or explicitly, a part of Indian policy discussions. Whether Indians are to be more or less

250. See discussion *supra* Part II.A.

251. Prucha explores this fundamental flaw in light of Collier's unsuccessful efforts at Indian reorganization:

The tragedy is that white Americans—whether their philanthropic impulse came from Christian sentiment or from social science commitments—have never really been willing to accept a pluralistic society. For nearly two centuries of United States history the dream of the reformers has been to bring the Indians into conformity with the prevailing moods—religious and intellectual—of white society. The dominant sentiments of an age could not make room for alternative or divergent patterns of life. The formulators of Indian policy, in all the periods we have looked at today, with typical reformers' zeal swept criticism and opposition aside, for they believed that they and the nation they represented were supremely right. The Indian has been asked to march to all kinds of drummers—except his own.

PRUCHA, INDIAN POLICY, *supra* note 124, at 35.

252. See *infra* Part III.B.2.

253. See *supra* Part I.B.

254. GROSS, *supra* note 116, at 15.

sovereign is thus a permanent consideration when legislating Indian affairs.²⁵⁵ These are inherently matters of judgment and opinion, and their resolution is quintessentially political in nature. Whether Congress decides to support and advocate Indian concerns or to undermine and suppress them, government policy will be significantly affected. Emma R. Gross has concluded that “[g]iven the existence of these tensions in Indian policy development, and the fact that they have defied attempts to definitely resolve the underlying questions at stake, Indian legislation is often contradictory or seems to reverse itself.”²⁵⁶

In addition to its conceptual difficulty, the challenge of developing a successful federal Indian policy is compounded by a number of structural factors associated with the task: First, the sheer number of distinct Indian nations and tribes makes the development of any workable policy a considerable challenge. Today, as always, each of the 560 different Indian nations²⁵⁷ has unique attributes that make the application of any general policy fraught with difficulty.²⁵⁸ All were dealt with differently by the United States during different historical periods.²⁵⁹ Moreover, the nations vary in their form of government and tribal organization, abundance of land and natural resources, degree of assimilation, and strength of traditional customs and beliefs.²⁶⁰ These characteristics contributed strongly to the difficulty of crafting a workable federal Indian policy during the last two hundred years.

Second, structural conflicts within the governmental organization of the United States have made uniformity in federal Indian policymaking problematic.²⁶¹ While federalism and the separation of powers may have been useful devices in developing and sustaining a vibrant American democracy, they have contributed to the generation of failed federal Indian policies and to a hodgepodge of federal law, executive orders, and regulations dealing with Indian affairs.

255. *Id.* at 18.

256. *Id.*

257. *See* Indian Entities Recognized, *supra* note 2, at 9251–55.

258. *See* GETCHES ET AL., *supra* note 15, at 7–8.

259. For an example of the inconsistencies in the United States' dealings with various tribes at different times, see the great variety of treaties in 2 INDIAN AFFAIRS: LAWS AND TREATIES, *supra* note 3.

260. *See* NAGEL, *supra* note 220, at 236.

261. *See generally* GROSS, *supra* note 116, at 61–92.

Congress, which is now established by the Constitution²⁶² and federal common law²⁶³ as having plenary power over Indian affairs, has historically had difficulty determining how to address relations with the Indians procedurally. It was not until 1871, when Congress ended Indian treaty making,²⁶⁴ that it was finally implied that the House, as well as the Senate, might have a role in managing this responsibility. Even after Congress became established as the primary authority over Indian affairs, the political and ideological questions associated with how to deal with the Indian nations have made consistent policy elusive.

The executive branch, primarily through the Bureau of Indian Affairs (BIA), has a long and undistinguished record in managing the federal government's relationship with the Indians.²⁶⁵ Fraught with the inherent conflict of interest of serving both as the trustee of the tribes²⁶⁶ and as the defenders of federal interests generally,²⁶⁷ the executive branch has had the difficult task of trying to implement the conflicting policies developed by Congress over the years.²⁶⁸ By virtue of its unenviable task as "overseer," the BIA has been unable to participate meaningfully in policy debate and has, too often, become the object of ridicule rather than the recipient of respect in the dialogue over the federal-tribal relationship.²⁶⁹ Furthermore, the BIA may well be more concerned about its own bureaucratic self-interest than about the concerns of the Indian people it is supposed to be serving as trustee.²⁷⁰

262. See U.S. CONST. art. I, § 8, cl. 3.

263. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-68 (1903).

264. See Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (1994)).

265. See SPECIAL COMM. ON INVESTIGATIONS OF THE SELECT COMM. ON INDIAN AFFAIRS, FINAL REPORT AND LEGISLATIVE RECOMMENDATIONS, S. REP. NO. 101-216, pt. 2, at 27-52 (1989).

266. See Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1230-34 (1975) (on the history and scope of the executive branch's trust responsibility).

267. See *id.* at 1236 (noting that the availability of equitable relief for Indian nations harmed by the federal government is "vital to accommodate the conflicts between Indian trustee responsibilities and competing government projects that affect countless federal agencies"); see also *id.* at 1233-34, 1236 n.105.

268. See Nixon Message to Congress, *supra* note 232, at 573.

269. See SPECIAL COMM. ON INVESTIGATIONS OF THE SELECT COMM. ON INDIAN AFFAIRS, FINAL REPORT AND LEGISLATIVE RECOMMENDATIONS, S. REP. NO. 101-216, pt. 1, at 5 (describing the BIA as a "federal bureaucracy ensnarled in red tape and riddled with fraud, mismanagement, and waste").

270. See *id.* at 22.

The problems afflicting the legislative and executive branches have not affected the judiciary. The Supreme Court has always played a central role in the development of federal Indian control law.²⁷¹ Although the court has not always been especially active in Indian cases, its pronouncements have served as the cornerstones for American law and policy towards the Indian nations.²⁷² Unlike its relationship to other bodies of law, the Court has written virtually the entire body of federal law applicable to the Indian nations. The Court has defined the scope of federal power over tribes,²⁷³ limited the tribal sovereignty recognized by the United States,²⁷⁴ and fleshed out the responsibilities of the United States as trustee for the Indians.²⁷⁵ While it has, in recent years, become less hospitable to claims favoring Indian interests,²⁷⁶ it nonetheless has consistently built upon its established precedents—the Marshall trilogy—that suppress tribal autonomy in the face of federal power.²⁷⁷

In addition to the challenges associated with the separation of powers, federalism has also affected management of Indian affairs. Under the Articles of Confederation, the states claimed

271. See WILKINSON, *supra* note 241, at 13–14.

272. See *id.* at 4, 135–37 n.11 (listing specific principles of federal Indian control law outlined by the Court).

273. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566–67 (1903).

274. See *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 (1973) (referring to tribal sovereignty doctrine as a “backdrop” in the Court’s analysis).

275. See *Nevada v. United States*, 463 U.S. 110, 128 (1983) (holding that, while the federal government has a general trust responsibility vis-à-vis the Native American nations, it must also represent other, possibly conflicting interests); *United States v. Mitchell*, 463 U.S. 206, 219–28 (1983) (holding that comprehensive scheme of federal statutes and regulations governing management of tribal timber imposes specific trust obligations on the federal government); *United States v. Mitchell*, 445 U.S. 535, 540–46 (1980) (holding that while the General Allotment Act of 1887 established a trust relationship, the scope of the relationship was limited to the provisions of the Act).

276. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 72–76 (1996) (weakening the Indian Gaming Regulatory Act); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 462–67 (1995) (construing a treaty); *Rice v. Rehner*, 463 U.S. 713, 733–35 (1983) (upholding state imposition of liquor license requirement); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154–59 (1980) and *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 481–83 (1976) (both validating imposition of state taxing schemes).

277. See, e.g., *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853 n.12 (1985) (citing *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823), *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), and *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17–18 (1831) in support of the proposition that Indian nations have been divested with respect to their relations with non-tribal members); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206, 209 (1978) (citing all three decisions in support of the proposition that Indian sovereignty is limited).

that their authority to manage Indian affairs co-existed with that of the federal government.²⁷⁸ While the replacement of the Articles by the Constitution clarified that the federal government would have primary authority over managing Indian affairs,²⁷⁹ the states continued to challenge this federal constitutional authority for years thereafter.²⁸⁰ Despite the clarity of pronouncements such as those in *Worcester v. Georgia*²⁸¹ and *Williams v. Lee*,²⁸² the states have continued to press for control over the Indian territory within their borders.²⁸³ The recent trend, in fact, has been for the Supreme Court to grant the states an even greater role in the administration of Indian affairs.²⁸⁴

While considerable, the institutional reasons why the United States is unable to formulate rational Indian policy are overshadowed by the fundamental reality of federal Indian policymaking: the United States has, and has always had, a tremendous appetite for Indian land, Indian resources, and Indian subjugation. Greed and ethnocentrism have interfered with the United States' ability to achieve harmony between its own long-term interests and those of the Indian nations located within its borders.²⁸⁵

Because of this fundamental reality, even the most altruistic and noble attempts to address the problems of Indian country have failed.²⁸⁶ From the beginning, when treaties were the predominant method of handling Indian affairs, the pressure to develop and expand has been so great that the solemn promises made by the United States in those agreements to secure

278. See *Oneida Indian Nation v. New York*, 860 F.2d 1145, 1156 (2d Cir. 1988).

279. See *id.* at 1159.

280. See, e.g., *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) (granting jurisdiction to the Oneida land sale to state of New York allegedly in violation of the Trade and Intercourse Act of 1793).

281. 31 U.S. (6 Pet.) 515, 560-62 (1832); see also *id.* at 590-92, 95 (McLean, J., concurring).

282. 358 U.S. 217, 221 (1959).

283. See, e.g., *Alaska v. Venetie Tribal Gov't*, 118 S. Ct. 948, 951-52 (1998); *Seminole Tribe v. Florida*, 517 U.S. 44, 55-64 (1996).

284. See, e.g., *Rice v. Rehner*, 463 U.S. 713, 731-35 (1983) (allowing California to regulate liquor licensing on the Pala Reservation); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 159-61 (1980) (allowing Washington to impose a cigarette tax on tribal smokeshops selling cigarettes to non-tribe members).

285. See CLINTON ET AL., *supra* note 11, at 193 (describing the Plenary Power Doctrine as "[r]ooted in [p]rejudice" and commenting on the "openly ethnocentric tone of the opinions of the Plenary Power Era" (citations omitted)).

286. See, e.g., discussion *supra* Part II.A.6.

Indian land and peace have all been broken.²⁸⁷ Even the Self-Determination Policy,²⁸⁸ the most successful federal Indian policy to date, has been hampered by the inability of the United States to let the Indian nations *actually* administer their own affairs in the face of their apparent willingness to do so.²⁸⁹ While this policy has encouraged tribes to assume greater control over their own affairs, there remains a huge bureaucracy, the BIA, which continues to micro-manage tribal affairs, destroy tribal initiative, and resist any meaningful reform efforts.²⁹⁰

As recently as in the 1980s, the United States and the Indian nations dependent upon the federal trust responsibility faced a difficult fiscal crisis.²⁹¹ Accordingly, the federal government made items of discretionary spending subject to cutbacks.²⁹² Even as the American economy has grown stronger, the Indians, one of the poorest and weakest voices within the United States, stand to lose, as we always have.²⁹³ Even worse, the policies that might be developed to help guide future conduct may be too heavily influenced by this competition for scarce resources. Unless deliberate action is taken to resist this pressure, Congress may be tempted at some time in the future to once again resolve America's troubles on the backs of the Indigenous peoples located within its borders.²⁹⁴

287. See discussion *supra* Part II.A.1.

288. See discussion *supra* Part II.A.8; discussion *infra* Part IV.A.

289. See discussion *infra* Part IV.A.2.

290. See *id.* (both the Demonstration Project and Self-Governance Act allow for the continued functioning of the BIA, and with regard to the Self-Governance Act, the Secretary of the Interior is given final control in choosing participating Indian Nations).

291. See Stuart, *supra* note 204, at 96 (detailing the effects of the overall budget cuts in domestic programs in the 1980s on Indian tribes).

292. See *id.*

293. Recently, the Chairman of the Ways & Means Committee of the House of Representatives, Bill Archer, has proposed a tax on Indian gaming revenues generated by tribal governments. See, e.g., Clay Chandler & Eric Pianin, *Hill Republicans Offer Plan to Cut Taxes: Proposal Authored by Rep. Archer Would Trim \$85 Billion over 5 Years*, WASH. POST, June 10, 1997, at A4; Patrick Wilson, *Legislator Seeks Tax on Tribes*, LAS VEGAS REV.-J., June 10, 1997, at 2A, available in 1997 WL 4546085. No commensurate proposal has been generated to tax state lottery and other state gaming revenues. In addition, Senator Slade Gorton has proposed that tribal sovereign immunity from lawsuits should be waived, further exposing tribal governments to potential financial devastation. See S. 1691, 105th Cong. § 3(3)(b)(3) (1998) (proposing an American Indian Equal Justice Act).

294. See Stuart, *supra* note 204, at 96 (noting the Reagan administration's attempts to relinquish federal responsibility for Indian programs).

III. WHY FEDERAL INDIAN CONTROL LAW MUST BE DECOLONIZED

There are at least four reasons why federal Indian control law must be decolonized: (1) the world community has rejected colonialism and supports the right of self-determination for all peoples; (2) federal Indian control law rationalizes American colonization and thus denies Indigenous people in the United States basic human rights of self-determination; (3) American colonization has been partially successful in destroying the Indian nations; and (4) decolonization and the commensurate redevelopment of the Indian nations will encourage a more cost-effective use of federal financial resources.

A. The World Community Has Rejected Colonialism

The nations of the world have rejected colonialism and support the right of all peoples to self-determination.²⁹⁵ After the horrors of Nazi atrocities, the United Nations has made considerable progress during the last 50 years toward the protection of basic human rights for all peoples under international law.²⁹⁶ This movement has been especially strong with respect to decolonization and the elimination of first world nation hegemony over third world nations.²⁹⁷ A similar development must occur with respect to the elimination of American hegemony over the Indigenous nations that exist within its boundaries.

Worldwide efforts to eliminate colonization have been affirmed and incorporated within the body of international law: for example, article I of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Cultural, and Social Rights, both adopted by the United Nations General Assembly in 1966, guarantees that “[a]ll peoples have the right of self-determination” and that

295. For an excellent survey of the international law on the right of self-determination, see John W. Head, *Selling Hong Kong to China: What Happened to the Right of Self-Determination*, 46 KAN. L. REV. 283, 283–91 (1998).

296. *See id.*

297. *See infra* notes 298–99 and accompanying text.

“[b]y virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”²⁹⁸ In adopting this treaty, the world’s nations have committed to eliminating colonial aggression against and hostility toward all peoples of the world.

Despite this general affirmation of the right of self-determination of all peoples, international law has yet to specifically acknowledge this right with respect to Indigenous peoples. Nonetheless, there has been forward movement in developing international law norms to recognize and protect the rights of Indigenous peoples. For example, article 8 of proposed International Labor Organization Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries²⁹⁹ requires that nations “have due regard for the customs or customary laws of indigenous and tribal peoples and to permit them to retain their own customs and institutions where not incompatible ‘[w]ith fundamental rights defined by the national legal system and with internationally recognised human rights.’”³⁰⁰

In addition, considerable progress has been made on developing a Declaration of Indigenous Rights.³⁰¹ The draft Declaration anticipates that international law will protect the right of self-determination of all of the world’s Indigenous peoples.³⁰² Its fundamental provisions include the following articles:

Article 3—Indigenous peoples have the right of self-determination. By virtue of that right they freely

298. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 1, SENATE EXEC. DOC. D, 95-2, at 23, 999 U.N.T.S. 172, 173 [hereinafter International Covenant]; International Covenant on Economic, Social, and Cultural Rights, *adopted* Dec. 16, 1966, art. 1, SENATE EXEC. DOC. E, 95-2, at 13 (signed Oct. 5, 1977, but not yet in force), 993 U.N.T.S. 3, 5.

299. Convention Concerning Indigenous and Tribal Peoples in Independent Countries 25–33, International Labour Organization (June 7, 1989), *reprinted in* CLINTON ET AL., *supra* note 11, at 165–75 [hereinafter Indigenous Peoples Convention]. As Clinton notes, this Convention revised the International Labor Organization Convention 107 of 1957. *See* CLINTON ET AL., *supra* note 11, at 175; Indigenous Peoples Convention, *supra*, art. 36.

300. Clinton, *supra* note 24, at 115–16 (quoting Indigenous Peoples Convention, *supra* note 299, art. 8).

301. *See id.* at 116.

302. *See Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations on Commission on Human Rights*, U.N. ESCOR, 45th Sess., at 50–60, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993).

determine their political status and freely pursue their economic, social, and cultural development.

Article 4—Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.³⁰³

Although these efforts to develop affirmative protective norms have yet to be fully achieved, the International Covenant on Civil and Political Rights³⁰⁴ demonstrates that colonialism has been rejected as a matter of international law. Perhaps most importantly, the United States, as a signatory to this Covenant, has accepted that colonization is an unacceptable policy for dealing with other peoples.³⁰⁵ In an obvious respect, then, the adoption of the Self-Determination Policy in the early 1970s manifests America's commitment to acknowledging the self-determination rights of the Indigenous people within its borders.³⁰⁶ This acknowledgment would be more effective, however, if it were backed up by an effort to eliminate the colonial foundations of federal Indian control law.

Inevitably, it would appear, the next millennium will continue to bring pressure on the nations of the world to protect the rights of Indigenous people against the colonizing and genocidal policies that both developed and developing nations continue to implement. Because it is a leading member of the international community, the United States should expunge the colonizing and genocidal aspects of its law dealing with the Indigenous people located within its boundaries.

B. Federal Indian Control Law Denies Basic Human Rights of Self-Determination

By definition, colonization suppresses the basic human rights of the people being colonized.³⁰⁷ Federal Indian control

303. *Id.* at 52.

304. *See supra* note 298 and accompanying text.

305. *See International Covenant, supra* note 298, at 173.

306. *See* 25 U.S.C. § 450 (1994); discussion *supra* Part II.A.8.

307. *See Clinton, supra* note 24, at 86.

law, because it has been developed to rationalize and justify the colonization of Indigenous peoples and lands within the United States,³⁰⁸ suppresses basic human rights of self-determination.³⁰⁹ This suppression is evidenced by the fundamental doctrines that comprise this body of law.

1. *The "Doctrine of Discovery" and the "Right of Occupancy"*—Both the "doctrine of discovery" and the "right of occupancy" doctrine suppress Indigenous tribal sovereignty as a matter of federal law solely by virtue of the Supreme Court's declaration of their existence in *Johnson v. M'Intosh*.³¹⁰ Together, they have the practical effect of divesting the Indian nations of their prior legal claim to the entire land mass of the United States and of subverting tribal self-government. While the Indian nations did enter into treaties that called for the "protection" of the United States, none of these treaties ceded or relinquished total self-governing authority or the entire tribal land base to the United States.³¹¹ Respect 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. Because the "doctrine of discovery" overreaches and unilaterally divests the Indian nations of the right to control their aboriginal lands, this doctrine denies fundamental human rights of self-determination.³¹²

2. *The Plenary Power Doctrine*—The United States Constitution provides that Congress shall have power "[t]o regulate commerce . . . with the Indian tribes."³¹³ Neither the Constitution nor any Indian treaty provides that the federal government shall have absolute power over the Indian nations or have the absolute ability to control any aspect of internal tribal relations.³¹⁴ Nonetheless, "[a]lthough not well-grounded in the nation's Constitution or its early history, federal Indian control law continues to assert total political hegemony of the United States government over the existence and sovereignty

308. See *id.* at 76 *passim*.

309. See Clinton, *supra* note 24, at 86, 115.

310. See discussion *supra* Part I.A.

311. See, e.g., Treaty of Peace and Friendship, Aug. 7, 1790, U.S.-Creek Nation, art. II, 7 Stat. 35, 35; Treaty, Nov. 28, 1785, U.S.-Cherokee, art. III, 7 Stat. 18, 19; Treaty, Jan. 21, 1785, U.S.-Wiandot-Delaware-Chippawa-Ottawa, art. II, 7 Stat. 16, 16.

312. See Williams, *Algebra*, *supra* note 33, at 290.

313. U.S. CONST. art. 1, § 8, cl. 3.

314. See generally U.S. CONST.; 2 INDIAN AFFAIRS: LAWS AND TREATIES, *supra* note 3.

of the Indian nations."³¹⁵ For this reason alone, the Plenary Power doctrine subordinates tribal sovereignty and prevents the Indian nations from being recognized as fully self-determining peoples within federal law.³¹⁶ Indeed, its existence wholly undermines the notion that the Indian nations have any legal sovereignty at all. Robert Clinton suggests that the Plenary Power doctrine has much more to do with power than with law:

As an assertion of naked political power, the plenary power doctrine accurately may describe the current balance of raw military force between the federal government and the much smaller Indian tribes. As a proposition of *legal* authority, however, it is certainly inconsistent with the approach of both international and domestic constitutional law toward national power over domestic and foreign sovereigns other than Indian tribes.³¹⁷

3. *The Federal Trust Responsibility*—Tribal self-determination is denied whenever the United States asserts its trust responsibility and imposes its view of ensuring the well-being of the Indian nations. While treaty provisions acknowledged that the United States would provide "protection" to the Indian nations,³¹⁸ the Supreme Court expanded this limited and negotiated protection into a full-blown "guardianward" relationship that has justified the suppression of tribal self-determination.³¹⁹ To be sure, the federal trust responsibility does have two faces, the protection of Indian nations from external threats and the regulation of internal affairs. To the extent that the trust responsibility is exercised to safeguard tribal interests against the states and other external threats, it may be fully consistent with the treaty-based conceptions of protection. But to the extent that the trust responsibility is exercised to interfere with internal tribal affairs such as land

315. Clinton, *supra* note 24, at 110.

316. See generally *id.* at 110–25.

317. *Id.* at 115.

318. See *supra* note 311 and accompanying text.

319. See, e.g., *United States v. Kagama*, 118 U.S. 375, 383 (1886); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

allotment,³²⁰ native religious practices,³²¹ and the "approval" of tribal laws,³²² because the federal government "knows best," it violates fundamental rights of Indigenous self-determination.³²³

4. *The Autocracy of the BIA*—Title 25, section 2 of the United States Code provides that "[t]he Commissioner of Indian Affairs, shall under the direction of the Secretary of the Interior . . . have the management of all Indian affairs."³²⁴ Although vague, this statutory provision has served as the basis for the expansion of the federal government's role in Indian affairs from that of mere "protector" to that of direct manager and service provider.³²⁵ For over one hundred years, federal administrative authority has expanded to envelop nearly all aspects of native life on the ground that "Indians, like minors or incompetents, are incapable of managing their own resources and business affairs."³²⁶ Over the years, the BIA has engaged in a wide variety of activities to control and manage native life, e.g., establishing laws and police forces to keep the peace and achieve assimilation,³²⁷ developing courts to resolve tribal disputes and impart the dominant society's conceptions of law and justice,³²⁸ constructing and operating boarding schools to convert Indian children to Christianity and to "educate" them in the "civilized" ways of the dominant society,³²⁹ and requiring that tribal government actions be approved by the Secretary.³³⁰ The overreaching and domination

320. See Indian General Allotment Act, ch. 119, §§ 1–4, 24 Stat. 388, 388–89 (1887) (codified as amended at 25 U.S.C. §§ 331–334 (1994)).

321. See Dussias, *supra* note 163, at 774–75.

322. See Clinton, *supra* note 24, at 125–29; see also 25 U.S.C. § 476 (1994).

323. See Clinton, *supra* note 24, at 134.

324. 25 U.S.C. § 2 (1994). This section is derived from Act of July 9, 1832, ch. 174, § 1, 4 Stat. 564, 564 (providing for the appointment of a commissioner of Indian affairs).

325. See FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 11, at 117 (noting that the section of the original 1832 Act codified at 25 U.S.C. §§ 1–2 "is still invoked as a basis for the administrative authority of the Commissioner of Indian Affairs").

326. Clinton, *supra* note 24, at 125.

327. See 25 C.F.R. §§ 11.100–11.450 (1998) (enacting regulations for Court of Indian Offenses). See generally WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES 154–68 (1966).

328. See 25 C.F.R. §§ 11.100–11.209 (1998). See generally HAGAN, *supra* note 327, at 104–25.

329. See Dussias, *supra* note 163, at 783–88.

330. There is no specific federal statutory or case law requiring tribal laws to be approved by the federal government, although such is the case as a matter of tribal law for Indian nations adopting BIA-drafted constitutions under the IRA. See *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 198–99 (1985). In certain specific areas, however, federal approval of tribal action is required. See, e.g., 25 U.S.C. §§ 81 (tribal

of the BIA is well-documented.³³¹ As long as the federal government, through the BIA, continues to provide direct services and manage tribal affairs as it sees fit, basic human rights of Indigenous self-determination will continue to be denied.³³²

5. Denial of Territorial-Based Conceptions of Tribal Authority—In the seventeenth and eighteenth centuries, colonial treaties implicitly accepted the territorial integrity of the Indian nations by treating them as sovereign nations.³³³ In significant part, this was necessary because the Indian nations, during most of this period, were a formidable military power.³³⁴ Nonetheless, even when the balance of military power changed, the United States still acknowledged the territorial component of tribal sovereignty.³³⁵ Since the early nineteenth century, however, there has been an increasing tendency within federal Indian control law to view tribal power as limited to tribal membership and by the consent of outsiders rather than acknowledging tribal sovereignty over territory.³³⁶ Examples of this development include the allotment and sale of Indian lands to non-Indians,³³⁷ the refusal to recognize the criminal jurisdiction of Indian nations over non-Indians³³⁸ and non-member Indians,³³⁹ the refusal to recognize civil adjudicatory jurisdiction over non-Indians,³⁴⁰ and the ability of states to tax non-Indians who do business within the Indian

contracts), 82a (attorney contracts), 177 (land sales and leases), 196, 197, 406, 407, 407d (timber sales), 396–396g, 398–401 (surface and mineral leases), 476–478 (tribal constitutions and by-laws), 503–505 (Oklahoma tribal constitutions and by-laws) (1994).

331. See SPECIAL COMM. ON INVESTIGATIONS OF THE SELECT COMM. ON INDIAN AFFAIRS, FINAL REPORT AND LEGISLATIVE RECOMMENDATIONS, S. REP. NO. 101-216, at 49–56 (1989).

332. See Clinton, *supra* note 24, at 136.

333. See KICKINGBIRD ET AL., *supra* note 125, at 9–10 (noting that the Europeans initially dealt with the Indians as sovereign nations); discussion *supra* Part II.A.1.

334. See KICKINGBIRD ET AL., *supra* note 125, at 9–10; discussion *supra* Part II.A.1.

335. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559–61 (1832).

336. See L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 837–38 (1996).

337. See *Brendale v. Yakima Indian Nation*, 492 U.S. 408, 422–23 (1989) (holding that Indian lands alienated under the General Allotment Act were not restored by the Indian Reorganization Act).

338. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

339. See *Duro v. Reina*, 495 U.S. 676, 684–85 (1990). *But see* Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (codified at 25 U.S.C. § 1301) (legislatively reversing *Duro* by recognizing power of tribal governments to exercise criminal jurisdiction over non-member Indians).

340. See *Strate v. A-1 Contractors*, 117 S. Ct. 1404, 1410 (1997).

territory located within their borders.³⁴¹ Federal Indian control law that allows encroachments by the states and non-members into internal tribal affairs interferes with the inherent right of self-determination.³⁴²

C. Colonization Has Partially Succeeded in Destroying the Indian Nations

After 500 years of colonization of what *Haudenosaunee* people believe to be a great turtle island,³⁴³ even a casual observer can see that the process has been at least partially successful. Originally an undeveloped land inhabited only by Indigenous peoples, what is now known as the American continent has been almost completely transformed by its immigrant population. Given the extent to which peoples from all over the world have imported their way of life to this continent, it is not surprising that American colonization has been partially successful in destroying the Indian nations.³⁴⁴

I do not mean to suggest that Indigenous people would not have changed in the absence of colonization. Inevitably, any society that does not evolve naturally by adapting to change will be unable to sustain itself and will run the risk of extinction. Indigenous societies, of course, are subject to these same fundamental rules, and even had there not been colonization of our lands, there likely would have been some form of change in our way of life.

Nonetheless, this otherwise natural process was dramatically altered by colonization. These colonizing efforts were accomplished by force and often with great speed, producing dramatic changes within Indigenous societies and interfering with the natural process of adaptation and change.³⁴⁵ This disruption has had a genocidal effect,³⁴⁶ groups of Indigenous

341. See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186–87 (1989); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 162 (1980); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 483 (1976).

342. See Clinton, *supra* note 24, at 142.

343. See ARTHUR C. PARKER, *SENECA MYTHS AND FOLK TALES* 62 (Buffalo Historical Soc'y Publication No. 27, 1923).

344. See *infra* notes 361–69 and accompanying text.

345. See discussion *supra* Part II.A.1–7.

346. See Clinton, *supra* note 24, at 78.

peoples that existed 500 years ago no longer exist.³⁴⁷ There should be no doubt that their extinction was not an accident—it was the product of a concerted effort to subjugate and eliminate the native human population in order to allow for the pursuit of wealth and manifest destiny.³⁴⁸ As a result, extinction is the most dramatic effect of colonization. Allowed to run its full course, colonization will disrupt and destroy the natural evolutionary process of the people being colonized to the point of extinction.

While it is difficult to measure precisely the success of the colonization process,³⁴⁹ I believe that American colonization, while an incomplete process, has fundamentally been successful. My concern is that, eventually, all of the remaining Indian nations may lose their desire for and ability to achieve self-determination. Indeed, I believe that this problem is so significant and irreversible that the extinction of some Indian nations is simply a matter of time.³⁵⁰

This conclusion might seem provocative, but to suggest that the Indian nations are threatened with extinction is not a new idea. Scholars, federal officials, and Indians themselves have decried the inevitable destruction of the Indian nations from the time of first contact with the White Man.³⁵¹ I agree with this conclusion primarily because extinction seems the inevitable outgrowth both of the federal government's concerted actions to destroy the Indian nations, and of the naturally caustic effect of American culture and society on cultural and

347. See NAGEL, *supra* note 220, at 4.

348. See discussion *supra* Part II.A.3, 5, 7.

349. Measuring the cumulative destructive effect of colonization on a still surviving people may be impossible. The precise degree to which colonization affects the natural evolutionary process of a people, to the extent such an answer could be found, may be measured only by an empirical analysis that cannot be conducted against any objective standard. Nonetheless, I believe that parameters can be drawn around the inquiry and general trends about its effect can be deduced by observing a variety of phenomena. Thus, as the question relates to the effect of federal colonization policies on the Indian nations, I believe that it is possible to approach the inquiry with some confidence.

350. I note that this type of inquiry and analysis is fraught with the possibility that those who seek to continue the colonization of the Indian nations may be fueled by this declaration of their partial success. Nonetheless, the degree to which colonization has had an effect to date, in my view, is so obvious that it is ridiculous *not* to call it what it is. In so doing, my intention is to raise the possibility that Indian nations that are concerned about extinction will more clearly realize their predicament and will initiate remedial action without further delay.

351. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 354–55 (Phillips Bradley ed., 1945) (1835); see also BRIAN W. DIPP, *THE VANISHING AMERICAN: WHITE ATTITUDES AND U.S. INDIAN POLICY* 1–11 (1982).

social difference. While there is a tremendous resiliency of Indian people,³⁵² the forces of American acculturation are overwhelming and make this conclusion for many Indian nations even more probable.

Intuitively, one might logically conclude that many Indian nations are bound for extinction, given the very real effects of colonization on a colonized people. Forcing Indigenous people to convert to the colonizing nations' religion,³⁵³ taking Indigenous common lands³⁵⁴ and imposing the colonizing nation's form of individual land ownership,³⁵⁵ and transforming Indigenous government and law into a form similar to those of the colonizing nations³⁵⁶ simply must have some effect over time. If one wishes to assume that these and similar actions taken by American colonists from the time of first contact have had no meaningful effect on the identity and way of life of native people and pose no threat to their future existence, then colonization obviously has been a meaningless endeavor and there is no legitimate reason to complain about the current state of the Indian nations, United States-Indian relations, or federal Indian control law and policy.³⁵⁷

As I see it, the complete destruction of the Indian nations will occur when the Indian people who comprise those nations have become indistinguishable from the rest of American society. Viewed this way, when all of the people comprising an Indian nation have become so assimilated into the dominant society as to be indistinguishable from the society at large, then they will have, by definition, become members of the colonizing society. Regardless of whether Indian people them-

352. Cf. Clinton, *supra* note 24, at 122-23 (asserting that "the Indian sense of peoplehood and sovereignty arises from within the community and cannot be easily extinguished" and that "Indian resistance . . . to . . . federal colonialist practices tend[s] to strengthen, rather than diminish, Indian peoplehood and their own sense of political autonomy").

353. See *supra* Parts I.A, II.A.3-5.

354. See *supra* Part II.A.2-3, 5.

355. See *supra* Part II.A.5, 7.

356. See *supra* Part II.A.5-7.

357. Perhaps the most troubling aspect of this conceptualization is the fact that most of the combatants in the modern Indian war—the tribal leadership and the federal, state, local, and private interests against which they battle—seem to have so little conception of the effect that colonization has had on the Indian nations to date. This short-sightedness makes it especially difficult to effectuate any long-term change in behavior. See generally Robert B. Porter, *Strengthening Tribal Sovereignty Through Government Reform: What Are the Issues?*, 7 KAN. J.L. & PUB. POL'Y 72 (1997) [hereinafter Porter, *Issues*] (arguing that much of the conflict and dysfunction occurring in Indigenous societies is the result of governmental disruption induced by colonization).

selves perceive this transformation, their assimilation is surely relevant to an American society called upon to make a policy decision concerning whom to recognize as members of separate sovereign nations. It is hard to defend the position that a people who are no longer distinct from American society should nonetheless be afforded recognition as such. This is especially true when this recognition may translate into a sovereign status that denies the application of the laws of the recognizing people. If there is absolutely no way to distinguish a group of so-called Indigenous people from a group not claiming to be Indigenous, on what basis does one deny that the same social contract should apply? It is wholly illegitimate to deny equal treatment on the sole basis that one's ancestors, but not oneself, at some time in the past had a distinct Indigenous existence.

Colonization has had a dramatic effect on Indian nations solely by virtue of the many generations of Indian people who have been forced to abandon their tribal way of life and who have otherwise assimilated into the cultural and social fabric of the United States.³⁵⁸ While there is some evidence that the number of people in the United States self-identifying as "Indian" has increased,³⁵⁹ this may simply be the result of a broadening of the definition of Indian to include people of Indian ancestry who are not tribal members, i.e., who are "Native American." Indeed, this phenomenon may be further evidence of a breakdown of Indian identity where ethnicity and race, and not political and cultural affiliation, have become the defining criteria.³⁶⁰

358. See *supra* Part II.A.7; *infra* text accompanying notes 361–369.

359. See NAGEL, *supra* note 220, at 83–105 (on American Indian population growth). Compare BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, CENSUS OF POPULATION: 1950 at vol. II, pt. 1, tbl. 36 (1953) (listing the number of self-identifying American Indian, Eskimo, or Aleut persons at 343,410), with BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, CENSUS OF POPULATION: 1960 at vol. I, pt. 1, tbl. 56 (1961) (listing the number of self-identifying American Indian, Eskimo, or Aleut persons at 529,591), and BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, 1970 CENSUS OF POPULATION at vol. I, pt. 1, tbl. 190 (1973) (listing the number of self-identifying American Indian, Eskimo, or Aleut persons at 760,572), and BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, 1980 CENSUS OF POPULATION at vol. I, ch. C, pt. 1, tbl. 7A (1983) (listing the number of self-identifying American Indian, Eskimo, or Aleut persons at 1,478,523), and BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, 1990 CENSUS OF POPULATION 3 (1992) (listing the number of self-identifying American Indian, Eskimo, or Aleut persons at 1,959,234).

360. See Deloria, *Evolution*, *supra* note 118, at 255. Deloria states:

Subsequent events have demonstrated that both Indian successes and failures have been connected to the Indian status as an identifiable racial minority

While there can be some debate as to whether natural processes of development or colonization are responsible for this state of affairs, I suggest that the following questions further lead to the conclusion that the colonization policies of the United States have had their intended effect:

- What does it mean that the Indian nations no longer have exclusive control over their own people and territories?³⁶¹
- What does it mean that most Indian nations no longer formally govern themselves in a traditional manner and have written constitutional forms of government modeled after that of the United States?³⁶²
- What does it mean that most Indian nations no longer rely upon traditional dispute resolution and now resolve disputes through court systems modeled after the American legal system?³⁶³
- What does it mean that many Indian nations no longer use a traditional economic system and are increasingly reliant upon capitalist enterprises as their primary economic system?³⁶⁴
- What does it mean that most Indians speak English instead of their own tribal language, and that most Indian nations no longer teach their own language to their children?³⁶⁵

within American society, not to the status of Indian tribes as domestic dependent nations. . . . [T]he practical fact appears to be that Indians have forsaken their traditional special status for that of a needy minority. . . .

Id.

361. See *supra* Part III.B.

362. See Porter, *Issues*, *supra* note 357, at 94–96.

363. See Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 238 (1997) [hereinafter Porter, *Indigenous Societies*].

364. See GETCHES ET AL., *supra* note 15, at 24–26. See generally STEPHEN CORNELL & JOSEPH P. KALT, PATHWAYS FROM POVERTY: ECONOMIC DEVELOPMENT AND INSTITUTION-BUILDING ON AMERICAN INDIAN RESERVATIONS (Harv. Project on American Indian Economic Development, 1989).

365. See JAMES S. OLSON & RAYMOND WILSON, NATIVE AMERICANS IN THE TWENTIETH CENTURY 210 (1984) (“English continues to gain ground as the primary language of most Native Americans. Indeed, in 1978, 65 percent of Native Americans spoke English as their primary language.”); Ives Goddard, *Introduction to Languages*, 17 HANDBOOK, *supra* note 2, at 1, 3 ([N]early 80 percent of the extant native lan-

- What does it mean that there is widespread intermarriage between Indians and non-Indians?³⁶⁶
- What does it mean that all Indians are recognized as citizens of the United States³⁶⁷ and that many Indians do not even think of themselves as citizens of their own tribal nations?³⁶⁸
- What does it mean that many people who think of themselves as “Native Americans” are not tribally affiliated?³⁶⁹
- What does it mean that some Indian nations may choose to exercise their sovereignty to recreate for themselves a way of life that is indistinguishable from American society?

I don't mean to suggest that there are not some Indian nations that are trying to reverse the effects of colonization and to revitalize their unique sovereign existence by redeveloping their language, culture, government, laws, economies, and so on.³⁷⁰ My point is that by envisioning the chasm that exists between modern Indigenous existence and the point from whence we started, it is hard to ignore the degree to which we have all been assimilated to some degree, or to ignore the impact that this assimilation might have on our desire and ability to self-determine in the future.

Regardless of how one evaluates the degree to which the Indian people have been colonized and assimilated into

guages of North America were no longer spoken by children and were facing effective extinction within a single lifetime, or in most cases, much sooner”).

366. See NAGEL, *supra* note 220, at 114.

367. See *supra* note 212 and accompanying text.

368. See NAGEL, *supra* note 220, at 202 (discussing Pan-Indian culture and the blurring of tribal distinctions among some Indians).

369. See NAGEL, *supra* note 220, at 246–47.

370. In fact numerous Indian nations have initiated efforts to revitalize tribal cultures, languages, and economies. See generally, e.g., NAGEL, *supra* note 220; Bruce L. Smith & M.L. Cornette, *Electronic Smoke Signals: Native American Radio in the United States*, CULTURAL SURVIVAL Q., July 31, 1998, at 28, available in 1998 WL 11300543; *Cherokee Cultural Center Preserving Past for Future Generations*, CHEROKEE ADVOC., Jan. 31, 1996, at 20, available in 1996 WL 15749517; Trace A. DeMeyer, *First Nations Sustainable Enterprises: Integrating Native Tradition with Emerging Technologies*, NEWS FROM INDIAN COUNTRY, Feb. 15, 1998, at 12A, available in 1998 WL 11438049; Dale Lezon, *Where Past and Future Coexist*, ALBUQUERQUE J., Jan. 10, 1998, at 1, available in 1998 WL 11562232; Ronnie Lupe, *Chairman's Corner: Our Casino and All Our Enterprises Pour Money into Our Region, State, and Nation*, FORT APACHE SCOUT, Oct. 13, 1995, at 2, available in 1995 WL 15333105; *SKC Program Immerses Students into Indian Culture*, CHAR-KOOSTA NEWS, Aug. 29, 1997, at 5, available in 1997 WL 11664459.

American society, the fact that assimilation and colonization are still occurring at all is strong evidence that the Indian nations may be less able than they once were, or may even be unwilling, to sustain a distinct existence. While it is surely the case that some incorporation of the dominant society's culture and identity may be both natural and necessary, colonization may induce some Indigenous people to take this process to the extreme. If one can imagine an Indian nation that seeks to exercise its sovereignty solely for the purpose of replicating itself in the image of the dominant society, then it is possible to see that colonization has achieved the ultimate success—the self-colonization of the colonized people.³⁷¹

When Indian nations make conscious choices to pay the colonizing nation's taxes, live by its laws, and actively seek to replicate its way of life, there is little distinct tribal existence left around which to wrap the cloak of tribal sovereignty. Sovereignty can include the choice to recreate yourself in the image of the colonizing society; but once that point is achieved, I do not believe that there remains any legitimate basis upon which to distinguish yourself as a separate sovereign nation.

371. For example, assume an Indian nation, while holding its land in common, has nonetheless decided to establish a system of private land ownership under tribal law. It has a capitalist economy in which the tribal government has so successfully developed business ventures by marketing its sovereignty-based, federally-supported regulatory advantages that it distributes thousands of dollars to its members every month. Its members are quite well-off, but the tribal language has totally died out, and most of the members belong to some kind of Christian church. Imagine further that the federal government seeks to impose taxes on the Indian nation because it has been so financially successful and threatens to strip its recognition of the lucrative regulatory advantages if the taxes are not paid. If the Indian nation is unable to thwart this effort, does it really seem likely that these people will say no to the taxes if it means jeopardizing their standard of living? One need only see the number of Indian nations currently paying the federal and state "regulatory fees," local government "payments in lieu of taxes," and outright cash payments to the states for the opportunity to engage in Class II and Class III gaming activities to see that this is not an unlikely possibility. See generally, e.g., Scott Dyer, *Tax on Indian Casinos Considered*, BATON ROUGE ADVOC., Apr. 21, 1998, at 10A, available in 1998 WL 4896099; *Indian Leaders Tell Babbitt That Gaming Compacts Are Flawed*, OJIBWE NEWS, June 6, 1997, at 2, available in 1997 WL 11719591; *Oneida Agree to Pay State \$5 Million Yearly in Casino Deal*, CAP. TIMES (Madison, Wis.), May 8, 1998, at 3A, available in 1998 WL 5870417; Amy Rinard & Gary Spivak, *Tax Winnings at Casinos, Senator Says: Welch Suggests Way to Cut Enthusiasm if Tribal Compact Talks Fail*, MILWAUKEE J. SENTINEL, Dec. 2, 1997, at 1, available in 1997 WL 12761440; Rick Romell, *Oneida Compact Gives State More Power: Money Deal Grants Electronic Monitoring of Slots: Thompson Calls it Model*, MILWAUKEE J. SENTINEL, May 9, 1998, at 1, available in 1998 WL 6323328; Gary Spivak, *Oneida Seek Gaming Pact Delay: Some Question State's Negotiating Tactics*, MILWAUKEE J. SENTINEL, July 4, 199, at 1, available in 1998 WL 14018716.

Whether Indian people want to hear it or not, our flirtation with American society and culture is more akin to a moth being drawn to the fire than to a thirsty man being drawn to an oasis. America is like a cultural Pandora's Box; it is the nature of American culture both to destroy and to accommodate cultural differences. In some respects, this unique character makes it hard to define what an "American" is, simply because America is an immigrant nation filled with pockets of wildly divergent racial, ethnic, and social groups. It is the ability of American society—its political, economic, social, and legal institutions—to find ways to harmonize and assimilate these divergent backgrounds that is one of its most defining characteristics as a nation. Because Americans are quite used to differences among the population, many provisions exist within American law to respect those differences.³⁷² The problem for a totally assimilated Indian nation, however, is that the claim for sovereign recognition may ring quite hollow in a society where powerfully distinct cultural and religious groups all find ways to exist in America without being recognized as sovereign nations.

If the United States truly values the existence of distinct Indigenous societies within its borders, it should remove the colonizing foundation of its Indian law. Only the Indian nations themselves can choose to retain a distinct existence. Eliminating the colonizing influence of federal Indian control law may allow many Indian nations the gasp of fresh air necessary to make it to the next stage of their distinct, sovereign existence by themselves. Indian people are especially hardy; given the hundreds of years of effort to wipe us out,³⁷³ it is nothing short of amazing that Indian nations still exist. While time, and the effects of time, cannot be reversed, the United States can take immediate steps to assist the Indian nations in their continued quest for survival by decolonizing its federal Indian control law.

372. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524, 547 (1993) (voiding, on First Amendment free-exercise grounds, city ordinances prohibiting animal sacrifice), *superseded by* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 5 U.S.C. § 505; 42 U.S.C. §§ 1988, 2000bb, 2000bb-1 to -4 (1994)), *held unconstitutional by* *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997); *Wisconsin v. Yoder*, 406 U.S. 205, 224 (1972) ("A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.").

373. See *supra* Part II.A.1-5, 7.

*D. Decolonization Is a More Efficient Use
of Federal Financial Resources*

It is extremely expensive and inefficient for the Indian nations to remain dependent upon the United States. Over the course of its history, the federal government has spent untold billions of dollars seeking to colonize the Indian nations and to manage and control what has remained of their otherwise self-governing existence.³⁷⁴ As a result, what has occurred is the establishment of an inefficient and ineffective federal bureaucracy and the crippling of the self-governing capacity of the Indian nations.³⁷⁵ In short, colonization has been an expensive proposition from the viewpoints of both the federal government and the Indian nations.

While decolonizing the federal-tribal relationship may result in lowering the finances required to *manage* Indian affairs, it does not necessarily mean, however, that federal spending on Indian programs should decrease. A decolonized relationship does not mean that there will be no relationship at all. The United States remains committed by treaty and legal obligations—which have certainly not been fully funded to date—to make provisions for the Indian nations and to protect them from external threats³⁷⁶ regardless of whether it adopts a colonizing or decolonizing policy for dealing with them.³⁷⁷ Indeed, President Nixon, in announcing his Self-Determination Policy, stated: “There is no reason why Indian communities should be deprived of the privilege of self-determination merely because they receive monetary support from the Federal government. Nor should they lose Federal money because they reject Federal control.”³⁷⁸ The only question that remains, then, is whether or not the federal government will expend these resources efficiently.

The new Self-Governance Policy was driven, in part, by the desire to achieve more cost effective administration of monies

374. See, e.g., FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880–1920 app. 2 (1984) (listing Congressional Proportions for Indian Schools from 1877–1920).

375. See SPECIAL COMM. ON INVESTIGATIONS OF THE SELECT COMM. ON INDIAN AFFAIRS, FINAL REPORT AND LEGISLATIVE RECOMMENDATIONS, S. REP. NO. 101-216, at 45–56, 60–61 (1989).

376. See Nixon Message to Congress, *supra* note 232, at 565–66.

377. See *infra* note 376 and accompanying text.

378. Nixon Message to Congress, *supra* note 232, at 567.

spent on behalf of the Indian nations.³⁷⁹ Unfortunately, the temptation thus far in implementing this Policy has been for the federal government to absorb any cost savings and not to pass on to the Indian nations the financial benefits of dismantling the BIA's administrative structure. Considerable pressure has been exerted by some in Congress to transfer these savings to general budget reduction.³⁸⁰ In Congress, Senator Slade Gorton, Chair of the Interior Appropriations Subcommittee, has exerted the same pressure.³⁸¹ So dramatic has this pressure been that some tribal leaders have described this process as "termination by appropriation."³⁸²

The tendency to ignore one of the weakest voices in the federal political process is inevitable. What must be realized, however, is that the appropriations to the Indian nations³⁸³ are not simply some kind of special interest "pork barrel" program. These payments should be regarded as solemn legal obligations made by the United States. Simply because the Indian nations no longer wish to be treated as a dependent people does not mean that the United States should abandon its legal and fiscal responsibilities to them.

Nonetheless, because dismantling the federal government's bureaucracy will save money, promote efficiency, and stimulate the self-sufficiency of the Indian nations, the United States should complement its existing Self-Governance Policy by decolonizing federal Indian control law.

379. See SPECIAL COMM. ON INVESTIGATIONS OF THE SELECT COMM. ON INDIAN AFFAIRS, FINAL REPORT AND LEGISLATIVE RECOMMENDATIONS, S. REP. NO. 101-216, pt. 1, at 22-23; Johnson & Hamilton, *supra* note 233, at 1268; cf. BUREAU OF INDIAN AFFAIRS, U.S. DEPT OF THE INTERIOR, BUDGET JUSTIFICATIONS AND ANNUAL PERFORMANCE PLAN: FY 1999, at 17 (n.d.) (noting that among the BIA's current goals is the mission "[t]o reduce long-term costs . . . through the use of modern, automated techniques and processes for management in the arena of administration") (on file with the *University of Michigan Journal of Law Reform*).

380. See *The White House: Press Briefing by the Vice President and Secretary of the Interior, Bruce Babbitt*, M2 PRESSWIRE, Sept. 29, 1995, available in LEXIS, Market Library, IACNWS File (arguing against a Congressional proposal to cut 18% or \$348,000,000 from the President's proposed budget request for the Bureau of Indian Affairs).

381. See 141 CONG. REC. S11,861 (1995) (statement of Sen. Gorton); see also *Reports from the Budget War: Indians are Getting a Fair Shake*, DENV. POST, Sept. 21, 1995, at B7, available in LEXIS, News Library, DPOST File.

382. *Indians Take Case to Washington: Tribes Feel Benefits Being Eroded During Government Cutbacks*, ROCKY MTN. NEWS, Apr. 14, 1996, at 6A, available in LEXIS, News Library, RMTNEW File.

383. See, e.g., Snyder Act, 25 U.S.C. § 13 (1998).

IV. RECENT REFORM EFFORTS AND WHY THEY FAIL TO ENSURE THE SURVIVAL OF THE INDIAN NATIONS

Since the early 1970s, the United States has sought to abandon its colonial legacy in Indian affairs by actively supporting tribal self-determination through the Self-Determination Policy³⁸⁴ and the Self-Governance Policy.³⁸⁵ Despite their stated purposes, however, these federal Indian policies will unlikely achieve their objectives because they fail to address the colonial foundation upon which they rest.

A. The Self-Determination Policy

1. *Description*—The Self-Determination Policy has generally been acknowledged as initiated by President Richard Nixon in his 1970 address on Indian affairs.³⁸⁶ President Nixon's policy initiative was timely and enlightened from the perspective of both the United States and the Indian nations.³⁸⁷ In refocusing the federal government's Indian policy toward supporting tribal self-determination, he repudiated the most colonizing federal Indian policy of all—Termination.³⁸⁸ At the same time, he correctly perceived that the expansion of the federal government's bureaucracy and increased spending on Indian programs under the "Great Society" initiatives, while better than previous affirmative efforts to destroy the Indian nations,³⁸⁹ would ultimately serve only as another form of suppressing genuine Indian self-governance by imposing a new layer of federal bureaucratic management and oversight.³⁹⁰

The legislation following this policy statement was the Indian Self-Determination and Education Assistance Act of

384. See *supra* Part II.A.8; *infra* Part IV.A.1.

385. See *infra* Part IV.B.

386. See Nixon Message to Congress, *supra* note 232, at 564; GROSS, *supra* note 116, at 34.

387. See GROSS, *supra* note 116, at 34–38; Stuart, *supra* note 204, at 94 ("The Indian Self-Determination Act represented a significant conceptual advance in Indian self-government.").

388. See Nixon Message to Congress, *supra* note 232, at 565–67; GROSS, *supra* note 116, at 35.

389. See discussion *supra* Part II.A.2–3,5,7.

390. See *infra* notes 404–08 and accompanying text.

1975.³⁹¹ While the concept underlying this legislation now seems uncontroversial, it was a profound shift in direction, given that the prior federal Indian policy was Termination. It seems that no one had actually considered that the Indian nations could handle money and administer programs without the intervention of federal bureaucrats. Ultimately, the Self-Determination Act allowed for the Indian nations to assume, under the terms of a negotiated funding contract with the federal government, a share of the administrative responsibilities and resources otherwise assumed by the BIA.³⁹²

One of the more distinctive features of the Act was that the federal trust responsibility was explicitly preserved.³⁹³ The program worked by having BIA administrators establish program funding priorities for contract allocations which were based on prioritized lists provided by the tribes themselves.³⁹⁴ Thus, while the Act anticipated that the Indian nations were to assume more responsibility over the administration of the federal programs that affected them, the fact that the BIA ultimately determined which contracts received funding ensured that the Indian nations would continue to perform the policies and the responsibilities of the federal government.

Despite this limitation, the Self-Determination Policy was a significant achievement. It “implicitly recognized the right of Indian self-determination” and actually “began the process of capacity rebuilding among [tribal] governments.”³⁹⁵ It was the first time in the forty years since the Indian Reorganization Act had been adopted that the federal government had professed its support for the existence and self-determination of the Indian nations.³⁹⁶

2. Why the Self-Determination Policy Ultimately Does Not Work—At the time the Self-Determination Act was passed, the federal government, primarily through the BIA, remained as deeply entrenched in the administration and management of

391. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, §§ 1-209, 88 Stat. 2203, 2203-17 (1975) (codified as amended at 25 U.S.C. §§ 450-458 (1994)) [hereinafter, Self-Determination Act].

392. See Johnson & Hamilton, *supra* note 233, at 1262-66.

393. The Act was intended “to articulate a policy of Indian control and self-determination consistent with the maintenance of the Federal trust responsibility and the unique Federal-Indian relationship.” H.R. REP. NO. 93-1600, at 20 (1974), reprinted in 1974 U.S.C.C.A.N. 7775, 7781.

394. See Johnson & Hamilton, *supra* note 233, at 1263.

395. *Id.* at 1263-64.

396. See discussion *supra* Parts II.A.6-8.

day-to-day Indian affairs as it had been for almost 200 years.³⁹⁷ Policymakers greatly underestimated how difficult it would be to extricate the BIA from the lives of Indian people.³⁹⁸

Once the Self-Determination Act was passed, the BIA began a struggle for its survival and thwarted the effort toward genuine tribal self-determination.³⁹⁹ "It" did not like, and still does not like, the idea that Indian people can take care of themselves and that they as nations have a sovereign right to do so.⁴⁰⁰ Having been established upon just the opposite premise—that it is the federal government's exclusive prerogative and responsibility to manage Indian affairs—the BIA resisted the implementation of the Self-Determination Act and the contracting of funds and programs to the Indian nations.⁴⁰¹ Implementation of the Act was hampered by a large bureaucracy that had no incentive or desire to facilitate success when faced with the prospect of losing jobs and power.⁴⁰²

The Self-Determination Act had other inherent problems as well. The 638 contracting process, named after Public Law 93-638,⁴⁰³ "imposed a byzantine bureaucratic burden on contracting tribes" that was exacerbated by "BIA micromanagement."⁴⁰⁴ Much of this bureaucratic burden was due to the fact that the Indian nations were, in a very real sense, carrying out the administrative responsibilities of the federal government. Accordingly, the 638 contracts required that Indian nations comply with a multitude of federal laws and regulations,⁴⁰⁵ as well as with the administrative oversight of the BIA at three different levels (agency, area, and central).⁴⁰⁶ This necessitated

397. See H.R. REP. NO. 93-1600, at 19-20, reprinted in 1974 U.S.C.C.A.N. 7775, 7781.

398. See *infra* notes 400-02 and accompanying text.

399. See *infra* notes 400-02 and accompanying text.

400. See H.R. REP. NO. 93-1600, at 19-20, reprinted in 1974 U.S.C.C.A.N. 7775, 7780-81.

401. See Johnson & Hamilton, *supra* note 233, at 1265 n.61.

402. See Robert A. Nelson & Joseph F. Shelley, *Bureau of Indian Affairs Influence on Indian Self-determination in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY*, *supra* note 92, at 177. See generally H.R. REP. NO. 93-1600 (1974).

403. See 25 U.S.C. § 450f (1994).

404. Johnson & Hamilton, *supra* note 233, at 1265; see also Clinton, *supra* note 24, at 136; Nelson & Shelley, *supra* note 402, at 182 ("[T]he BIA has retained its powerful position through increased bureaucratization, a tactic relatively unnecessary prior to Public Law 93-638.")

405. See 25 U.S.C. §§ 450j(a)-(m), 450j-1 (1994).

406. See Johnson & Hamilton, *supra* note 233, at 1265. Some of these administrative difficulties were alleviated through legislative amendments enacted in 1994. See Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat.

the establishment of commensurately well-developed tribal bureaucracies.⁴⁰⁷ As a result of this complex bureaucratic interconnectedness, the Self-Determination Act actually made the Indian tribes more dependent on the federal government.⁴⁰⁸

The preservation of the fully intact federal trust responsibility also undermined tribal self-determination. Despite being premised on the eventual self-determination of the Indian nations, the Self-Determination Act explicitly preserved the federal government's trust responsibility, including continued responsibility over those governing activities that would no longer be directly in the hands of the federal government.⁴⁰⁹ Structured this way, the Self-Determination Act established a kind of legal relationship in which one party, the Indian nation, was serving both as the trustee and beneficiary with respect to certain tribal governmental activities.

Aside from being a legal anomaly, this construction simply did not make much sense. The Indian nation, which was presumably in control of its own affairs, nonetheless was made to comply with a wide variety of legal and administrative burdens that were only relevant because the federal government was the trustee. For example, the administrative reporting and paperwork requirements required federal oversight to ensure that the Indian nation was properly spending the federal government's money.⁴¹⁰ This construct overlooked the fact that the money, in essence, "belonged" to the Indian nation and, if self-determination was to have any true meaning, the funds should have been administered as the Indian nation saw fit.

These policy shortcomings have been critically analyzed by George Esber, who has concluded that the ultimate objectives of the Self-Determination Act were "not designed to guarantee Indian self-determination."⁴¹¹ Esber highlights the fact that the Act never addressed the issue of power transfer to the tribes, a key determinant of any policy designed to effectuate genuine

4250, 4250-78. Nonetheless, the 638 contracting process under the Self-Determination Act remains "cumbersome." See Johnson & Hamilton, *supra* note 233, at 1266.

407. See Stuart, *supra* note 204, at 103.

408. See Donald D. Stull, *Reservation Economic Development in the Era of Self-Determination*, 92 AM. ANTHROPOLOGIST 206, 206 (1990). See generally Nelson & Shelley, *supra* note 402.

409. See H.R. REP. NO. 93-1600, at 20 (1974), reprinted in 1974 U.S.C.C.A.N. 7775, 7781.

410. See 25 U.S.C. § 450c (1994).

411. George S. Esber, Jr., *Shortcomings of the Indian Self-Determination Policy*, in STATE AND RESERVATION: NEW PERSPECTIVES ON FEDERAL INDIAN POLICY 212, 213 (George Pierce Castile & Robert L. Bee eds., 1992).

self-determination.⁴¹² Instead, he observes that the Act simply anticipated the “orderly transition from federal domination of programs . . . and services [for] Indians to effective and meaningful participation by the Indian people in the planning, conduct and administration of those programs and services.”⁴¹³ Without any serious relinquishment of federal power, any “‘meaningful participation’ [of the tribes in providing these programs and services] is not control but at best a limited exercise of power, which must be translated as ‘relative powerlessness’ given the legal definition of the federal-Indian relationship.”⁴¹⁴

Viewed together, this powerlessness and the continued dependency of the tribes on federal administration ensures that the Self-Determination Policy, in the long run, only perpetuates America’s colonial legacy. This can be seen in several different ways. First, under this Policy the federal government, not the tribes, determines which policies and programs are to be funded.⁴¹⁵ Second, any contracted activity that involves federal trust resources—such as timber, fish, or water—requires

412. *See id.*

413. *Id.* (quoting Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, § 2, 88 Stat. 2203, 2204 (1975) (codified as amended at 25 U.S.C. § 450a (1994))).

414. *Id.* Esber explains that the Self-Determination Act was structurally flawed:

The genesis of Public Law 93-638, like all other federal Indian policies, was a top-down decision from the legislative and executive branches of the government. Like other federal policies, the self-determination legislation provides no guarantee to Indian peoples about the shape that any future policy might take, when it might be legislated, or to what extent Indian communities might participate in its formulation. Indian peoples have never had control over the policies that affect them, nor can they expect to, given the asymmetrical relationship that has been defined by the federal government.

Id. at 214.

415. Federal control is furthered as the result of the BIA’s administrative self-interest and manipulation:

The [Indian Priority System] required each tribe to prioritize its projects or programs to the BIA. Typically, after some budgetary gamesmanship, the Agency would claim funds to tribes were therefore allocated based on the priorities established by the tribes themselves.

Of course, from the tribes’ perspective, this system was rigged. It allowed the Agency to convey the impression that many tribal programs were of a very “low” priority. This supplied the bureaucratic justification to cut back programs, when in reality these programs were highly necessary.

BIA concurrence in decision-making.⁴¹⁶ Finally, the 638 contracts require that the contracting Indian nation comply with a whole panoply of federal social policies, reflected by provisions in the contracts requiring compliance with various American civil rights, employment, and labor laws.⁴¹⁷ These activities all undermine tribal self-determination and perpetuate federal power and hegemony over Indian affairs.⁴¹⁸ Thus, Esber concludes, the Self-Determination Policy ultimately fails for the following reason:

For the government to accept the idea of a perpetual debt to peoples of prior rights would be to undermine its sense of power and control—something the United States is unwilling to forfeit. In lieu of a policy that permits genuine self-determination, the current policy, as it is implemented through a variety of state and federal programs, has demanded a certain degree of assimilation from Indian communities.⁴¹⁹

Nevertheless, despite its shortcomings, the Self-Determination Policy has moved Indian people closer to real autonomy for the first time since America's founding.⁴²⁰ It has allowed many tribes the first opportunity in generations to have the financial resources to begin some kind of redevelopment.⁴²¹ While the path that was laid down for them ultimately

416. *See id.* at 1265.

417. *See, e.g.*, 25 U.S.C. §§ 450e, 450f(a)(2), 450j(b), 450m (1994).

418. *See Esber, supra* note 411, at 215 ("In essence, the United States is agreeing to legal compliance with the self-determination policy by granting Indian participation in Anglo activities. This is not equivalent to the governance of Indian affairs as Indian undertakings").

419. *Id.*; *see also* Stuart, *supra* note 204, at 83 ("It seems likely that current and proposed federal policy will fall short of achieving the promise of full self-determination for American Indians.").

420. Esber concludes:

There is no question that Native Americans are closer now to the ideal of self-determination than at any other time since Anglo domination began. They are represented by tribal councils that interface with dominant society on a government-to-government basis, by a variety of national organizations, and by spokespeople whose voices are being heard, though often ignored. Certainly in the expression of their need for and management of services, they have a much greater voice than in the past.

Esber, *supra* note 411, at 221.

421. *See, e.g.*, *HIS Implementation of the Self-Governance Demonstration Project: Hearing Before the Comm. on Indian Affairs of the U.S. Senate*, 104th Cong. 10-11 (1995) (statement of Dale Risling, Chairman, Hoopa Valley Indian Tribe, Hoopa, Cali-

was consistent with the federal government's long-term preoccupation with its own self-interest, the Policy does not appear to have been spawned with that intention. Rather, like the Reorganization Policy from 1934,⁴²² it appears to have been developed by good-hearted people who simply were unable to eliminate the residual underpinnings of America's colonial legacy from their consciousness. In light of the Self-Governance Policy that has recently been developed, the Self-Determination Policy appears to be simply a transition period from an era in which the United States was intent on destroying the Indian nations to one in which it may be fully willing to participate in a decolonized vision of what is best for them—which is what *they* see fit.

B. The Self-Governance Policy

1. *Description*—Because of the problems with the Self-Determination Act, the Indian nations “began viewing the 638 process as a behemoth in dire need of trimming.”⁴²³ The reform effort that followed eventually led to the implementation of the Self-Governance Demonstration project in 1988.⁴²⁴

The Self-Governance Policy developed out of efforts by the Department of Interior and the tribes themselves to amend the Self-Determination Act.⁴²⁵ After a series of articles in the *Arizona Republic* in October 1987 reported widespread mismanagement and waste within the BIA,⁴²⁶ the Interior

fornia) (describing how self-governance “played” a major role “in the development of the Alternative Rural Community Hospital,” which opened in 1996); *Tribal Self-Governance Act of 1993: Hearing on H.R. 3508/S. 1618 Before the Subcomm. on Native Am. Affairs of the Comm. on Natural Resources*, 103d Cong. 88–91 (1994) (statement of Christine Collison, duly-elected President of the Ketchikan Indian Corp. (KIC)). Collison asserts that self-governance “allows Tribes to address issues that arise at the local level,” including, for KIC, education. *Id.* at 89.

422. See Hauptman, *supra* note 197, at 133 (discussing how Commissioner John Collier's “good intentions [in orchestrating the IRA] . . . were undermined by his paternalistic attitude toward Indians, by his naïve and often romantic perceptions of modern Indian life, . . . and even by his general lack of understanding of Native American cultures and diversity”).

423. Johnson & Hamilton, *supra* note 233, at 1266.

424. See Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, Title III, 102 Stat. 2285, 2296–98; GETCHES ET AL., *supra* note 15, at 257–58.

425. See Johnson & Hamilton, *supra* note 233, at 1266–69; Stuart, *supra* note 204 at 96–97.

426. See Johnson & Hamilton, *supra* note 233, at 1267.

department proposed that in lieu of 638 contract funding, Indian nations should simply receive federal funds to manage themselves.⁴²⁷ For Indian nations receiving such benefits, Interior proposed that the federal government be relieved of its trust responsibility.⁴²⁸

Indian nations rejected the Interior proposal, and proposed that an additional title, authorizing the "Tribal Self-Governance Demonstration Project" be added to Public Law 93-638.⁴²⁹ The primary distinction between this proposal and the Interior proposal was that the federal government's trust responsibility would be maintained and that the Indian nations not participating in the Self-Governance Project would remain eligible for federal services.⁴³⁰ Congress responded favorably and approved the Project under a new Title III of the Indian Self-Determination and Education Assistance Act.⁴³¹

The Self-Governance Project was limited to 20 Indian nations.⁴³² To qualify for the Project, certain eligibility criteria had to be satisfied: (1) an Indian nation had to complete a Self-Governance planning grant; (2) the governing body of the Indian nation had to declare its interest in participating in the Project; (3) the Indian nation had to perform two or more mature 638 contracts prior to participation in the Project; and (4) the Indian nation "must have demonstrated sound fiscal management capabilities for three years prior to [participation in] the Project."⁴³³

The Self-Governance Project directed the Secretary "to negotiate, and to enter into, an annual written funding agreement with the governing body of a participating tribal government."⁴³⁴ Under the Compacts, Indian nations were authorized to "plan, conduct, consolidate, and administer programs, services, and functions" of the Department of the Interior.⁴³⁵ Compact funding was to be allocated from existing

427. *See id.*

428. *See id.*; cf. Stuart, *supra* note 204 at 96-97 (noting that in 1987, Ross Swimmer, Assistant Secretary of the Interior for Indian Affairs, proposed "separating" the BIA's trust and service responsibilities).

429. *See* Johnson & Hamilton, *supra* note 233, at 1267 n.71.

430. *See* S. REP. NO. 103-205, at 2 (1993).

431. Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 209, 102 Stat. 2285, 2296-98 (codified as amended at 25 U.S.C. § 450f (1994)).

432. *See* 25 U.S.C. § 302(a).

433. *Id.* § 302(a), 102 Stat. 2285, 2296; S. REP. NO. 103-205, at 2.

434. 25 U.S.C. § 303(a), 102 Stat. 2285, 2296.

435. *Id.* § 303(a)(i), 102 Stat. 2285, 2296.

BIA funds, particularly the agency, area, and central office accounts.⁴³⁶ Allocation was to be made "on the basis of what the tribe would have received in funds and services in the absence of the agreement."⁴³⁷ Indian nations could decide for themselves the degree to which they might "redesign programs, activities, functions or services and . . . reallocate funds" for such purposes.⁴³⁸ In sum, the Demonstration Project allowed participating Indian nations

to receive funds in a large block grant from the Secretary of the Interior[,] . . . to move money among programs[,] as well as [having] the power to actually prioritize spending, as opposed to the shadow prioritizing process that characterized the IPS . . . [and, fundamentally,] to make choices and be responsible for their choices.⁴³⁹

The Self-Governance Demonstration Project was well-received in Indian country.⁴⁴⁰ This may have been due in significant part to the explicit prohibition against the waiver, modification, or diminishment of the federal government's trust responsibility to the Indian nations and to individual Indians in the course of implementing the Project.⁴⁴¹ The Indian nations appreciated the negotiated and respectful manner in which Congress was withdrawing the BIA from their daily affairs.⁴⁴² While the project preserved the trust responsibility, it allowed the Indian nations to develop governmental competence without fear of losing federal funding.⁴⁴³

Historically, despite their considerable misgivings about the BIA, Indian nations may have been hesitant to call for its demise because of the belief that its non-existence would eliminate a bureaucratic presence in Washington for the funding and representation of Indian interests.⁴⁴⁴ Self-governance provided a

436. See S. REP. NO. 103-205, at 2 (1993).

437. *Id.*

438. 25 U.S.C. § 303(a)(2), 102 Stat. 2285, 2297. Certain funds, including funds available for tribal community colleges, were restricted from reallocation. See § 303(a)(3). Moreover, Indian nations could only reallocate funds to programs that had been previously authorized by Congress, although they could reallocate funds from one funded program to another, see S. REP. NO. 103-205, at 2, and participate in new contract programs. See § 303(b)(1).

439. Johnson & Hamilton, *supra* note 233, at 1268.

440. See *id.*

441. 25 U.S.C. § 303(a)(7), 102 Stat. 2285, 2296.

442. See Johnson & Hamilton, *supra* note 233, at 1268.

443. See *id.*

444. See Clinton, *supra* note 24, at 136-37.

mechanism in which the Indian nations could shed the BIA's limiting influence, while maintaining the protective aspects of the federal trust responsibility. From the perspective of the Indian nations, this was the best of both worlds.

In 1991, Congress extended the Self-Governance Project for three additional years.⁴⁴⁵ The legislation also extended the maximum number of participants from twenty to thirty Indian nations.⁴⁴⁶ Finally, the legislation provided for a feasibility study to determine whether the Self-Governance Project could be extended to the Indian Health Service.⁴⁴⁷ After determining that the extension was feasible, Self-Governance was extended to the IHS in 1992.⁴⁴⁸

By 1993, Congress recognized that the Project was a success and entertained recommendations that it be established as federal law and policy on a permanent basis.⁴⁴⁹ The following year, Congress wrote "[a] new chapter in Federal-Indian relations"⁴⁵⁰ when it enacted the Tribal Self-Governance Act of 1994.⁴⁵¹ The language used in support of the law was unequivocal:

The [Senate Indian Affairs] Committee strongly supports the concept of Tribal Self-Governance. . . . Self-Governance reflects the unique relationship between the United States Government and the individual Indian Tribes. Self-Governance recognizes that Tribes are governments with the inherent rights to govern themselves. The Tribal Self-Governance Project was designed to reduce Federal control over decision-making, and to enhance fiscal control, resource allocations, and management at the tribal level.⁴⁵²

445. See Tribal Self-Governance Demonstration Project Act of 1991, Pub. L. No. 102-184, § 2, 105 Stat. 1278, 1278.

446. See *id.* § 3 (amending Indian Self-Determination Amendments of 1988, Pub. L. No. 100-472, § 302(a), 102 Stat. 2285, 2296).

447. See *id.* § 6(d) (amending Pub. L. No. 100-472 by adding § 308(a)).

448. See S. REP. NO. 103-205, at 3 (1993).

449. The Senate Report to the legislation stated: "Because of the Project's success, many of the participating tribes, including many non-participating tribes who can't enter into compacts because of the current statutory ceiling on tribal participants, have expressed a desire to establish the Self Governance Project on a permanent basis." *Id.*

450. *Id.* at 4.

451. Pub. L. No. 103-413, §§ 201-408, 108 Stat. 4270, 4270-78 (codified as amended at 25 U.S.C. § 450-458hh (1994)).

452. S. REP. NO. 103-205, at 3-4.

On a permanent basis, the Self-Governance Policy is a program of "incremental self-governance" and provides for the participation of only twenty new Indian nations in any given year.⁴⁵³ The permanent program operates much like the demonstration project, except that the Indian nations now have the opportunity to assume responsibility over all programs administered by the BIA⁴⁵⁴ and over non-BIA Interior Department programs, such as national parks located on or near reservations.⁴⁵⁵ Moreover, the Act authorizes Indian nations to "redesign or consolidate programs, services, functions and activities,"⁴⁵⁶ allowing each to tailor programs "to suit tribal tradition, customs, and circumstances best."⁴⁵⁷

Perhaps the most fundamental characteristic of the new Self-Governance Policy is that the federal-tribal relationship is to be defined by mutual consent.⁴⁵⁸ In this sense, there is an unmistakable parallel (and some irony) that this "new chapter in Federal-Indian relations"⁴⁵⁹ has all the primary attributes of the very first Indian policy utilized by the United States—treaty making—a correlation that does not seem lost on Congress: "The negotiated agreements struck between Indian tribes and the federal agencies are to be solemn agreements—compacts between governments—that may not be altered unilaterally by the Department of the Interior."⁴⁶⁰

Given the depths of the policy chasm from which it was spawned, the adoption of the Self-Governance Policy within only 25 years after the end of the Termination Policy era is a phenomenal achievement—for the Bush Administration that proposed it, for the Congress that enacted it, and for the Indian nations that urged and shaped its development. As it now stands, Congress has achieved for the United States an

453. See Johnson & Hamilton, *supra* note 233, at 1270 ("However, some flexibility is provided in that consortia of two or more tribes are eligible to enter the program as one tribe.")

454. See Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, § 403(b), 108 Stat. 4270, 4272-74 (codified at 25 U.S.C. § 458cc(b)(1) (1994)).

455. See 25 U.S.C. § 458cc(b)(2); Johnson & Hamilton, *supra* note 233, at 1271-72.

456. 25 U.S.C. § 458cc(b)(3).

457. Johnson & Hamilton, *supra* note 233, at 1272.

458. So committed does Congress seem towards consensual relations that it even allowed the Indian nations to shape *its* policy toward dealing with the United States: "The Federal policy of Tribal Self-Governance was conceived and nurtured by Indian Tribes and their able leaders. It is a policy seasoned by experience and matured by time." S. REP. NO. 103-205, at 4 (1993).

459. *Id.*

460. *Id.*

Indian relations policy consistent with the desires of the Indian nations.⁴⁶¹

2. *Why the Self-Governance Policy Does Not Go Far Enough*—The theory underlying the Self-Governance Policy is logical and compelling: put Indian nations in control of the resources that they need to revitalize themselves and recognize their authority to make the decisions on their own behalf. Even though the Self-Governance Policy is not perfect—federal oversight continues through audit control⁴⁶²—it nonetheless enhances tribal sovereignty because it generally allows the Indian nations to assume responsibility for determining the course of their development and for administering their own affairs.⁴⁶³ The federal government is better off because the burden and expense of governmental management of Indian affairs has been diminished; for the Indian nations, there is a real possibility that they will achieve greater self-determination.

Nonetheless, despite its firm theoretical grounding and successful implementation thus far, the Self-Governance Policy has at least four limitations that inhibit its ability to allow the Indian nations to achieve true self-determination and decolonization in the long run.

a. *Limitation to Fiscal Matters Only*—First, the Self-Governance Policy only addresses the fiscal and administrative relationship between the United States and the Indian nations. Without question, putting more money with fewer bureaucratic restrictions in the hands of tribal governments will create new opportunities for self-governance and self-determination. The residual problem, however, is that there is much more to governmental responsibility than simply having control over financial resources.

For Indian nations truly to self-determine and assume governmental responsibility over their own affairs, they must be free from the strictures associated with the vast body of federal Indian control law. Without altering the current legal scheme of the United States to deny recognition of critical attributes of tribal sovereign authority,⁴⁶⁴ any self-determination

461. See *id.* ("Indian Tribes have been and will continue to be permanent governmental bodies exercising basic powers of government, as of Federal and State governments, to help meet the needs of their citizens.")

462. See 25 U.S.C. § 450c (1994).

463. See discussion *supra* Part IV.B.1.

464. I believe that federal Indian control law denies recognition of inherent tribal sovereignty. *But see* Stuart, *supra* note 204, at 85 (noting the view of Congressman

that the Indian nations might obtain through fiscal responsibility over their own affairs would remain limited by existing law. Thus, regardless of how successful an Indian nation is at administering federal financial resources, that nation will never achieve its full measure of self-determination because federal Indian control law will not recognize it.

For example, if an Indian nation wanted to commit some of its federal share of resources to developing an industrial park to encourage non-Indian business to relocate to the reservation, this venture might fail because the BIA could interfere with its development plans through the approval process,⁴⁶⁵ or the state could tax the non-Indian business profits.⁴⁶⁶ Or, if an Indian nation wanted to assume greater responsibility over domestic violence against its women and children by subjecting non-Indian spouses to its criminal justice process, it would not be able to do so because the Supreme Court does not recognize an Indian nation's sovereign power to exercise criminal jurisdiction over all persons within its territory.⁴⁶⁷ These legal restrictions greatly inhibit the ability of the Indian nations to self-determine. If the federal government is serious about redressing its colonial legacy by encouraging tribal self-determination, it must ensure that the Indian nations have both the fiscal and legal means to support their sovereign vision.

b. Preservation of the Federal Trust Responsibility—The second problem with the Self-Governance Policy is that it preserves without modification the federal trust responsibility over Indian affairs.⁴⁶⁸ As a result, while Self-Governance presents the possibility of greater tribal independence, any measure of improvement will be offset by one of the most well-entrenched instruments of colonial oppression—the federal trust responsibility.

Under the Self-Governance Policy, the trust responsibility comes into play in two areas: (1) in those instances in which the federal government has assumed clear trust duties for Indian lands and resources, and (2) through the process of

Lloyd Meeds that the United States has plenary power over the Indian nations and thus, that the Indian nations only have the power that Congress *allows*).

465. See 25 U.S.C. §§ 81, 415c (1994).

466. See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 173–93 (1989).

467. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195–212 (1978).

468. See Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, § 203, 108 Stat. 4250, 4271.

negotiating and settling upon compact terms.⁴⁶⁹ If the Indian nations are going to have true self-determination and sovereignty, the federal government cannot maintain full trust responsibility over their affairs. By definition, these two concepts are irreconcilable.

Congress considered this policy dilemma when it formulated the Self-Governance Policy: Tadd Johnson, former Staff Director and Counsel of the House of Representatives Subcommittee on Native American Affairs,⁴⁷⁰ which had authority over the legislation, writes with James Hamilton that “[t]he Self-Governance Demonstration Project was an experiment in the compatibility of tribal sovereignty and the federal trust responsibility. . . . Can Indian Tribes, the ‘ward,’ do the job of the ‘guardian,’ and can the guardian accede responsibility within its legal obligation?”⁴⁷¹

In answering this question, Congress acknowledged that the Indian nations could “do the guardian’s job,” but did not agree that it could relinquish its legal obligations. In doing so, it left the trust responsibility intact; thus, a considerable measure of what purportedly was being “given” to the Indian nations in terms of self-governing capacity was effectively undermined. Johnson and Hamilton explain this conflict as follows:

The Secretary is not without remedies in the Act. The Secretary is required to monitor the performance of trust functions through an annual trust evaluation. *If the Secretary finds imminent jeopardy to a physical trust asset, natural resource, or public health and safety, then he can unilaterally reassume the program.*⁴⁷²

The reassumption provision is the clearest assertion of the classic trust responsibility long held by the Secretary. Given this construction, then, how exactly are the Indian nations supposed to achieve true self-governance if the Secretary continues to hover over the tribal governing process? At the outset, Johnson and Hamilton suggest that the quandary is not quite as dramatic as the statutory text might imply:

It must be noted that the terms of the trust evaluation will be determined, in part, in the rulemaking process, but

469. See *id.* §§ 403(a), 403(b)(9), 406(b).

470. See Johnson & Hamilton, *supra* note 233, at 1251.

471. *Id.* at 1268–69.

472. *Id.* at 1274 (emphasis added) (discussing 25 U.S.C. § 458cc(d)(2) (1994)).

primarily in the funding agreements themselves. Hence, again tribes are given the power to bargain for when and how the Secretary evaluates trust assets. This is a significant shift in policy. The Secretary once acted as the owner of physical trust assets on reservations; under Self-Governance he is merely a detached fiduciary.⁴⁷³

While this interpretation of the statute sounds quite reasonable, it is confusing in that it does not comport with the unequivocal statement in the Self-Governance law that the Secretary's trust responsibility remains fully intact.⁴⁷⁴ If the Indian nations have binding legal authority to control the exercise of the Secretary's trust responsibilities, then there has been a clear modification of the federal government's role. If the Indian nations have the authority to "negotiate away" certain aspects of the Secretary's trust responsibility, then the statute should reflect this reality. If this occurs, it will be a great stride towards maximizing tribal consent in the self-government process, and thus towards the decolonization of federal Indian control law. If the beneficiary can control the trustee, then there is no trust; in terms of basic trust law, the beneficiary has become emancipated from the trustee because the beneficiary has control over his own affairs.⁴⁷⁵

If, on the other hand, the Self-Governance law is to be read literally and as saying that the Secretary retains the authority to "unilaterally reassume"⁴⁷⁶ his trust responsibilities in contravention of a bilateral, negotiated funding agreement, then the Self-Governance Policy could end up being a meaningless sham. For example, Johnson and Hamilton write that "[a] tribe in Self-Governance which . . . clear cuts its own forest would be subject to the reassumption of its forestry program by the Secretary."⁴⁷⁷ Secretarial actions of this kind would necessarily undermine Indian self-determination. Actions like these would suggest that tribal self-government will only be respected if, according to the Secretary, "correct" or "wise" policy decisions are implemented. If Indian tribal self-government means anything, it should also mean that Indian nations have the ability to make policy decisions that turn out to be "wrong," or even

473. *Id.*

474. *See supra* note 472 and accompanying text.

475. In such a case, the trustee becomes merely an agent of the beneficiary. *See* RESTATEMENT OF TRUSTS § 8 (1935).

476. Johnson & Hamilton, *supra* note 233, at 1274.

477. *Id.*

foolish, in the long run. Unless the true ramifications of self-governing actions are felt by the Indian people involved, then there can be no true development or participation in the normal development of the society. Making mistakes and learning from them is an essential attribute of any self-determining people.

Thus, from the text of the statute, the legislative history, and the words of one of its primary architects, the Self-Governance Policy supports tribal self-government only if the Indian nations, in the exercise of their inherent sovereign power, comply with the federal government's vision of how that power should be exercised. Thus, the potential exists that the hammer of the federal trust responsibility will drop on any given tribal initiative. This will, in the long run, chill, and may even preclude, the development and exercise of genuine Indigenous self-government.

Johnson and Hamilton give one possible explanation for why the trust responsibility was continued unmodified. They explain that the Self-Governance Act focused on whether the "ward" could do the "guardian"'s job, whether the federal government "trusted Indian Tribes to implement federal duties,"⁴⁷⁸ and whether "qualified Indian tribes [could] step[] into the shoes of the United States."⁴⁷⁹ Viewed in this way, the Self-Governance Policy seems entirely consistent with all previous federal Indian policies that furthered American colonization of the Indian nations. Such an interpretation assumes that the Indian nations should follow the federal government's policy priorities. If the objective is to get the Indian nations to carry out the federal government's "duties" or wear its "shoes," then the law as drafted may work just fine. If, however, the federal government's objective is truly to allow the Indian nations to self-determine, then the federal government's responsibilities should end where the tribal government's obligations begin. Because it very much seems the case that Johnson, the other federal policy makers, and the tribal leadership involved were trying to do the right thing, the failure to appreciate or respect self-determination demonstrates how much colonial federal Indian policies have affected everyone involved in federal Indian policy making.

c. Unrealistic Policy Objectives—In addition to its structural limitations, the Self-Governance Policy appears to be

478. *Id.* at 1269.

479. *Id.* at 1278.

predicated upon the logical flaw that its implementation will automatically revitalize tribal self-government. It is certainly true that the Policy initiates a "new chapter in Federal-Indian relations."⁴⁸⁰ But Johnson and Hamilton suggest that the enactment of the Self-Governance Policy began "the process of retribalization of Indian Government."⁴⁸¹ Although it remains unclear exactly what this means,⁴⁸² if it has anything to do with the goal of restoring some kind of pre-colonial governing capacity to the tribes, it is unlikely that the Self-Governance Act or the federal government will achieve that. The course of tribal self-determination is a tribal, not a federal, matter. Removing the shackles that restrain tribal self-government is one thing; decolonizing the Indian nations is something that only the Indian nations themselves can do if they so choose.

d. Failure to Deal With Colonization's Remnants—Finally, the Self-Governance Act does not adequately address the reality that not all Indian nations will be able to reassume a full or significant measure of their former self-governing powers. The cold, hard truth of the matter is that a significant number of Indian nations have been so vanquished by colonization that they are truly "domestic dependent nations."⁴⁸³ The Self-Governance Policy preserves the possibility that the federal government will one day again respect the full measure of tribal sovereignty. But, as Johnson and Hamilton note: "As the castle walls of paternalism crumble, what should be done about the tribes left inside?"⁴⁸⁴ Although it appears that Johnson and Hamilton were thinking only of those Indian nations who are inside the "castle walls" for purposes of federal financial support, the bigger problem lies in dealing with the reality that some Indian nations will be inside the "castle walls" either because they choose to be there, or because they will be unable to leave.

This is a significant policy quandary with no easy solution. It is inevitable that the federal trust responsibility must be preserved in some modified form to respect the underlying

480. S. REP. NO. 103-205, at 4 (1993).

481. Johnson and Hamilton, *supra* note 233, at 1269.

482. *Cf. id.* at 1252 n.2. Johnson and Hamilton suggest that the term "New Tribalism" should be used to describe the process of the federal government's involvement in "capacity building by Indian tribes aimed at empowering tribal governments." *Id.*

483. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831); see discussion *supra* Part I.B.

484. Johnson and Hamilton, *supra* note 233, at 1279.

treaty obligations and to ensure the survival of the Indian nations. Given the territorial limitation on tribal sovereignty, the federal government must remain involved to protect Indian lands, resources, and sovereignty from external threats. But as the Self-Governance Policy encourages some Indian nations to self-determine and decolonize, the heretofore unacknowledged barrier between those Indian nations inside and outside of the "castle walls" will become more prominent. The Self-Governance Policy has begun the process of dividing the Indian nations into two categories: "domestic autonomous nations" and "domestic dependent nations." If the United States is prepared to continue its colonial policies to ensure some increasingly weak vestige of tribal self-government for the "domestic dependent nations," then perhaps there is little to be concerned about. If not, then all of the Indian nations must be prepared for the possibility that the weaker nations will be the first ones "terminated" under some future effort to "ethnically cleanse" the United States of the weakest Indian nations within its boundaries—that is, those most assimilated and least equipped to administer their own territory and affairs.

Regardless of these policy flaws, it is clearly the case that both the Self-Determination and Self-Governance Policies are significant improvements over their predecessors. As Johnson and Hamilton suggest, it is anticipated that there will be "incremental self-governance" over time.⁴⁸⁵ It may also be true that federal policy-makers have an unwritten understanding that the Indian nations will make mistakes in the course of their self-governing redevelopment and should be given some leeway to make those mistakes. On the part of the tribal leadership, insisting upon the express continuation of the trust responsibility may simply have been an instinctive reaction in the face of the long history of the federal government's equivocal and self-interested colonial policies regarding Indian affairs. In any event, the Indian nations and the Congress must revisit the issue of the continuing validity of the trust responsibility if federal Indian control law is to be decolonized and the Indian nations allowed true freedom to self-determine.

Only time will tell whether the concerns set forth above will present themselves. In the interim, however, the Self-Governance Policy breathes new life into the continuing

485. *Id.* at 1270.

effort to ensure native survival because it eliminates many of the obstacles to Indian self-government. In this sense, the Self-Governance Policy is the foundation of a future federal decolonization policy. If the federal government eliminates the legal strictures it has imposed on the Indian nations, it can truly begin to shed its colonial legacy once and for all.

C. Administration Reform Initiatives

1. *The Nature of the Reform*—Consistent with existing Congressional policy, your Administration has affirmed its commitment to supporting tribal self-determination. In April 1994, you issued an executive order to the heads of the federal agencies to direct them to deal with the Indian nations on a “government-to-government” basis when tribal governmental or treaty rights are at issue.⁴⁸⁶ In May 1998, you issued an executive order directing that all federal agencies provide “meaningful consultation and collaboration with Indian tribal governments in the development of regulatory practices on Federal matters that significantly or uniquely affect their communities.”⁴⁸⁷ These actions were consistent with actions your predecessors took to support tribal self-determination.⁴⁸⁸

Within the various branches of the federal government, the Department of Justice (DOJ) has shown perhaps the most noticeable commitment to supporting tribal self-government.⁴⁸⁹ Led by Attorney General Janet Reno, the DOJ has undertaken a number of initiatives in support of Indigenous self-determination, including the issuance of its own policy on tribal sovereignty⁴⁹⁰ and initiating

486. See Exec. Memorandum, Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,451 (1994).

487. Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (1998).

488. See, e.g., 137 CONG. REC. S15,878 (daily ed. June 21, 1991) (statement of President George Bush); Statement on Indian Policy, 1983 PUB. PAPERS 90, 90-100 (Jan. 24, 1983) (Ronald Reagan); Nixon Message to Congress, *supra* note 232, at 564-76; H.R. DOC. NO. 90-272, at 9-11 (1968) (Lyndon B. Johnson).

489. See Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113, 113-17 (1995) (detailing several Justice Department initiatives that support tribal justice systems).

490. See *Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes* III.A (last modified Apr. 9, 1998) <<http://www.usdoj.gov/otj/sovtrb.html>> (“The Department recognizes that Indian tribes as domestic dependent nations retain sovereign powers, except as divested by

government-to-government relations with the Indian nations.⁴⁹¹

The DOJ has established an Office of Tribal Justice, which coordinates DOJ relations with the Indian nations.⁴⁹² In addition, it has "initiated a Tribal Courts Project to help tribal governments develop and strengthen their systems of justice,"⁴⁹³ and has facilitated federal law prosecutions by having federal courts convened on or near reservations using a magistrate judge.⁴⁹⁴ It has also supported tribal court jurisdiction over civil litigation by urging through amicus briefs that tribal remedies be exhausted⁴⁹⁵ and that other federal agencies "respect tribal court jurisdiction and use tribal courts for litigation."⁴⁹⁶ Finally, the DOJ has acted to ensure that the Indian nations have access to existing funding which is available for law enforcement agencies throughout the United States.⁴⁹⁷

the United States, and further recognizes that the United States has the authority to restore federal recognition of Indian sovereignty in order to strengthen tribal self-governance.").

491. The policy provides, in part:

The Department [of Justice] is committed to strengthening and assisting Indian tribal governments in their development and to promoting Indian self-governance. Consistent with federal law and Departmental responsibilities, the Department will consult with tribal governments concerning law enforcement priorities in Indian country, support duly recognized tribal governments, defend the lawful exercise of tribal governmental powers in coordination with the Department of the Interior and other federal agencies, investigate government corruption when necessary, and support and assist Indian tribes in the development of their law enforcement systems, tribal courts, and traditional justice systems.

Id. at III.C.

492. *See Reno, supra* note 489, at 114.

493. *Id.* The DOJ's "overall goal" for the Project "is to help tribal justice systems operate as partners with state and federal judiciaries in the administration of justice."
Id.

494. *See id.* at 115. The Attorney General contends that federal courts may not be fully exercising their jurisdiction because of "inconvenience due to distance, lack of resources, or other reasons." *Id.* Convening federal court on or near reservations "involves no expansion of federal jurisdiction. It is merely moving the federal forum closer to Indian country, thereby focusing attention on previously unredressed misdemeanors." *Id.* (footnote omitted).

495. *See id.* at 116.

496. *Id.*

497. This includes establishing an American Indian and Alaska Native Desk in the DOJ's Office of Justice Programs, *see id.*; providing funding under the Violence Against Women Act of 1994, 42 U.S.C. §§ 3796gg-3796ii (1994), for the Offices of Victims of Crime and Juvenile Justice and Delinquency Prevention, *see id.* at 117; and working with two tribal governments under the Tribal Strategies Against Violence Program in the Bureau of Justice Assistance. *See id.* at 116-17.

There is little doubt that the DOJ has initiated a full-scale administrative effort to assist tribal self-determination.

Other federal agencies have also become involved in supporting tribal self-determination. The Environmental Protection Agency, for example, has established its own policy for dealing with the Indian nations.⁴⁹⁸ This policy arises out of legislative and administrative initiatives to treat the Indian nations as states for purposes of enforcing the federal environmental laws.⁴⁹⁹ In addition, the Department of Health and Human Services⁵⁰⁰ and the Energy and Commerce Departments⁵⁰¹ have also initiated programs to support the Indian nations.

2. Why Current Administrative Initiatives May Have a Damaging Effect—Despite the well-intentioned motives underlying them, not all of the reform efforts taken by your Administration have had the effect of supporting tribal self-determination.

As a threshold matter, effectuating administrative reform runs the risk that these changes will only last as long as the duration of the current Administration. The Indian nations who are now redeveloping themselves may be dependent upon a certain degree of administrative “friendliness.” If this support is withdrawn by future administrations, there could be serious setbacks for the Indian nations, due to changes in funding

498. See Safe Drinking Water Act, 42 U.S.C. § 300j-11 (1994); Clean Water Act, 33 U.S.C. § 1377 (1994); see also Richard A. Monette, *Treating Tribes as States Under Federal Statutes in the Environmental Arena: Where Laws of Nature and Natural Law Collide*, 21 VT. L. REV. 111, 114 (1996) (“Congress amended the Safe Drinking Water Act (SDWA) in 1986 and the Clean Water Act (CWA) in 1987, providing the EPA with the authority to treat ‘Tribes as States’ for certain programs.”) (citations omitted).

499. See, e.g., Safe Drinking Water Act, 42 U.S.C. § 300j-11 (1994); Clean Water Act, 33 U.S.C. § 1377 (1994); Clean Air Act, 42 U.S.C. § 9626 (1994). See generally Monette, *supra* note 498.

500. See O'BRIEN, *supra* note 2, at 270. O'Brien notes:

The [Indian Health Service] (IHS), a subagency of the [Department of Health and Human Services] Public Health Service . . . provides medical services, hospital care, preventive health care, medical training, and funds for improving water supply and wastewater treatment systems to federally recognized tribes and individual members of federally recognized tribes living on or near a reservation.

Id.; see also CLINTON ET AL., *supra* note 11, at 200; GETCHES ET AL., *supra* note 15, at 276.

501. See *id.* at 271 (“The Energy and Commerce departments are directly involved in programs to help reservations achieve greater economic development. Both provide loans and other assistance to tribal governments so that they can explore for mineral deposits and develop industrial parks, tribal businesses, and recreational and tourist facilities.”).

priorities. It is unlikely that this kind of policy inconsistency and the instability that it fosters can have any positive effect on the Indian nations in the long run.

Perhaps the most damaging aspect of these Administrative reform efforts, however, is the likelihood that the Indian nations will become more fully incorporated into the federal system and thus will become more colonized. For example, while the DOJ's efforts to expand federal prosecutions by deputizing tribal prosecutors to enforce federal law and moving federal courts closer to the reservations may have the practical effect of increasing prosecutions against non-Indians who commit crimes against Indians, these results will come at the expense of tribal sovereignty. A significant reason why more prosecutions are needed is because of misdemeanors being committed by non-Indians with impunity.⁵⁰² An enforcement "gap" arises because federal prosecutors either focus only on major crimes or are too far from the crime scene to prosecute misdemeanants effectively⁵⁰³ and because the Indian nations are not recognized as having criminal jurisdiction over non-Indians.⁵⁰⁴ The "right" answer to this problem—that is, the one that is most consistent with tribal sovereignty—would be to change federal law to recognize the power of the Indian nations over misdemeanors committed by non-Indians within tribal borders. This has already happened in the case of crimes committed by non-member Indians.⁵⁰⁵ Simply "federalizing" the tribal prosecutor and moving the federal court closer to the reservation only infuses federal law and process more deeply into the tribal community instead of strengthening tribal law itself.

Similarly, treating the Indian nations as states for purposes of environmental law enforcement⁵⁰⁶ is *de jure* colonization. Perhaps more than any other federal activity besides national defense, protecting the environment is a uniquely federal function. While it is undoubtedly true that Indian nations involved in joint EPA projects may develop a certain technical proficiency at implementing federal environmental law and regulations, to what end? To perform at tribal expense a job that belongs legitimately to the federal government, e.g., to protect tribal lands and peoples from toxins emanating from

502. See *Reno*, *supra* note 489, at 115.

503. See *id.*

504. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195–212 (1978).

505. See Act of Oct. 28, 1991, Pub. L. No. 102-137, § 1, 105 Stat. 646, 646 (1991).

506. See *Monette*, *supra* note 498, at 114.

off-reservation sources? To create a new generation of Indian technocrats conversant in the jargon of federal environmental laws and programs? Treating the Indian nations as states imposes a heavy burden on limited tribal treasuries that simply is not justifiable in the face of a legitimate federal trust responsibility for protecting Indian lands. Moreover, minimizing tribal sovereignty by treating the Indian nations as states explicitly furthers a colonizing function. It is hard to see how this kind of administrative reform can result in genuine self-determination for the Indian nations in the long run.

Overall, the problem with recent administrative efforts to strengthen tribal sovereignty is that they seem founded upon a faulty assumption—that the federal government can actually make the Indian nations more sovereign. The reality, of course, is that only the Indian nations can strengthen themselves. Federal agencies that seek to support tribal self-government are left with the choice of either providing support to the tribes as they might determine or doing nothing. The problem with federally sponsored programs—even those that originate with tribal requests—is that the federal “solutions” can only be conceived of in terms of activities in which the federal agency already engages, e.g., enforcing federal laws, commandeering the states, and providing funding for federally-defined priority programs.

This lack of vision can and will have a dramatic effect on tribal sovereignty. Rarely do federal priorities mesh with tribal priorities,⁵⁰⁷ and it is unlikely that they ever will. It is also unlikely that many federal agency staff members have ever worked within tribal government. Moreover, few tribal officials appear to conceive of the federal government’s role as other than a funding source or in terms of what the federal government already does.⁵⁰⁸ Thus, the inertia associated with the federal government’s priorities prevails in the face of less well-defined tribal priorities, and the Indian nations simply carry out whatever federal program happens to be funded at the moment.⁵⁰⁹ At best, this process destabilizes long-term tribal

507. See discussion *supra* Part IV.B.2.

508. I observed this conception at the National American Indian Listening Conference in Albuquerque in May, 1994, conducted by Secretary of the Interior Bruce Babbitt and Attorney General Janet Reno with 300 tribal leaders from throughout Indian Country. As indicated by the testimony of the tribal leaders in attendance, lack of funding is a significant problem of tribal justice systems. See Reno, *supra* note 489, at 114.

509. For years, tribal governments have engaged in governmental activities because the federal government defines these activities as priorities and funds them—

planning; at worst, it is colonization by absorbing the Indian nations into the dominant society's administrative infrastructure.⁵¹⁰ In this process, it doesn't matter that the federal agency or certain federal officials are well-intentioned or even that the federal government acknowledges limitations on its participation.⁵¹¹ The end result of federal government absorption of Indian nations through its administrative policy is the further weakening of tribal self-determination by supplanting a distinct tribal governmental and legal identity with that of the federal government.⁵¹²

V. A PROPOSAL TO IMPLEMENT A FEDERAL INDIAN DECOLONIZATION POLICY

As the Indian nations and the United States enter the next phase in their relationship, there is some reason to be optimistic that the federal government is committed to reestablishing a true government-to-government relationship with the Indian nations. The Self-Governance Policy and recent Administrative policies restore the fundamental principle of mutual respect in government-to-government relations. Despite these improvements, however, the foundation of the federal-tribal relationship—the body of federal

not the other way around. See Johnson & Hamilton, *supra* note 233, at 1264–66 (discussing the Tribal Self-Governance Demonstration Project Act of 1991, Pub. L. No. 102-184, 105 Stat. 1278 (1991)). This structure encourages a cycle where, once the funding ends, the federally-funded tribal employees are laid off or reassigned to a new program, and the tribe goes back to doing what it otherwise did.

510. For example, although the Attorney General acknowledges that “[t]ribal courts articulate tribal values,” Reno, *supra* note 489, at 114, the Justice Department's programs all appear to relate to the training of tribal judges and prosecutors to perform like their federal government counterparts. See *id.* (“The Tribal Courts Project . . . will create technical assistance and training opportunities, primarily through the local offices of U.S. Attorneys.”); *id.* at 115–16 (“[The magistrate project] is also an innovative vehicle for channeling technical assistance and training to tribal courts. . . . The U.S. Attorney's Office will provide training, technical assistance, and oversight to the tribal prosecutor when acting on behalf of the federal government.”). This is not surprising, since it is unlikely that there is any institutional source of “tribal values” located within the DOJ.

511. See, e.g., Reno, *supra* note 489, at 114 (“[T]ribal justice systems are ultimately the most appropriate institutions for maintaining order in tribal communities.”).

512. For example, this would be true with respect to federal government training of tribal judges and prosecutors. See generally Porter, *supra* note 36, at 274–96 (discussing the destructive effect of Anglo-American legal practices on tribal governance).

Indian control law—continues to promote a colonial agenda,⁵¹³ I believe this means that the United States, despite recent policy initiatives, will continue to effectuate the gradual assimilation and destruction of the Indian nations. If you are genuinely concerned about the future of the Indian nations, I propose that you adopt a federal Indian policy that is premised upon the decolonization of federal Indian control law.

To assist you in conceptualizing how the United States might decolonize its Indian control law, I would like to draw upon the teaching of the *Gus-Wen-Tah*, or the Two Row Wampum.⁵¹⁴ For hundreds of years prior to the establishment of the United States, the Seneca People were governed by the *Gay-anashagowa*, or Great Binding Law.⁵¹⁵ The primary tenet of the Great Law was the obligation that all peoples should live in peace.⁵¹⁶ In the diplomatic interactions between my forefathers and the first colonists, the principle of peace embodied in the *Gus-Wen-Tah* guided the discourse.⁵¹⁷ While life was not without conflict—those nations who refused to live in peace with the *Haudenosaunee* were vanquished⁵¹⁸—the guiding principle of peace shaped the relationships among the Indian Nations and allowed for these peoples to have a strong and stable coexistence with their allies for many generations.

The Two Row Wampum is a treaty belt that symbolizes the agreement between the *Haudenosaunee* and the early American colonists to live in peaceful coexistence:

When the Haudenosaunee first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Tah, or Two Row Wampum. There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum

513. See discussion *supra* Parts I, II.A.

514. See Williams, *Algebra*, *supra* note 33, at 223, 291 (quoting SPECIAL COMMITTEE ON INDIAN SELF-GOVERNMENT, INDIAN SELF-GOVERNMENT IN CANADA back cover (1983) (quoting HAUDENOSAUNEE CONFEDERACY, PRESENTATION TO THE SPECIAL COMM. ON INDIAN SELF-GOVERNMENT, CANADIAN HOUSE OF COMMONS; AREN AKWEKS [TEHANETORENS], WAMPUM BELTS (1947))).

515. See PARKER, *supra* note 343, bk. 3, at 7.

516. See PAUL A.W. WALLACE, THE WHITE ROOTS OF PEACE 6 (1946).

517. See Williams, *Algebra*, *supra* note 33, at 291.

518. See Abler & Tooker, *supra* note 2, at 505, 506 (noting that the Seneca Indians dispersed the Huron Indians in 1649 and the Petun Indians in the winter of 1649–50).

separating the two rows and they symbolize peace, friendship, and respect.

These two rows will symbolize two paths or two vessels, travelling down the same river together. One a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.⁵¹⁹

If there is to be peaceful coexistence between the Indian nations and the United States into the future, then the balance in our relationship must be completely restored. For over 200 years, the United States has sought to "steer" our "vessel" and control our way of life.⁵²⁰ The argument that such actions were justified on the ground that they were for our own good is unacceptable. Our right to self-determination is one given to us by our Creator, and it is the spirit of that right that has allowed for our people to survive to the present day. If the United States has any regard for its longstanding commitments to our nations, it should commit to restoring the vision of the Two Row Wampum⁵²¹ in our future relations, and it should decolonize its "Indian law" once and for all.

The remainder of this section will explain how I propose how this objective can be accomplished.

A. Substantive Aspects of the Decolonization Policy

1. Define All Aspects of the Federal-Tribal Relationship by Agreement—To effectuate the vision of the Two Row Wampum as directly as possible, the United States should again adopt a policy for dealing with the Indian nations that requires that *all* aspects of our intergovernmental interaction be defined by

519. INDIAN SELF-GOVERNMENT IN CANADA, *supra* note 514, at back cover (quoting HAUDENOSAUNEE CONFEDERACY, PRESENTATION TO THE SPECIAL COMM. ON INDIAN SELF-GOVERNMENT, CANADIAN HOUSE OF COMMONS; AREN AKWEKS [TEHANETORENS], WAMPUM BELTS (1947)).

520. See discussion *supra* Part II.

521. See generally Williams, *Algebra*, *supra* note 33, at 291-97.

the parties concerned pursuant to agreement.⁵²² In this way, the right of self-determination of both the United States and the Indian nations can be protected and respected.

As a practical matter, this can be done by expanding the Self-Governance Policy to include legal issues of concern to the Indian nations and the federal government, as well as to the financial and administrative issues covered by the current Policy. Primarily, these issues would relate to questions of jurisdiction of the tribal, federal, state, and local governments. If the approach taken under the Self-Governance Policy were expanded, the federal, tribal, and state government relationship would be defined by the parties concerned, rather than by a static statutory scheme fine-tuned by Supreme Court decisions. If adopted, this approach would demonstrate the greatest respect for Indigenous self-determination and at the same time allow for legitimate federal and state interests to be respected.

Under such a scheme, the Indian nations could assert their desire to assume greater responsibility over various jurisdictional areas currently in the hands of the federal, state, and local governments. The federal government would assume the lead responsibility for handling the negotiations from its side, consulting in advance with state and local officials about appropriate negotiating strategy and about the politically and practically acceptable parameters of tribal-federal-state authority. Ultimately, negotiations would end with agreement between the Indian nations and the United States as to where jurisdictional lines could be drawn. If no agreement could be reached, the default position would be the existing federal Indian control law.

Throughout such a process, the Indian nations would carry the burden of demonstrating their ability to assume greater responsibility over their own affairs. In effect, then, tribal negotiating positions would be tempered by realistic policy considerations, such as each tribe's administrative capability, financial resources, political viability, and ability to follow through on long-term commitments. If these assessments are objectively not realistic for a particular Indian nation, then the Indian nation probably has no legitimate reason for seeking

522. See James A. Casey, Note, *Sovereignty by Sufferance: The Illusion of Indian Tribal Sovereignty*, 79 CORNELL L. REV. 404, 405 (1994) (arguing that "the constant erosion of the remnants of tribal sovereignty is the result of the lack of definition and consent in the current tribal-federal-state relationship" and that "free association agreements" should be the foundation of a new system).

greater authority over such matters, and the United States would be justified in refusing to accede to its requests. In the negotiating process, the United States would have little incentive to "let" the Indian nations do whatever they might want because of the political, and possibly fiscal, risks of doing so. Thus, looking at both sides of the process, there should be a meaningful negotiation regarding the terms and conditions of tribal reassumption of responsibility over matters that might have long been administered by the federal and state governments.

If Indigenous self-determination is truly the federal government's express policy desire,⁵²³ there seems little reason to limit the existing compacting process to strictly financial matters. There are many other areas currently defined by federal Indian control law that can and should be left to agreement rather than being regulated by rigid and binding statutes, regulations, and judicial decisions. For example, Indian nations could negotiate for greater civil and criminal jurisdictional authority over cases currently handled by federal or state officials.⁵²⁴ Taxation, regulation, environmental controls, land leasing, and state and local social service delivery are other areas in which Indian nations could negotiate for greater or more clearly defined authority. Indian nations could even negotiate the legal limits of the federal government's trust responsibility. In short, the United States should embark upon a new era in federal-tribal relations in which anything and everything that is of concern to the Indian nations and the United States can be negotiated and memorialized by agreement.

From the federal perspective, the United States has every reason to encourage the Indian nations to assume more responsibility for their own affairs. Even if the federal government's commitment to decolonization is weak, such a policy is justified by fiscal reasons alone.⁵²⁵ Indeed, this combination of factors appears to be what allowed the Self-Governance Policy to develop in the first place.⁵²⁶

523. See Tribal Self-Governance Act of 1994, 25 U.S.C. § 458aa (enacting the Congressional Declaration of Policy of Pub. L. 103-413).

524. State views would be addressed either through the federal negotiators or directly, depending upon the wishes of the parties. There is no reason to believe that Indian nations might not want greater authority to work with the states.

525. See discussion *supra* Part III.D.

526. See discussion *supra* Part III.D.

2. *Implement BIA Reform*—The decolonization of federal Indian control law cannot occur unless the federal government's colonial administrative infrastructure, the BIA, is dismantled and a new institution for handling relations with the Indian nations is established. Because of its central role in the suppression of tribal self-determination,⁵²⁷ there is sufficient independent reason to eliminate this anachronistic and dysfunctional agency.⁵²⁸ But given the changes unleashed by the Self-Governance Policy, it is absolutely necessary that immediate action be taken to restructure the federal government's administrative mechanism for dealing with Indian relations.⁵²⁹

The Self-Governance Policy anticipates a transfer of authority over critical aspects of governmental responsibility from the BIA to the Indian nations and a commensurate reduction in the size and function of the BIA.⁵³⁰ Until Congress implements central plans concerning the BIA's withdrawal from the daily affairs of the Indian nations, however, there will be conflict and confusion in the Self-Governance process. As the Indian nations begin to reassume authority over their own affairs, they are in essence "molting"—throwing off the shell of their former selves. Unfortunately, they also wear another shell, that of the BIA, which must be strategically thrown off as well if the Indian nations are to achieve genuine self-determination.

As long as the administrative and regulatory strictures of the BIA remain intact, the capacity of the Indian nations to achieve self-governance in the long run will be hampered, if not halted altogether. Congress, in enacting this program, was

527. See discussion *supra* Part III.B.4.

528. See SPECIAL COMM. ON INVESTIGATIONS OF THE SELECT COMM. ON INDIAN AFFAIRS, FINAL REPORT AND LEGISLATIVE RECOMMENDATIONS, S. REP. NO. 101-216, at 61 (1989).

529. See Clinton, *supra* note 24, at 134-41.

530. One of the architects of the Self-Governance Policy writes:

Downsizing due to Self-Governance is inevitable and irreversible. Pub. L. No. 103-413 requires the Central Office to determine how it will parcel itself out to Self-Governance tribes. Currently in the BIA there are 12 Area Offices, 83 Agency Offices, 3 sub-agencies, 6 field stations, and 2 irrigation project offices. At the end of fiscal year 1993, total employment at the BIA was 14,568 positions and 13,074 full time equivalents. The BIA administers 42 million acres of tribally owned land and 10 million acres of individually owned trust land.

well aware of the BIA's intransigence in dealing with the changes contemplated by Self-Governance:

The [Senate] Committee [on Indian Affairs] is troubled by the continuing refusal of the Department of the Interior for the past four years to negotiate, on a line-by-line basis with participating Self-Governance Tribes, tribal shares of [the] Bureau of Indian Affairs (BIA) central office funds and resources despite clear directives to do so in various appropriations and authorizing Committee Reports.⁵³¹

The Indian nations can ill afford to have the BIA as an enemy in their struggle for greater self-determination. Unless Congress acts affirmatively, rather than passively, to deal with the increasingly desperate acts of a crumbling administrative regime, the promise of the Self-Governance Policy and the hope of true Indian decolonization will be in jeopardy.

Some action has been taken in this regard in the drafting of BIA reorganization legislation. In 1996, legislation was submitted in the Senate by Senator John McCain that would require the BIA to reorganize significantly to accommodate and support increasingly independent Indian nations, while continuing to serve those Indian nations unable to self-govern. The legislation did not pass, but was resubmitted in 1997.⁵³² Representative Bill Richardson and Senator John McCain were the primary sponsors of the legislation. Unfortunately, Bill Richardson left the House and his seat on the Indian Affairs Committee for an administration position and Senator McCain, although still a member of the Senate Committee on Indian Affairs, gave up his chairmanship of the committee.⁵³³ Aside from some introductory remarks having been read concerning it in September of 1997, no action has been taken on the legislation since it was submitted,⁵³⁴ and its fate is unclear. If genuine decolonization and the maximum effect of the Self-

531. ESTABLISHING SELF-GOVERNANCE, S. REP. NO. 103-205, at 9-10 (1993).

532. S. 545, 105th Cong. (1997), 143 CONG. REC. S3011-03, available in 1997 WL 168775, *S3012.

533. See *Richardson Gets Energy Post/Holbrooke to Be Named to UN*, NEWSDAY, June 18, 1998, at A23, available in LEXIS, News Library, NEWSDY file (stating that Bill Richardson will serve as Secretary of Energy); *McCain Comes Out Swinging*, J. COM., Mar. 10, 1997, at 10A, available in LEXIS, BUSFIN Library, JOC file (reporting that Senator McCain, no longer Chairman of the Committee on Indian Affairs, has become Chairman of the Senate Commerce Committee).

534. See *Thomas: Legislative Information on the Internet* (visited Nov. 2, 1998) <<http://thomas.loc.gov/bss/d105query.html>>.

Governance Policy are to be achieved, the BIA must be restructured in a conscious deliberate manner instead of letting time and decay undermine the possibility that it may one day serve a productive role in assisting the Indian nations. Development in the direction of a "Department of State-Indigenous Relations" would better serve the long term interests of the Indian nations and the United States.

3. *Repeal Colonial Federal Indian Control Law*—While Congress has been determined by the Supreme Court to have the "plenary power" over Indian affairs, all three branches of government have contributed to the creation of the existing body of federal Indian control law.⁵³⁵ The most direct and effective way in which this body of law can be decolonized is to repeal, overrule, and withdraw it from having any future effect. While this sounds dramatic and radical, clear changes should be made to expedite the self-governance of the Indian nations. The following are a few specific examples of federal laws that Congress should immediately consider repealing or amending.⁵³⁶

a. *Recognize the Authority of Indian Nations to Exercise Jurisdiction over Crimes Committed by Non-Indians*—In *Oliphant v. Suquamish Indian Tribe*,⁵³⁷ the Supreme Court held that the United States would not recognize the inherent sovereignty of the Indian nations to exercise criminal jurisdiction over non-Indians.⁵³⁸ This restriction limits the ability of Indian nations to address crimes committed by non-Indians within their territory—frequently White men assaulting Indian women—and undermines tribal sovereignty. As it did when it legislatively reversed *Duro v. Reina*,⁵³⁹ Congress should amend the Indian Civil Rights Act (ICRA)⁵⁴⁰ or take other legislative action to recognize inherent tribal sovereignty over crimes committed by non-Indians within the Indian territory.

b. *Recognize the Authority of Indian Nations to Exercise Jurisdiction over Civil Matters Involving Only Non-Indians*—In

535. See discussion *supra* Parts I (judicial branch), II (legislative branch), II.A.8 (executive branch); *supra* note 488 (executive branch).

536. These recommendations are presented in the alternative, and I anticipate that not all of them will be implemented at the same time.

537. 435 U.S. 191 (1978).

538. See *id.* at 206–12.

539. See Act of Oct. 28, 1991, Pub. L. 102-137, § 1, 105 Stat. 646, 646, *overruling* *Duro v. Reina*, 495 U.S. 676 (1990).

540. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1341 (1994).

Strate v. A-1 Contractors,⁵⁴¹ the Supreme Court held that the United States would not recognize the inherent sovereignty of the Indian nations to exercise civil adjudicatory jurisdiction in Indian territory over cases involving only non-Indians.⁵⁴² This restriction undermines the credibility of tribal courts and erodes the territorial component of tribal sovereignty. As was the case with the legislative reversal of *Duro v. Reina*,⁵⁴³ Congress should amend the Indian Civil Rights Act or take other legislative action to recognize inherent tribal sovereignty over civil actions involving only non-Indians arising within the Indian territory.

c. Recognize Tribal Sovereignty to Exercise Traditional Justice Methods—The Indian Civil Rights Act⁵⁴⁴ strongly suggests that Indian nations must exercise their jurisdiction over civil and criminal matters arising within their territory in a manner analogous to the Anglo-American legal system.⁵⁴⁵ This emphasis is driven by a fixation on individual rights.⁵⁴⁶ This overemphasis is an assimilating force within tribal communities and continues to weaken traditional tribal existence.⁵⁴⁷ Congress should amend the Indian Civil Rights Act to recognize explicitly the right of Indian nations to address matters involving the rights of individual members in a manner consistent with tribal common law.⁵⁴⁸

d. Recognize Concurrent Tribal Jurisdiction over Major Crimes—Existing case law is unclear whether Indian nations are recognized as having criminal jurisdiction over major crimes committed by their members.⁵⁴⁹ Ambiguity in this regard unnecessarily limits tribal sovereignty. Congress should amend the Indian Major Crimes Act⁵⁵⁰ to recognize inherent tribal sovereignty over major crimes committed by Indians

541. 117 S. Ct. 1404 (1997).

542. *See id.* at 1407–08.

543. *See* Act of Oct. 28, 1991, Pub. L. 102-137, § 1, 105 Stat. 646, 646.

544. 25 U.S.C. §§ 1301–1341 (1994).

545. *See* 25 U.S.C. § 1301(2).

546. *See* 25 U.S.C. §§ 1302–1303.

547. *See* *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 890–93 (2d Cir. 1996) (sustaining an action filed against tribal government and its traditional chiefs on the grounds that banishment of tribal member constitutes a “detention” sufficient to invoke habeas corpus review by the federal courts pursuant to ICRA).

548. *See generally* Robert Yazzie, “*Life Comes from It*”: *Navajo Justice Concepts*, 24 N.M. L. REV. 175, 180–87 (1994).

549. *See* FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 11, at 339–41.

550. Appropriations Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153, 3242 (1994)).

and to establish clearly concurrent federal-tribal criminal jurisdiction. Specifically, Congress should recognize exclusive tribal jurisdiction over Indians punished in accordance with the laws of the Indian nation in which the crime occurred. If such a change is accomplished, for those Indian nations having law-trained judges, the Indian Civil Rights Act should be amended to repeal the sentencing limitations that it contains.⁵⁵¹

e. Recognize the Power of Indian Nations and States to Enter into Jurisdictional Compacts—Existing case law prohibits the Indian nations and the states from entering into agreements in which jurisdiction may be altered.⁵⁵² Maximum tribal sovereignty would allow Indian nations and states to enter agreements covering a wide range of matters, including jurisdictional transfers. Congress should enact legislation that recognizes the power of Indian nations and states to enter into wide-ranging compacts.⁵⁵³ To ensure that the states do not overreach, such compacts should require the parties to re-visit their agreements regularly, and these compacts should be void if their duration is longer than three years. Congress already resolved this policy issue in favor of allowing such tribal-state agreements when it enacted the Indian Child Welfare Act⁵⁵⁴ and the Indian Gaming Regulatory Act.⁵⁵⁵ It should expand this process to allow all matters to be resolved by agreement.

f. Repeal Public Law 280 and Equivalent Legislation—Under Public Law No. 67-280⁵⁵⁶ (commonly called Public Law 280), Congress granted certain states criminal and civil adjudicatory jurisdiction over the Indian country located within their borders.⁵⁵⁷ Since Public Law 280 was enacted, many

551. See 25 U.S.C. § 1302(7) (1994) (prohibiting tribes from imposing jail sentences longer than one year or fines of more than \$5,000).

552. See *Kennerly v. District Court*, 400 U.S. 423, 429 (1971) (per curiam). For an introduction to this issue, see SENATE SELECT COMM. ON INDIAN AFFAIRS, TRIBAL-STATE COMPACT ACT, S. REP. NO. 95-1178, at 6 (1978) (committee report accompanying the proposed Tribal-State Compact Act, S. 2502, 95th Cong. (1978)).

553. See SENATE SELECT COMM. ON INDIAN AFFAIRS, TRIBAL-STATE COMPACT ACT, S. REP. NO. 95-1178, at 7-8.

554. See 25 U.S.C. § 1919 (1994).

555. See 25 U.S.C. § 2710(d)(3)(C) (1994).

556. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, 589 (codified at 18 U.S.C. § 1162 (criminal), 28 U.S.C. § 1360 (civil) (1994)).

557. See Act of Sept. 13, 1950, ch. 947, 64 Stat. 845 (codified at 25 U.S.C. § 233 (1994)) (civil jurisdiction in New York); Act of July 2, 1948, ch. 809, 62 Stat. 1224 (codified at 25 U.S.C. § 232 (1994)) (criminal jurisdiction in New York); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (criminal jurisdiction over the Sac and Fox Reservations in Iowa); Act of June 25, 1948, ch. 645, 62 Stat. 827 (codified at 18 U.S.C. § 3243

Indian nations have developed their own criminal justice systems and are now addressing law enforcement concerns as an exercise of their sovereignty.⁵⁵⁸ These tribal justice systems would be strengthened, and others might be encouraged to do the same, if state criminal justice systems did not have concurrent criminal jurisdiction. Similarly, tribal courts would be strengthened by eliminating state civil adjudicatory jurisdiction and not having to compete with the state courts over matters involving reservation Indians or arising within Indian country. I have seen firsthand how concurrent state court jurisdiction can undermine the tribal courts and can assure you that access to the state courts undermines tribal sovereignty, as one federal district court recently discovered in a case involving my Nation.⁵⁵⁹

Congress should repeal Public Law 280 and all related statutes in order to recognize (i) exclusive tribal jurisdiction over civil actions arising within Indian country, and (ii) concurrent federal-tribal jurisdiction over crimes occurring within Indian country. This is not a novel idea; Congress previously resolved this policy issue in favor of requiring tribal consent to state jurisdiction when it amended the Indian Civil Rights Act in 1968.⁵⁶⁰

g. Repeal the Indian Reorganization Act and Equivalent Legislation—If self-determination means anything, it means that the Indian nations do not need the United States to control the manner in which they govern themselves.⁵⁶¹ The IRA presupposes that the Indian nations should adopt a constitutional government in accordance with its provisions if it were unable to independently do so.⁵⁶² In recent years, a few Indian

(1994)) (criminal jurisdiction in Kansas); Act of May 31, 1946, ch. 279, 60 Stat. 229 (criminal jurisdiction over the Devils Lake Reservation in North Dakota).

558. *Report of the Executive Committee for Indian Country Law Enforcement Improvements: Final Report to the Attorney General and the Secretary of the Interior*, (visited Oct. 1997) <<http://www.usdoj.gov/otj/icredact.htm>> (indicating strong tribal resistance to direct federal involvement in law enforcement).

559. See *Bowen v. Doyle*, 880 F. Supp. 99, 105 (W.D.N.Y. 1995) (rejecting state jurisdiction over internal Seneca Nation political matters brought to state court by tribal political officials).

560. See 25 U.S.C. §§ 1321 (requiring tribal consent for extension of state criminal jurisdiction), 1322 (requiring tribal consent for extension of state civil adjudicatory jurisdiction).

561. See Porter, *Issues*, *supra* note 357, at 77–78.

562. See 25 U.S.C. § 476 (allowing tribes to adopt “an appropriate constitution and bylaws . . . at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe” and listing the rights and powers that this constitution “shall” vest in the tribe) (emphasis added); *cf.* Porter, *supra*

nations have significantly changed their IRA constitutions, including the removal of Secretarial approval of tribal laws.⁵⁶³ The only legitimate interest of the federal government in tribal governance is the ability to determine the identity of the lawful tribal government. This requires a recognition process, which already exists.⁵⁶⁴ Thus, the IRA should be repealed to allow the Indian nations to adopt their own forms of government. In addition, the Oklahoma Indian Welfare Act⁵⁶⁵ and the governance provisions of the Alaska Native Claims Settlement Act⁵⁶⁶ should be repealed for the same reasons. In their place, a new law should be adopted requiring the Administration to recognize whatever form of government an Indigenous people may choose.

h. Effectively Repeal the General Allotment Act—Congress sought to eliminate the modern-day effects of the Indian General Allotment Act⁵⁶⁷ when it enacted the Indian Land Consolidation Act of 1983 (ILCA).⁵⁶⁸ The ILCA established a procedure to recognize the authority of tribal governments to develop land consolidation plans and to undo the effect of the Allotment Act by dividing up reservations into trust lands and fee lands.⁵⁶⁹ In addition, to minimize the effect of highly fractionated parcels of land, the ILCA provided for the escheat of economically unproductive parcels to the tribe.⁵⁷⁰ This escheat provision has been struck down by the Supreme Court,⁵⁷¹ amended by Congress,⁵⁷² and struck down again.⁵⁷³ Because checkerboarded and fractionated reservation lands undermine the ability of tribal governments to exercise their authority,

note 357, at 94–96 (arguing for tribal governments to look to their own historical tribal governing traditions when drafting new constitutions rather than to the more well-known American governing tradition).

563. See, e.g., CONST. AND BY-LAWS OF THE ROSEBUD SIOUX TRIBE OF SOUTH DAKOTA amend. XVIII (1985); REVISED CONST. AND BY-LAWS OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS art. 8, § 1(r) (revised 1975).

564. See 25 C.F.R. § 1001.2(a) (1994) (relying on the definition of “federally recognized” in P.L. No. 93-638).

565. 25 U.S.C. §§ 501–509 (1994).

566. 43 U.S.C. §§ 1606–1607 (1994).

567. Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–358 (1994)).

568. Pub. L. No. 97-459, tit. II, 96 Stat. 2517 (codified as amended at 25 U.S.C. §§ 2201–2211 (1994)).

569. See 25 U.S.C. §§ 2204, 2205.

570. See 25 U.S.C. § 2206.

571. See *Hodel v. Irving*, 481 U.S. 704, 718 (1987).

572. See 25 U.S.C. § 2206(a), amended by Pub. L. No. 101-644, § 301(a), 104 Stat. 4666 (1990).

573. See *Babbitt v. Youpee*, 117 S. Ct. 727, 728–29 (1997).

Congress should fund the repurchase of fee lands within allotted reservations.⁵⁷⁴

i. Repeal the Indian Civil Rights Act—The ICRA imposes upon tribal government the individual rights protections of the Bill of Rights.⁵⁷⁵ While it has been determined that any remedy for a violation of the ICRA must derive from within the tribe,⁵⁷⁶ the ICRA does impose substantive limitations on tribal government actions.⁵⁷⁷ These limitations perpetuate American conceptions of justice,⁵⁷⁸ tribal sovereignty is thereby undermined and American colonial objectives are furthered. To the extent that Indian nations desire to safeguard the rights of individuals against government misconduct, a genuine respect for sovereignty would dictate that the Indian nations themselves define their own substantive and procedural standards and the remedies for the violations of those standards. Accordingly, Congress should repeal the ICRA.

j. Repeal the Citizenship Act of 1924—American citizenship was imposed upon Indian people to further assimilation into the American polity.⁵⁷⁹ Since this statute was opposed by many Indian people,⁵⁸⁰ full decolonization of federal Indian control law would dictate that mandatory American citizenship should be withdrawn. American citizenship, if it is desired by Indian people, should be left as a matter of personal choice.

574. See H.R. 2743, 105th Cong. § 4 (1997), available in LEXIS, Lexis Library, BLT 105 File (suggesting amendments to the Indian Land Consolidation Act, 25 U.S.C. §§ 2201–2220 (1994), including authorization, in proposed § 213, for the Secretary of the Interior “to acquire . . . any fractional interest in trust or restricted land”).

575. See Indian Civil Rights Act of 1968, 25 U.S.C. § 1302–1303 (1994); discussion *supra* Part V.3.C.

576. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65–66 (1978).

577. Compare 25 U.S.C. §§ 1302–1303 (limiting Indian tribes’ powers to make any laws or commit any acts that would violate most protections guaranteed by the Bill of Rights) with U.S. CONST. amend. I–X.

578. See *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 881–901 (2d Cir. 1996) (allowing Indians banished from their tribe to apply for writs of habeas corpus).

579. See Citizenship Act of 1924, ch. 233, 43 Stat. 253, 254 (codified at 8 U.S.C. § 1401(b) (1994)); GETCHES ET AL. *supra* note 15, at 738–39 (noting how the United States citizenship that was extended piecemeal by various treaties and statutes before the 1924 Act was conditioned “upon Indians conforming their individual behavior to the dominant society’s norms and renouncing tribal culture and traditions”).

580. See, e.g., Vine Deloria, Jr., “Congress in its Wisdom”: *The Course of Indian Legislation*, in THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880S, *supra* note 92, at 117 (noting that upon passage of the Citizenship Act of 1924, “the Iroquois . . . promptly sent the President notice of their rejection of American citizenship). But see, e.g., DIPPIE, *supra* note 351, at 194 (noting that Red Fox Skiu-hushu, a Blackfoot minister, urged Congress to grant citizenship to Indians).

4. *Abandon the Colonial Foundation of Federal Indian Control Law Doctrine*—To truly decolonize federal Indian control law, its colonial doctrinal foundation must be abandoned. This includes abandoning the “doctrine of discovery,”⁵⁸¹ the Indian “right of occupancy” doctrine,⁵⁸² the Plenary Power Doctrine,⁵⁸³ and federal approval requirements,⁵⁸⁴ rejecting member-based conceptions of tribal sovereignty;⁵⁸⁵ no longer imposing remedies for tribal injustices based upon the exclusiveness of federal court litigation;⁵⁸⁶ and no longer treating money as the equivalent of land.⁵⁸⁷ In addition, while the federal trust responsibility⁵⁸⁸ should not be discarded entirely, it should be significantly modified to eliminate federal inference in internal tribal matters.⁵⁸⁹

B. Implementation of the Decolonization Policy

The effectiveness of the proposed federal Indian Decolonization Policy will depend upon the process utilized to implement it. Any efforts to work significant changes in federal Indian policy are likely to bring out the following special interests: (1) those Indian nations who seek greater self-determination; (2) those Indian nations who wish to maintain the status quo; (3) the BIA, which seeks to perpetuate itself; (4) the anti-Indian lobby, which seeks to weaken tribal sovereignty; (5) the governmental reformists, who wish to make government more efficient; and, (6) the fiscal conservatives, who want to save money by cutting back on budgets regardless of the impact or source of the cuts. Given that these competing interests can grossly manipulate and contort any comprehensive policy proposal, successful implementation of the Self-Governance Policy looks like a Herculean task. More importantly, however, the implementation of that policy is evidence that change can be effectuated if there is a genuine desire and commitment to do so.

581. See discussion *supra* Part III.B.1.

582. See *id.*

583. See discussion *supra* Part III.B.2.

584. See Clinton, *supra* note 24, at 125–29.

585. See *id.* at 141–53.

586. See Williams, *Algebra*, *supra* note 33, at 293–97.

587. See Clinton, *supra* note 24, at 153–58.

588. See discussion *supra* Part III.B.3.

589. See Clinton, *supra* note 24, at 134.

Much of the difficulty in implementing a federal Indian Decolonization Policy will arise because many Indian nations will resist it. Having spent such a long time in a dependent relationship, many Indian nations will exercise their sovereign prerogative to resist any change in the status quo. If the United States chooses to recognize an Indian nation's choice to remain dependent upon it, there will likely never be any mechanism to effectuate the decolonization of that Indian nation in the future.

In my view, the federal government need not engage in an endless debate with the Indian nations over whether it should implement a Decolonization Policy. Instead, the United States should engage in one final colonial act: it should unilaterally adopt a Decolonization Policy and force the Indian nations either to choose the path of independence or to preserve the status quo of dependence.

As a practical matter, then, Congress should simply repeal a number of its colonial enactments, such as those set forth above,⁵⁹⁰ and give the Indian nations one year before the repeal becomes effective. If an Indian nation chooses to preserve the status quo and maintain a more dependent relationship, then there would be no change in the legal relationship between the United States and that nation. If, on the other hand, an Indian nation is looking to expand its self-determination, the one-year time period would spur the development of the necessary infrastructure to reassume the aspect of government responsibility at issue. In this way, the Indian nations could make strategic multi-year decisions about which areas to develop, and could maintain the application of the federal Indian control law up until the time is right for them to apply their own law. Maybe, for the first time ever, they would have to take a deep, hard look at whether they are really able to assume responsibilities previously exercised by the federal government or the states.

It is unlikely that any but the handful of independently wealthy Indian nations would be able to afford to displace federal and state authority immediately. Indeed, it may be imprudent to eliminate all restrictive federal legislation, case law, and executive orders. The bigger problem, however, is that in many instances, the anticipated trauma of assuming governmental responsibility over matters that may not have been handled in generations would be so great that some Indian nations would likely resist the proposed change, either because

590. See discussion *supra* Part V.A.3-4.

they could not administratively or financially assume such new responsibility, or because they may have grown accustomed to being dependent upon the federal or state governments.

This dependence is a critical defect in any modern effort to decolonize federal Indian control law. Given the changes forced upon Indian people during the last 200 years, there has been a commensurate change in the native conception of sovereignty.⁵⁹¹ While many Indian nations today may embrace a firm and clear conception of their own sovereignty, others may not.⁵⁹² For the latter, sovereignty may not even have any meaning in the face of overwhelming pressures to satisfy individual—rather than tribal—needs and desires. Unfortunately, some Indian nations may be such in name only. In short, colonization has transformed tribal conceptions of self-government so dramatically that some Indian nations may simply have no idea what it means to assume greater authority over their own affairs.

If the trust responsibility is to have any modern utility, it should be used to force the Indian nations to face up to their self-governing capabilities and weaknesses. That this act itself might violate tribal sovereignty is not a valid reason for not doing it. After all, the federal government takes unilateral actions to control Indian lives every day. Because the United States is unilaterally responsible for destroying tribal self-government and establishing a widespread psychology of dependence,⁵⁹³ it should take similarly bold action to revitalize it. While it may seem painful, and maybe even harsh, to implement, it pales in comparison to what has previously been done to destroy our nations by confiscating our land base⁵⁹⁴ and extinguishing our unique way of life.⁵⁹⁵

The revitalization of the Indian nations requires that drastic and painful action be taken now to restore the psychology of self-determination. The United States should move gradually toward eliminating its colonial legacy by adopting a policy that requires the Indian nations to make meaningful choices as to whether they will assume greater responsibility over their own affairs. Just as Indigenous assimilation is the direct result of the affirmative exercise of

591. See Porter, *Issues*, *supra* note 357, at 81–83 (detailing changing conceptions of sovereignty in the Seneca Nation and the Cherokee Nation).

592. See generally *id.*

593. See discussion *supra* Part II.

594. See discussion *supra* Part II.A.2, 5.

595. See discussion *supra* Part II.A.7.

federal power, Indigenous revitalization can also be encouraged by the affirmative exercise of this power. My proposal is that the United States unilaterally repeal its colonial federal Indian control laws and force the Indian nations to consider assuming greater governmental responsibility over areas that were once within their exclusive authority.

C. Likely Effects of the Decolonization Policy

A federal Indian Decolonization Policy would have several significant effects. First, it would put as much power in the hands of Indian people as they could handle responsibly. This is the essence of self-determination and the key to Indigenous survival.

Second, such a policy would more efficiently allocate scarce federal and tribal resources.⁵⁹⁶ Unlike the current arrangement, in which federal officials in the BIA provide direct services to Indian nations,⁵⁹⁷ the most efficient allocation of resources may be for tribal government or coalitions of tribal governments⁵⁹⁸ to deliver such services. In addition, the possibility also exists for Indian nations to form their own service delivery consortiums, as is anticipated in the proposed BIA reorganization plan.⁵⁹⁹ Either way, the possibility of resource maximization is one step closer.

Third, the Decolonization Policy would eliminate even more administrative bureaucracy within the federal and state governments as the Indian nations assume greater responsibility for their own affairs. To be sure, the federal government's role would not disappear. Rather than providing direct services, the federal government's role in Indian affairs would be limited to two simple functions: negotiating federal-tribal compacts and enforcing the federal government's remaining trust responsibility. In this way, the BIA would be transformed into a kind of tribal Department of State. And because the trust responsibility would be defined by the terms of the compacts, there would still need to be an enforcement and oversight mechanism

596. See discussion *supra* Part III.

597. See discussion *supra* Part III.B.4.

598. See S. REP. NO. 105-545, at 5-29 (1997) (discussing §§ 101-103 of a bill to reorganize the BIA (1997)).

599. See generally *id.*

within the federal bureaucracy. In all other ways, the federal government's role would be significantly reduced.

I do not mean to suggest that there would not be barriers to adopting such a Decolonization Policy in full. The primary limitations will be those imposed by economic, political, and practical reality. Should an Indian nation seek to obtain authority over an area that it could not objectively and responsibly assume, the negotiation process would be a limiting factor. In such an event, the federal negotiators could refuse to acquiesce.

Indeed, with some Indian nations, the problem may come from precisely the opposite direction. Despite the willingness of federal officials for an Indian nation to assume more responsibility in a particular area, some Indian nations may be unwilling to do so. After generations of dependence, some tribal officials may simply have no conception of their own self-governing capacity, or if they do, no political desire to place demands upon a complacent and perhaps incapable citizenry. Ultimately, the right answer will depend upon the priorities established for the negotiations by both sides and the resources available to achieve various self-governing objectives.

Despite the apparent novelty of the proposed Federal Indian Decolonization Policy, it would actually require only a minor change in existing federal Indian control law and policy. In addition to the current Self-Governance Policy, existing federal Indian control law provides for a number of areas in which the Indian nations can negotiate for or otherwise assume greater authority over their own affairs, including gaming regulation,⁶⁰⁰ environmental regulation,⁶⁰¹ child welfare jurisdiction,⁶⁰² mineral development,⁶⁰³ forest and wildlife management,⁶⁰⁴ and certain aspects of criminal jurisdiction.⁶⁰⁵ Thus, expanding the Self-Governance Policy into a Decolonization Policy would simply allow for a comprehensive mechanism for dealing with a multitude of tribal governing decisions that are all interrelated in the first place. This, it would seem, would be helpful to the planning functions of both the United States and the Indian nations.

600. See Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1994).

601. See Indian Lands Open Dump Act of 1994, 25 U.S.C. §§ 3901-3908 (1994).

602. See Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (1994).

603. See Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (1994).

604. See National Indian Forest Resources Management Act, 25 U.S.C. §§ 3101-3120 (1994).

605. See 25 U.S.C. §§ 1301-1341 (1994).

Pursuing a Decolonization Policy will ensure that the Indian nations, perhaps for the first time, will have to make difficult political choices about what governmental responsibilities they will assume; the downside is the same. Given the limits facing tribal government—economic, political, and practical—there is little incentive for a tribal government to negotiate for authority that it has neither the wherewithal nor means to handle. After generations of conditioned weakness and dependency, however, there is unlikely to be a magical transformation of tribal self-government overnight. Indeed, there will likely only be growing pains that would give ample room for the critics of self-determination to scuttle the initiative.⁶⁰⁶ In any event, if decolonization and the survival of

606. Critics of self-determination can cite the recent U.S. Department of Housing and Urban Development (HUD) Indian housing scandal, which the *Seattle Times* reported in a series of articles in December, 1996. See Eric Nalder et al., *A National Disgrace: HUD's Indian-Housing Program*, SEATTLE TIMES, Dec. 1, 1996, at A16, available in LEXIS, News Library, Seattm File; Eric Nalder et al., *From Deregulation to Disgrace—The House that HUD Built: 5,300 Square Feet for One Family—Despite Their \$92,000 Income, Tulalip Couple Got Housing Aid*, SEATTLE TIMES, Dec. 1, 1996, at A1, available in LEXIS, News Library, Seattm File [hereinafter Nalder, *Deregulation*]; Eric Nalder et al., *How a Few Got Best Part of HUD Pie*, SEATTLE TIMES, Dec. 3, 1996, at A1, available in LEXIS, News Library, Seattm File; Eric Nalder et al., *HUD Program Changing—For Better or Worse*, SEATTLE TIMES, Dec. 5, 1996, at A1, available in LEXIS, News Library, Seattm File [hereinafter Nalder, *HUD*]; Eric Nalder et al., *Key to HUD's Cashbox*, SEATTLE TIMES, Dec. 2, 1996, at A1, available in LEXIS, News Library, Seattm File; Eric Nalder et al., *Playing Favorites—Rules Applied Unevenly, Says Critics [sic] at HUD*, SEATTLE TIMES, Dec. 3, 1996, at A10, available in LEXIS, News Library, Seattm File; Eric Nalder et al., *Quinault Tribe—Minding the Rules, Making Them Work*, SEATTLE TIMES, Dec. 5, 1996, at A1, available in LEXIS, News Library, Seattm File; Eric Nalder et al., *Safety Funds Spent on Frills and Friends*, SEATTLE TIMES, Dec. 3, 1996, at A11, available in LEXIS, News Library, Seattm File; Eric Nalder et al., *Sending Good Money After Bad—HUD Missed Signs of Waste, Then Gave Tribe More Money*, SEATTLE TIMES, Dec. 4, 1996, at A11, available in LEXIS, News Library, Seattm File; Eric Nalder et al., *South Dakota—"Vicious" Politics Gets Blame for Nepotism*, SEATTLE TIMES, Dec. 3, 1996, at A11, available in LEXIS, News Library, Seattm File; Eric Nalder et al., *The Muckleshoots: HUD Program Undermined, While Many Remain in Shacks*, SEATTLE TIMES, Dec. 1, 1996, at A15, available in LEXIS, News Library, Seattm File; Eric Nalder et al., *The Otoes: One Tribe Divided—Leaders Replace Needy on Waiting List for Homes*, SEATTLE TIMES, Dec. 1, 1996, at A17, available in LEXIS, News Library, Seattm File [hereinafter Nalder, *The Otoes*]; Eric Nalder et al., [*The Pequots*], SEATTLE TIMES, Dec. 4, 1996, at A1, available in LEXIS, News Library, Seattm File [hereinafter Nalder, *The Pequots*]; Eric Nalder et al., *Tribal Housing*, SEATTLE TIMES, Dec. 1, 1996, at A1, available in LEXIS, News Library, Seattm File; Eric Nalder et al., *What a Time for the Boss to Leave Town*, SEATTLE TIMES, Dec. 5, 1996, at A1, available in LEXIS, News Library, Seattm File; Eric Nalder et al., *Yakima Tribe—Hired "Rescuer" Ends Up in Prison*, SEATTLE TIMES, Dec. 2, 1996, at A9, available in LEXIS, News Library, Seattm File.

In reporting that the HUD was riddled with fraud, abuse, and mismanagement, the *Seattle Times* reported that "many tribal leaders have taken advantage of relaxed oversight by HUD to benefit themselves, their friends, and their relatives at the expense of more needy Indians." Nalder, *HUD*, *supra*. Examples include: the building of

the Indian nations is a real priority for the United States, then the federal government must fully restore the right of the Indian nations to take this kind of step forward.

CONCLUSION

In recent years, Congress has made great strides in developing new policy initiatives to revitalize the self-determination of the Indian nations. Unfortunately, these efforts are unlikely to have their intended effect because little has been done to eliminate the colonial legal and administrative foundation that has been developed during the first 200 years of the United States' history. While the roots of these colonizing laws and policies run deep into the fabric of the American way of life, there is much associated with American values that supports the rights of all peoples to exercise the right of self-determination.

Mr. President, I believe that you can, and should, participate in the process of ensuring the survival of the Indigenous peoples located in the United States. By embracing a visionary legislative agenda designed to eliminate the federal law that continues to colonize the Indian nations and inhibit Indigenous self-determination, you can make a dramatic change in the course of our history together. Unless some drastic action is taken soon, I fear that the Indian nations are in grave jeopardy. The United States is responsible for this state of affairs. It is my belief that the United States should do something about it.

Da-nay-ho,⁶⁰⁷

Robert B. Porter

luxury houses on big lots using a \$2.5 million HUD grant for low-income housing (including a 5,296 square-foot house for the housing authority's executive director and her husband, who make \$92,319 a year), see Nalder, *Deregulation*, *supra*; the replacement of families on a housing waitlist by housing-authority staff, board members and their families, see Nalder, *The Otoes*, *supra*; and the financing of 15 large homes through a \$1.5 million low-income housing grant for a tribe with no low-income families and a casino reputed to clear \$1 million a day, see Nalder, *The Pequots*, *supra*.

607. "It is said."

