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## Building a New Longhouse: The Case for Government Reform within the Six Nations of the *Haudenosaunee*

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## ARTICLE

### **Building a New Longhouse: The Case for Government Reform within the Six Nations of the *Haudenosaunee***

ROBERT B. PORTER†

Introduction .....	806
I. What is the Current State of <i>Haudenosaunee</i> Govern- ernance? .....	814
A. Acceptance of the <i>Gayanashagowa</i> and Estab- lishment of the Confederacy .....	814
B. Transformation and Americanization.....	821
C. Dysfunction and the Modern Era.....	844
II. What are the Reasons for <i>Haudenosaunee</i> Govern- mental Dysfunction?.....	889
A. The Change in <i>Haudenosaunee</i> Society and Identity.....	890
B. The Transformation of <i>Haudenosaunee</i> Eco-	

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	nomic Philosophy .....	893
	C. The Altering of <i>Haudenosaunee</i> Political Philosophy .....	899
	D. The Corrosive Influence of Modern American Society .....	905
	E. The General Problem of Americanization .....	910
III.	What are the Primary Effects of <i>Haudenosaunee</i> Governmental Dysfunction? .....	912
	A. The Erosion of <i>Haudenosaunee</i> Law .....	913
	B. The Weakening of Government .....	916
	C. The Loss of Sovereignty .....	921
IV.	What is the Case for Reforming <i>Haudenosaunee</i> Government? .....	927
	A. Disorganization and Inaction are Destroying the <i>Haudenosaunee</i> Way of Life .....	928
	B. Decolonization Through Collective Action is the Only Viable Remedy .....	933
	C. Collective Action Can Only Occur if Government is Once Again Made Legitimate ....	937
V.	What Should be the Fundamental Objective of <i>Haudenosaunee</i> Governmental Reform? .....	940
	A. The Restoration of Peace .....	940
	B. The Case for Restoring Peace .....	940
	C. The Process of Restoring Peace .....	943
	Conclusion .....	944

## INTRODUCTION

The Six Nations of the *Haudenosaunee*, or Iroquois Confederacy,<sup>1</sup> have existed as separate sovereign nations for hundreds of years<sup>2</sup> despite the perpetual efforts by Euro-American peoples to colonize *Haudenosaunee* aboriginal territory and destroy their political, social, economic and cultural existence. However, as the twentieth century of the

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1. *Haudenosaunee* means "people of the Long House." See *Haudenosaunee Homepage*, Oct. 8, 1998 <[http://sixnations.buffnet.net/Culture/Welcome.html?article=who\\_we\\_are](http://sixnations.buffnet.net/Culture/Welcome.html?article=who_we_are)> (on file with author and the *Buffalo Law Review*); LEWIS H. MORGAN, *LEAGUE OF THE IROQUOIS* 51 (1962). See generally *A Basic Call to Consciousness: The Hau De No Sau Nee Address to the Western World*, in *BASIC CALL TO CONSCIOUSNESS* 65, 66 (*Akwesasne Notes* ed., 6th ed. 1995); Elisabeth Tooker, *The League of the Iroquois: Its History, Politics, and Ritual*, in 15 *HANDBOOK OF NORTH AMERICAN INDIANS* 418, 418-41 (William C. Sturdevant ed., 1978) [hereinafter *HANDBOOK*].

2. It is estimated that the Confederacy is at least 400 years old. See PAUL A.W. WALLACE, *THE WHITE ROOTS OF PEACE* 3 (1946).

colonizing nation's history draws to a close, there is strong indication that the forces promoting *Haudenosaunee* destruction, which have long caused internal fragmentation within *Haudenosaunee* society, may finally be having their ultimate effect.

Established sometime before the arrival of Christopher Columbus, the *Haudenosaunee* Confederacy was founded upon the concept of maintaining universal peace amongst its component nations—the Mohawk,<sup>3</sup> the Oneida,<sup>4</sup> the

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3. The Mohawks' name for themselves is *Kanienkahagen*, meaning "The People of the Flint." See *Haudenosaunee Homepage*, Oct. 9, 1998 <<http://sixnations.buffnet.net/Culture/Welcome.html?article=who-we-are> (on file with author and the *Buffalo Law Review*). They are also known as the "Keepers of the Eastern Door" and as an "Older Brother." Originally from what is now much of Montgomery County, New York (the so-called Mohawk Valley), the Mohawks live on several different territories in the United States and Canada. See William N. Fenton & Elisabeth Tooker, *Mohawk*, in HANDBOOK, *supra* note 1, at 466, 478. These territories include: *Akwesasne*, which straddles the U.S.-Canada boundary along the Saint Lawrence River, *Kahnawake*, *Kanesatake*, *Tyendinaga*, *Wahta* and the Six Nations Reserve. See *Mohawk Nation Council of Chiefs Homepage*, Oct. 9, 1998 <<http://www.slic.com/~mohwkna/mncc.htm>> (on file with author and the *Buffalo Law Review*). There are also Mohawks living at a settlement in New York, *Ganienkeh*, that arose out of an armed takeover of Adirondack land in 1974. See Robert L. Smith, *Ganienkeh Territory After Nearly 20 Years, New York Officials Remain Frustrated By A Mohawk Settlement that Stirs Debate, Defies Definition*, POST-STANDARD (Syracuse), Nov. 8, 1993, at A1. Moreover, a new Mohawk settlement, *Kanatsiohareke*, was recently established in aboriginal lands in the Mohawk Valley in New York State. See *The Mohawk Valley Project: Kanatsiohareke*, Oct. 9, 1998 <<http://www.atsrc.com/des-site/mohawk.htm>> (on file with author and the *Buffalo Law Review*).

The analysis in this paper is limited to discussion of the Mohawks at *Akwesasne*, a territory comprising approximately 23,000 acres (with 14,000 acres on the American "side") with a total Mohawk enrollment of 3100. See LAURENCE M. HAUPTMAN, FORMULATING AMERICAN INDIAN POLICY IN NEW YORK STATE, 1970-1986 app. at 164-65 (1988) [hereinafter HAUPTMAN, AMERICAN INDIAN POLICY]. There are three different groups claiming governing authority at *Akwesasne*. They include the Canadian recognized Mohawk Council of *Akwesasne*, see *Mohawk Council of Akwesasne Homepage*, Oct. 8, 1998 <<http://www.glen-net.ca/>> (on file with author and the *Buffalo Law Review*), the American recognized Saint Regis Mohawk Tribal Council, see Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 60 Fed. Reg. 9250, 9253 (1995), and the traditional government which traces its roots to the *Gayanashagowa*, the Mohawk Nation Council of Chiefs, see William N. Fenton & Elisabeth Tooker, *Mohawk*, in HANDBOOK, *supra* note 1, at 477-78.

4. The Oneida name for themselves is *Onyotaaka*, meaning "The People of the Standing Stone." See *Oneida Indian Nation Homepage*, Oct. 8, 1998 <<http://one-web.org/oneida>> (on file with author and the *Buffalo Law Review*). They are also known as a "Younger Brother." See *infra* note 38. The Oneidas

Onondaga,<sup>5</sup> the Cayuga,<sup>6</sup> the Seneca<sup>7</sup> and the Tuscarora<sup>8</sup>—

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now live on three different territories in New York, Wisconsin and Ontario. See Jack Campisi, *Oneida*, in HANDBOOK, *supra* note 1, at 485-89. The Oneida Indian Nation of New York is located on approximately 7000 acres, see Paul Lipkowitz, *Oneida Nation's Holdings Grow; The Tribe Buys 1,000 Acres Across Route 46 From the 32-Acre Territory the Oneidas Have Lived on For Centuries*, POST-STANDARD (Syracuse), Sept. 4, 1998, at B3, with a total enrollment of approximately 620 people. See HAUPTMAN, AMERICAN INDIAN POLICY, *supra* note 3, at 165.

5. The Onondaga name for themselves is *Onundagaono* which means the "People of the Hills." See *Haudenosaunee Homepage*, Oct. 9, 1998 <[http://sixnations.buffnet.net/Culture/Welcome.html?article=who\\_we\\_are](http://sixnations.buffnet.net/Culture/Welcome.html?article=who_we_are)> (on file with author and the *Buffalo Law Review*). They are also known as the "Keepers of the Fire" and an "Older Brother." See Harold Blau et al., *Onondaga*, in HANDBOOK, *supra* note 1, at 499. The Onondaga Nation is located near Syracuse, New York on approximately 7300 acres of aboriginal territory with an enrollment of approximately 1475. See HAUPTMAN, AMERICAN INDIAN POLICY, *supra* note 3, at 165.

6. The Cayuga name for themselves is *Guyohkohnyoh* meaning the "People of the Great Swamp." See *Haudenosaunee Homepage*, Oct. 9, 1998 <[http://sixnations.buffnet.net/Culture/Welcome.html?article=who\\_we\\_are](http://sixnations.buffnet.net/Culture/Welcome.html?article=who_we_are)> (on file with author and the *Buffalo Law Review*). They too are also known as a "Younger Brother." See Marian E. White et al., *Cayuga*, in HANDBOOK, *supra* note 1, at 500. The Cayugas lost all of their aboriginal lands in the late eighteenth and early nineteenth centuries. *Id.* at 502. They dispersed, with some joining with a few Senecas and eventually migrating to a territory on the Lower Sandusky River in Ohio and later to the Indian Territory where they became the Seneca-Cayuga Tribe of Oklahoma." *Id.* See generally William C. Sturdevant, *Oklahoma Seneca-Cayuga*, in HANDBOOK, *supra* note 1, at 537-43. The Cayugas have a total enrollment of 396 people, see HAUPTMAN, AMERICAN INDIAN POLICY, *supra* note 3, at 165, who live on other *Haudenosaunee* territory, primarily the Cattaraugus Territory of the Seneca Nation, the Onondaga Nation and Six Nations Reserve. The analysis in this paper is limited to discussion of the Cayugas in New York.

7. The Seneca name for themselves is *Onodowahgah* meaning "People of the Great Hill." See *Haudenosaunee Homepage*, Oct. 9, 1998 <[http://sixnations.buffnet.net/Culture/Welcome.html?article=who\\_we\\_are](http://sixnations.buffnet.net/Culture/Welcome.html?article=who_we_are)> (on file with author and the *Buffalo Law Review*); SENECA LANGUAGE TOPIC REFERENCE GUIDE: NURTURING AND GROWING WITH SENECA LANGUAGE (Gowanada Central School District, Gowanda, N.Y.) 1987, at 2 [hereinafter SENECA LANGUAGE GUIDE]. The Senecas are also known as the "Keepers of the Western Door" and as an "Older Brother." See generally Thomas S. Abler & Elisabeth Tooker, *Seneca*, in HANDBOOK, *supra* note 1, at 505-17. The Senecas now live on several different territories in New York, Ontario and Oklahoma. The Seneca Nation of Indians is a constitutional republic formed in 1848; it is politically separate from the Confederacy. The nation is comprised of approximately 5500 members, about half of whom reside on 50,000 acres of land across Western New York State. See HAUPTMAN, AMERICAN INDIAN POLICY, *supra* note 3, at 165. See generally SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 97 (1989). Seneca people who did not pursue the constitutional form of government in 1848 and who remain members of the Confederacy are known as the *Tonawanda Band of*

through the mutual acceptance of the *Gayanashagowa*, or the Great Law of Peace.<sup>9</sup> Under the *Gayanashagowa*, the *Haudenosaunee* were unified and thus sufficiently empowered to carry on trading activity, diplomatic relations and warfare with England, France and other Indian nations throughout the seventeenth and eighteenth centuries. In securing an intermediate position between the nascent French and British colonies in America, the *Haudenosaunee* were for a time the most significant continental power in what is now the eastern United States and Canada.<sup>10</sup> With

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*Senecas*. See generally Thomas S. Abler & Elisabeth Tooker, *Seneca*, in HANDBOOK, *supra* note 1, at 511-12. See also, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 60 Fed. Reg. 9250 (1995). Other Senecas who moved from aboriginal Seneca territory in the nineteenth century to the Indian Territory are known as the "Seneca-Cayuga Tribe of Oklahoma." See generally William C. Sturdevant, *Oklahoma Seneca-Cayuga*, in HANDBOOK, *supra* note 1, at 537-43. See also Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 60 Fed. Reg. 9250, 9253 (1995). 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* note 1, at 528.

8. The Tuscarora name for themselves is *Ska-Ruh-Reh* meaning "The Shirt Wearing People." See *Haudenosaunee Homepage*, Oct. 9, 1998 <[http://sixnations.buffnet.net/Culture/Welcome.html?article=who\\_we\\_are](http://sixnations.buffnet.net/Culture/Welcome.html?article=who_we_are)> (on file with author and the *Buffalo Law Review*); see also David Landy, *Tuscarora Among the Iroquois*, in HANDBOOK, *supra* note 1, at 518-24. Originally from what is now North Carolina, the Tuscaroras migrated north and became part of the Confederacy in 1722 as the Tuscarora Nation. See *id.* at 518-19. See also Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 60 Fed. Reg. 9250, 9253 (1995). The Tuscaroras number approximately 1000 and live on 5700 acres near Akron, New York. See HAUPTMAN, AMERICAN INDIAN POLICY, *supra* note 3, at 165.

9. Beginning in the nineteenth century, the *Gayanashagowa* and accounts of the founding of the Confederacy were recounted by Indians and transcribed by non-Indians. See, e.g., Arthur C. Parker, *The Constitution of the Five Nations, or the Iroquois Book of the Great Law*, in PARKER ON THE IROQUOIS (William N. Fenton ed., 1968); JOHN ARTHUR GIBSON, CONCERNING THE LEAGUE: THE IROQUOIS TRADITION AS DICTATED IN ONONDAGA (Hanni Woodbury ed., 1992); John C. Mohawk, *Prologue* to Wallace, *supra* note 2, at vii-viii (citing Chief Gibson's account). As with any oral tradition, there are a multitude of interpretations and various accounts of the Confederacy's founding, structure and method of operation. See WILLIAM N. FENTON, THE GREAT LAW AND THE LONGHOUSE 52, 66-67, 94 (1998); *Haudenosaunee Homepage*, Oct. 9, 1998 <[http://sixnations.buffnet.net/Culture/Welcome.html?article=Great\\_Law\\_of\\_Peace](http://sixnations.buffnet.net/Culture/Welcome.html?article=Great_Law_of_Peace)> (on file with author and the *Buffalo Law Review*).

10. Elisabeth Tooker, *The League of the Iroquois: Its History, Politics, and Ritual*, in HANDBOOK, *supra* note 1, at 418 ("Of all Indians in the Northeast, the Iroquois of the League—the famed confederacy of the Mohawk, Oneida,

the ascension of the colonial settlements, however, the Confederacy's power was seriously challenged. Unable to agree upon a common ally during the American Revolutionary War, it was divided and easily neutralized as a potent military threat to the newly established United States.<sup>11</sup> As a result of this disintegration, it was impossible to mount any credible defense. The Confederacy crumbled and the *Haudenosaunee* people scattered throughout what is now New York, Ontario and Quebec.<sup>12</sup>

By the beginning of the nineteenth century, almost all *Haudenosaunee* aboriginal lands had been lost to the United States and its speculators.<sup>13</sup> While the Confederacy eventually was reconstituted,<sup>14</sup> the process of American colonization induced great changes in the *Haudenosaunee*

Onondaga, Cayuga, and Seneca tribes—most profoundly influenced history in the seventeenth and eighteenth centuries.”). The *Haudenosaunee* were especially successful in serving as an intermediary between French and British colonial expansion:

Although the Iroquois were not especially numerous and were reduced in numbers by the epidemics of the early seventeenth century[ ], other individuals, both Indian and White, often found their fate rested on an Iroquois decision, and whole peoples also were to learn that their destinies were similarly determined. No nation was exempt. As both France and England knew, their contest for control of the North American continent ultimately would be decided by the choice the Iroquois made between them. Aware of this, the Iroquois occasionally courted the French but usually found their interests best served by an alliance with the British, and England prevailed.

*Id.* See also *id.* at 430-35.

11. This failure effectively ended the Confederacy as a functioning political entity for many years:

When the Revolution did break out, neither of the tribes that comprised the League nor the members of the separate tribes could agree on the course of action they should take, that is, whether to side with the English, to side with the Revolutionaries, or to remain neutral. Many of the Mohawks decided to espouse the British cause, but many of the Oneidas were sympathetic to the Americans, while the Onondagas, Cayugas, and Senecas were more inclined to the English. Being unable to agree, they covered the council fire of the League in 1777, leaving each tribe to pursue its own course of action during the war.

*Id.* at 434-35.

12. See *id.* at 435.

13. See *id.* at 435-37.

14. The League Council was reestablished at the Six Nations Reserve in Canada and at the Buffalo Creek Reservation in the late 1790s. See *id.* at 435-36.

way of life.<sup>15</sup> Unlike the case with other Indian nations in the United States—where the federal government assumed a paramount role—it was the State of New York (State) that began to assert paternalistic authority over the entirety of *Haudenosaunee* social, cultural, economic and political life. At the same time, the State and its private economic interests continued to press for control over the remaining *Haudenosaunee* territories, eventually succeeding in reducing the entire land base to just a few small reservations by 1842.<sup>16</sup> By the late nineteenth century, State officials and their missionary allies sought to “help” the *Haudenosaunee* as best they could by targeting the population for “civilization” and seeking to eradicate any unique language, culture, common land base or political structure.<sup>17</sup> Since the mid-nineteenth century, the *Haudenosaunee* have continued to face challenges and threats like these, usually motivated by the economic pursuits of outsiders. Lands have been lost. Jurisdiction and control over remaining lands have been undermined. Cultural and social integrity have eroded.

Perhaps most damaging to the inner workings of *Haudenosaunee* society, however, has been the way that the *Haudenosaunee* self-government has been transformed. The State and its social reformers have long fought to undermine the traditional form of government by chiefs, clan mothers and warriors established under the *Gayanashagowa*. As a result of these influences, the Mohawks, the Oneidas, the Cayugas and the Senecas have all split into separate political entities. Nonetheless, despite all of the efforts to transform *Haudenosaunee* governance during the last 225 years, the *Haudenosaunee* continue to exist today as both a Confederacy and as a people.<sup>18</sup>

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15. Colonization can be defined as the exploitation of or annexation of lands and resources previously belonging to another people of a different race or ethnicity, and the involuntary expansion of political power over them, often displacing, partially or completely, their prior political organization. See Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 86 (1993).

16. See Elisabeth Tooker, *The League of the Iroquois: Its History, Politics, and Ritual*, in HANDBOOK, *supra* note 1, at 435-37.

17. See REPORT OF THE SPECIAL COMMITTEE TO INVESTIGATE THE INDIAN PROBLEM OF THE STATE OF NEW YORK (1889) [hereinafter THE WHIPPLE REPORT].

18. Many traditional *Haudenosaunee* people take the position that those people who have rejected the *Gayanashagowa* as the official form of government (for example the Seneca Nation and the Saint Regis Mohawk Tribal Council)



During the last thirty years, however, changes have occurred that threaten the very existence of the *Haudenosaunee* nations. While the "usual" problems—such as land takings and encroachments by the federal and State governments—have continued, dangerous new developments have occurred that have been spawned by the rapid infusion of the American way of life into each of the *Haudenosaunee* societies. Today, almost all *Haudenosaunee* children speak only the English language and are educated in New York State public schools. Most *Haudenosaunee* have divided political loyalties between their own nation and the United States. And perhaps most significantly, all *Haudenosaunee* nations have been transformed by the infusion of millions of dollars of economic development monies, either through federal and State land claims settlement funds,<sup>19</sup> the federal government's Self-Determination Policy<sup>20</sup> or the establishment and proliferation of privately- and publicly-owned businesses within the *Haudenosaunee* territories.<sup>21</sup>

Like the previous society shaping events, the impact of these recent changes in *Haudenosaunee* society has been dramatic. Foremost has been the emergence of crippling political division and infighting. Today, every *Haudenosaunee* nation is suffering through some stage of what can

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are no longer *Haudenosaunee* because they are no longer "within" the Longhouse. See Doug George-Kanentiio, *Senecas' Gaming Move Has Some Bitter Roots*, SYRACUSE HERALD-AM., May 10, 1998, at D3. While I would agree that adopting a new form of government severs any formal relationship with the Confederacy, it is obvious that the people of the Seneca and Mohawk nations effectuating these changes retain the same underlying identity and governing traditions as those who continue allegiance to the Confederacy. Thus, for purposes of this article the term "*Haudenosaunee*" will be used in its broadest practical sense to refer to the entirety of the people now living who are the ancestors of those who lived under the *Gayanashagowa* for hundreds of years.

19. See Seneca Nation Settlement Act of 1990, Pub. L. No. 101-503, § 2, 104 Stat. 1292 (1990) (codified as amended at 25 U.S.C. § 1774d (1994)) (explaining that the Seneca Nation was paid \$60 million in federal and state monetary and in-kind compensation for settlement of fraudulent land leases originally approved by the United States in 1875).

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

21. Indeed, the economic transformation recently occurring within the *Haudenosaunee* nations has been a major event, on par with the *Haudenosaunee* involvement in the fur trade in the seventeenth century or America's Industrial Revolution in the late nineteenth century.

only be called civil war. Much of this infighting has been the result of the economic competition associated with the introduction of capitalism and the problems of having weak tribal governments attempting to regulate this powerful economic activity. In other ways, however, this divisiveness simply reflects the conflict associated with more traditional *Haudenosaunee* people living in the same small physical location with those *Haudenosaunee* people who have assimilated American political and economic values. Viewed from its most basic level, the conflict now occurring may simply be previously non-existent class warfare. Regardless of its actual source, however, this recent infighting amongst the *Haudenosaunee* people has led to death, violence, and the undermining of *Haudeno-saunee* government and sovereignty.

This Article is neither an attempt to describe every aspect of *Haudenosaunee* societal dysfunction nor to identify every one of its possible sources. Instead, its purpose is to focus attention on the one thing common in all human societies that might channel these forces of conflict into the satisfaction of common objectives—the institution of government. In doing so, this Article takes a snapshot of recent events within each of the *Haudenosaunee* nations and attempts to analyze the significance of these events against the historical backdrop of more than five hundred years of *Haudenosaunee* governance. Foremost, however, this Article is my argument, made as forcefully and respectfully as I can, that any hope of resolving the contemporary problems facing the *Haudenosaunee* people and preserving a distinct political existence into the future is dependent upon a major reformation of *Haudenosaunee* national and confederate government.

The reader should be aware of my personal connection to the subject of this Article. I am a member of the Seneca Nation and was raised on our Allegany Reservation. I come from a family of Seneca politicians and civil servants<sup>22</sup> and

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22. My grandfather, Leonard Redeye, served on the Seneca Nation Council for almost 40 years between the 1930s and the 1970s. My mother, Lana Redeye, was appointed the first Seneca Nation Education Director in 1977 and has served for nearly 20 years in various senior administrative positions within the Seneca Nation government. Many of my other relatives from both the Bowen and Redeye sides of my mother's family have been active in our political affairs through the generations. I am also a descendant of one of our most important leaders, *Gyantwahia* (Cornplanter).

for almost four years, I served as the first Attorney General of the Seneca Nation. In that capacity, I was involved in a wide variety of matters associated with our internal and external development and legal affairs, including the partial reform of the Seneca Nation Constitution. As a result of these experiences, I write not only for the academic purpose of trying to understand and analyze what has been happening within my own nation and throughout the Confederacy, but also for the more personal purpose of participating in the revitalization of *Haudenosaunee* self-government and a distinct *Haudenosaunee* way of life.<sup>23</sup>

Part I of this Article is an overview of the origins, transformation and current state of *Haudenosaunee* governance. Part II will identify some of the primary reasons for the recent problems within *Haudenosaunee* government. Part III will explore the primary effects of *Haudenosaunee* governmental dysfunction. In Part IV, I will set forth my argument why *Haudenosaunee* government in every nation should be reformed to some degree. And finally, in Part V, I will propose what I believe should be the fundamental objective of any *Hau-denosaunee* governmental reform process.

## I. WHAT IS THE CURRENT STATE OF HAUDENOSAUNEE GOVERNANCE?

### A. *Acceptance of the Gayanashagowa and Establishment of the Confederacy*

To make sense of what is now happening within *Haudenosaunee* government, it is first necessary to understand how the *Haudenosaunee* people governed for hun-

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23. In doing so, I regret that I must discuss and analyze matters that are, fundamentally in my view, "family business." In the not too distant past, to put in writing and make available to non-*Haudenosaunee* peoples information relating to our internal affairs would have been inappropriate. But in this modern era, too many of our own people and leaders have already aired our "dirty laundry" in public—usually for self-serving political and economic ends—through the media and in the courtrooms and administrative fora of the federal and state governments. As a result, the best solution that I can conceive of right now for addressing the problems that face us is to take this already public information, analyze it in (hopefully) a coherent fashion, and produce some written material that might help *Haudenosaunee* people better comprehend our predicament and spur them to take action to do something about it.

dreds of years previously. Under the *Gayanashagowa*, the most significant aspect of *Haudenosaunee* governance was that “peace was the law” and the affirmative objective of government.<sup>24</sup> So dominant was this philosophy that its pursuit affected the entire range of *Haudenosaunee* international, domestic, clan and interpersonal relationships.

According to *Haudenosaunee* history, the *Gayanashagowa* was a gift from the Creator for the purpose of saving the people of the Six Nations from destroying themselves.

[W]hen the Confederacy was formed, it was a time of great sorrow and terror for the Haudenosaunee. All order and safety had broken down completely and the rule of the headhunter dominated the culture. When a man or woman died . . . [t]he aggrieved family then sought vengeance and a member set forth with the purpose of finding [an] unsuspecting and arguably innocent offender and exacting revenge. That killing sparked a spiral of vengeance and reprisal which found assassins stalking the Northeastern woodlands in a never ending senseless bloodletting.<sup>25</sup>

Against this grisly backdrop of cannibalism and civil war, a young man, born of mysterious circumstances and known outside of *Haudenosaunee* ceremonies only as the “Peacemaker,” brought a powerful message to the survivors of this tribal warfare: “all peoples shall love one another and live together in peace.”<sup>26</sup>

In addition to this substantive message, the Peacemaker also proposed a governmental process through which this message could be brought into practice.<sup>27</sup> The

24. See WALLACE, *supra* note 2, at 7 (explaining that “peace was the law”).

25. See John C. Mohawk, *Prologue* to WALLACE, *supra* note 2, at xvi.

26. See WALLACE, *supra* note 2, at 15. The Peacemaker’s message of peace had three parts—Righteousness (“*Gaiwoh*”), Health (“*Skenon*”) and Power (“*Gashasdenshaa*”)—with each part having two messages:

Righteousness means justice practiced between men and between nations; it means also a desire to see justice prevail.

Health means soundness of mind and body; it also means peace, for that is what comes when minds are sane and bodies cared for.

Power means authority, the authority of law and custom, backed by such force as is necessary to make justice prevail; it means also religion, for justice enforced is the will of the Holder of the Heavens and has his sanction.

*Id.* at 15-16. See also *Haudenosaunee Homepage*, Oct. 9, 1998 <[http://sixnations.buffnet.net/Culture/Welcome.html?article\\_three-principals](http://sixnations.buffnet.net/Culture/Welcome.html?article_three-principals)> (on file with author and the *Buffalo Law Review*).

27. See WALLACE, *supra* note 2, at 16.

Longhouse, which was the traditional *Haudenosaunee* dwelling, had many fires and was designed to ensure that those residing within it could "live together as one household in peace."<sup>28</sup> This Longhouse structure was borrowed as the symbolic model for the governing process to ensure that the *Haudenosaunee* would "have one mind and live under one law" and to continually reaffirm that "thinking shall replace killing, and [that] there shall be one commonwealth."<sup>29</sup>

As might be expected, given the times, the Peacemaker's message was neither universally nor quickly accepted. It took years for there to be an appreciable acceptance of his message of peace.<sup>30</sup> While the process was slow and time consuming, the Peacemaker eventually was able to bring together the leadership of what was to become the Mohawk, Oneida, Onondaga, Cayuga and Seneca nations. Solely on the basis of his teachings, these five nations formed a great alliance that was dedicated to perpetuating the message of peace through unity and strength.

The Peacemaker's message was profound and effective for many reasons. The message was simple and easily communicated and understood by those willing to listen: "all human beings really did possess the potential for rational thought, that when encouraged to use rational thought they would inevitably seek peace."<sup>31</sup> Moreover, while the Peacemaker's message was itself powerful in substance, it was also clear that he had an incredibly effective style of persuasion. He was both positive and visionary, and perhaps most importantly, able to com-

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28. *Id.*

29. *Id.*

30. In the course of his work, the Peacemaker confronted many challenges. The first involved his efforts to convince a ruthless cannibal, whom he later named Hiawatha, to end his evil ways and to accept the Great Law. *See id.* at 17-18. Later, as the Peacemaker and Hiawatha attempt to convince Atotarho, the evil wizard leader of the Onondagas, to accept the Great Law, Hiawatha's three daughters were killed. It is through the condolence of Hiawatha that the Peacemaker rehabilitates his Good Mind from that stricken by grief, thereby showing that reason can return to all men. *See id.* at 23-25. In their final attempt to unify the League by convincing Atotarho (or "Tadadaho"), the Peacemaker and Hiawatha presented all of the other chiefs of the Five Nations who had accepted the Great Law. Only upon seeing the power of the Great Law to bring together this number of leaders and the offering to him of the leadership of the Confederacy does Atotarho accept the Great Law and dedicate his life to the pursuit of reason and peace among all people. *See id.* at 27-29.

31. *See* John C. Mohawk, *Prologue* to WALLACE, *supra* note 2, at xvii.

municate in a manner directly related to the cultural foundations with which his listeners were familiar.<sup>32</sup>

Pursuing peace was fundamental not just to the establishment of the Confederacy, but also its perpetuation. Foremost, the *Gayanashagowa* was a tool of government and frequently has been referred to as the *Haudenosaunee* Constitution.<sup>33</sup> As such, it sets forth a variety of mechanical rules governing the process by which the member nations address confederate affairs,<sup>34</sup> including the management of diplomatic and military relations with the other continental powers, trade relations with governmental and private interests and colonial relationships with client tribes.

The manner in which the *Haudenosaunee* arrived at decisions is evidence of their commitment to peace. Unlike the system of majority rule utilized by the Anglo-Europeans,<sup>35</sup> the *Haudenosaunee* relied upon a governing process that was both dependent upon and designed to achieve consensus. Actions could not be taken unless there was unanimity and its leaders were of "one mind."<sup>36</sup>

In order to facilitate consensus, the Longhouse, the location at which Confederate Council meetings were held, was structured so that all debate took place "across the fire."<sup>37</sup> Discussion on a particular subject would be carried through three separate and elaborate stages until consensus was reached.<sup>38</sup> As might be expected, there was

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32. *See id.*

33. *See* WALLACE, *supra* note 2, at 34.

34. *See id.* at 33-37. For example, Confederate Council discussions did not occur at night to prevent "frayed tempers and hasty judgments." *Id.* at 35. Moreover, public discussion on an important matter could not occur on the same day it was received in Council. If it appeared that serious disagreements existed, committee discussions were held first. *Id.* at 35-36.

35. *See id.* at 34.

36. *See* MORGAN, *supra* note 1, at 111.

37. *See* WALLACE, *supra* note 2, at 40. The Mohawks and Senecas sat on the north side of the fire; the Oneidas and Cayugas sat on the south side. The Onondagas served as mediators and sat on the north side of the fire. *See id.* *See generally* *Haudenosaunee Homepage*, Oct. 9, 1998 <[http://sixnations.buffnet.net/Culture/Welcome.html?Great\\_Law\\_of\\_Peace.html?](http://sixnations.buffnet.net/Culture/Welcome.html?Great_Law_of_Peace.html?)> (on file with author and the *Buffalo Law Review*).

38. *See* WALLACE, *supra* note 2, at 40. Wallace describes the process as follows:

First, each national delegation discussed the proposition and came to a conclusion so that it might speak with one voice. Second, the national unit compared its conclusions with that of its "brother" (the Mohawk with the Seneca, the Oneida with the Cayuga), in order that each side

often disagreement that impeded the discussions.<sup>39</sup> Depending upon the stage at which the discussion broke down, the matter would be referred back to the point at which the process ceased. If, however, it was not possible to achieve unanimity, the matter was laid aside until a later time.<sup>40</sup> Unreasonableness in this process was not tolerated and any "sachem"<sup>41</sup> so acting would have "influences . . . brought to bear on him which he could not well resist."<sup>42</sup>

This elaborate decision-making process ensured that the official positions taken by the Confederacy would carry the full support of all the member nations and their people. Under this system of government, when decisions were reached, they had been extremely well discussed, with each of the nations fully informed of the competing considerations and solidly behind any chosen action. This deliberative process facilitated the compromises and accommodations necessary to achieving "one voice" regarding any planned actions.

Because it was not possible for the *Haudenosaunee* to act without all nations being in agreement, there was no risk that a decision could be perceived by a political minority as being illegitimate. Commensurately, the fact that minority positions had veto power ensured that power was exercised wisely and deliberately.<sup>43</sup> This consensus oriented decision-making process allowed for such a concentration of political strength that the *Haudenosaunee* was the dominant Indian presence on the American

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of the fire might speak with one voice. Then the Mohawks, as representing the Elder Nations, handed the joint decision of Mohawks and Senecas across the fire to the Oneidas, who received it on behalf of the Younger Nations. If the Younger Nations agreed, the matter was handed back across the fire to the Mohawks, who announced the agreement to the Onondagas, and the presiding officer, who inherited the title of "Atotarho," declared the matter settled.

*Id.* See also MORGAN, *supra* note 1, at 112.

39. See WALLACE, *supra* note 2, at 37; see also MORGAN, *supra* note 1, at 112.

40. See MORGAN, *supra* note 1, at 113.

41. This term was used by Morgan to describe the *Haudenosaunee* Confederacy chiefs, as opposed to the "local" national chiefs. *Id.* at 112-13. Arthur C. Parker called them "lords." See generally, PARKER ON THE IROQUOIS, *supra* note 9. The *Haudenosaunee* term is "goyaneh." See *Haudenosaunee Homepage* <[http://sixnations.buffnet.net/culture/welcome.html?article=roll\\_of\\_chiefs](http://sixnations.buffnet.net/culture/welcome.html?article=roll_of_chiefs)>.

42. See MORGAN, *supra* note 1, at 113.

43. See WALLACE, *supra* note 2, at 36.

continent during the eighteenth century.<sup>44</sup>

This dominance often confused outsiders into thinking that the Confederacy was strong solely as the result of force. The reality, however, was that, for the *Haudenosaunee*, peace was the objective and diplomacy was the means to achieve it, with force being utilized only when necessary to enforce the *Gayanashagowa*:

It was not by force alone that the Iroquois held this vast region under their Peace. It was by statesmanship, by a profound understanding of the principles of peace itself. They knew that any real peace must be based on justice and a healthy reasonableness. They knew also that peace will endure only if men recognize the sovereignty of a common law and are prepared to back that law with force—not chiefly for the purpose of punishing those who have disturbed the peace, but rather for the purpose of preventing such disturbance by letting all men know, in advance of any contingency, that the law will certainly prevail.<sup>45</sup>

This philosophy typified the *Haudenosaunee* approach to international relations. According to the *Gayanashagowa*, an invitation was held out to any nation, including a hostile one, to join the *Haudenosaunee* upon acceptance of its terms.<sup>46</sup> If a hostile nation refused an offer of peace, it would be met with a declaration of war and conquest,<sup>47</sup> which did, on occasion, occur.<sup>48</sup>

Because of its foundational belief that all human beings have the power of rational thought and that all significant decisions must be achieved through consensus, *Haudenosaunee* society was afflicted with relatively little interpersonal conflict and transgressions of community norms.<sup>49</sup> Individual behavior was governed by a strong unwritten social code that relied upon social and psychological sanctions, such as ridicule and embarrassment, as the

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44. *See id.* at 3.

45. *Id.*

46. *Id.* at 53. "When the proposition to establish the Great Peace is made to a foreign nation, it shall be done in mutual council. The foreign nation is to be persuaded by reason and urged to come into the Great Peace." *Id.*

47. *See id.*

48. It is reported that the Iroquois destroyed the Hurons, the Neutrals, the Eries, the Susquehannocks and the Tobacco Nation. Others survived, but as client states of the Iroquois upon their acceptance of the Great Law. *See id.* at 56.

49. *See MORGAN, supra* note 1, at 330, 333.



primary methods of enforcement.<sup>50</sup> According to Anthony F.C. Wallace "[b]ehavior was governed not by published laws enforced by police, courts, and jails, but by oral tradition supported by a sense of duty, a fear of gossip, and a dread fear of retaliatory witchcraft."<sup>51</sup>

Despite the fact that pursuing peace was the foundation of *Haudenosaunee* strength, it was also its weakness. Most significantly, with the onset of the American Revolutionary War, the Confederacy was torn apart because of the tension associated with its long-standing relationship with Great Britain and the American colonists.<sup>52</sup> Many Oneidas and Tuscaroras chose to side with the Americans; the Mohawks, Onondagas, Cayugas and Senecas sided with the British.<sup>53</sup> Unable to maintain a unified diplomatic position, the Confederacy was unable to repel American military power.<sup>54</sup> Because the British had made no provision for their *Haudenosaunee* allies in the Treaty of Paris in 1784, the *Haudenosaunee* entered into their own treaties with the United States to secure the peace.<sup>55</sup> The emergence of

50. See *id.* at 333-34 (explaining that theft was handled by "the lash of public indignation, the severest punishment known to the red man, [which] the only penalty attached to this dereliction from the path of integrity").

51. ANTHONY F.C. WALLACE, *DEATH AND REBIRTH OF THE SENECA* 25 (1973). An example of how this system worked is demonstrated by the following story:

A young warrior steals someone else's cow—probably captured during a raid on a white settlement—and slaughters it to feed his hungry family. He does this at a time when other men are out fighting. No prosecution follows, no investigation, no sentence: the unhappy man is nonetheless severely punished, for the nickname "Cow-killer" is pinned to him, and he must drag it rattling behind him wherever he goes. People call him a coward behind his back and snicker when they tell white men, in his presence, a story of an unnamed Indian who killed cows when he should have been killing men.

*Id.* at 25-26. This story was about the Seneca leader Red Jacket, who "vindicated his courage in later wars, became the principal spokesman for his nation, and was widely respected and revered. But he never lost his nickname." *Id.* at 26.

52. See Elisabeth Tooker, *The League of the Iroquois: Its History, Politics, and Ritual*, in *HANDBOOK*, *supra* note 1, at 434-35. Tooker argues that *Haudenosaunee* dominance began to wane after the French and Indian War in 1763, during which the Confederacy also was divided in its loyalties to the British and the French. The resulting British victory allowed them to trade directly with the western Indian nations, thereby bypassing the *Haudenosaunee* as the agent in Indian-Indian relations. See *id.* at 434.

53. See *id.* at 435. The Confederacy "covered the council fire" in 1777 and allowed each nation to pursue its own course. *Id.*

54. See *id.*

55. See Treaty With the Six Nations at Fort Stanwix, Oct. 22, 1784, 7 Stat.

factionalism and division within the Confederacy, however, resulted in the loss of almost all *Haudenosaunee* lands, scattering of its members throughout small reservations in upstate New York and Canada, and the abandonment of the *Gayanashagowa* within a twenty year period following the War.<sup>56</sup> Professor Laurence M. Hauptman, a prolific historian on the *Haudenosaunee*, writes:

The years immediately after the American Revolution were the decisive period in the history of the Iroquois Indians. In the decade and a half following the conflict, the Iroquois lost over 95 percent of their lands as a result of unprecedented white pressures on their vast and rich estate. Although the religious and cultural forms of Iroquois life and reverence for tradition continued, the military power of the individual nations—Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora—as well as that of its ancient league were gone forever.<sup>57</sup>

## B. Transformation and Americanization.

1. *The Foundation of State Colonization.* Following the Revolutionary War, the Confederacy was reconstituted,<sup>58</sup> and the *Haudenosaunee* entered a period in which outside

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15; Treaty at Fort Harmar, Jan. 9, 1789, 7 Stat. 33; Treaty With the Six Nations at Canandaigua, Nov. 11, 1794, 7 Stat. 44.

56. In addition to the loss of the aboriginal land base, there were other disastrous effects:

A further consequence . . . was an exacerbation of factionalism. The Mohawks, most of the Cayuga, and some from the other tribes refused to live in the United States. Led by Joseph Brant, many of them removed to a reservation at Grand River set aside for them in Ontario by the Crown; their descendants have remained there. This act split the confederacy in half. Among those remaining in New York, further factional divisions arose over issues such as the war in the west and relationships with White Americans generally.

Anthony F.C. Wallace, *Origins of the Longhouse Religion*, in HANDBOOK, *supra* note 1, at 444. See also WILLIAM T. HAGAN, LONGHOUSE DIPLOMACY AND FRONTIER WARFARE 55-56 (1976).

57. HAUPTMAN, AMERICAN INDIAN POLICY, *supra* note 3, at 4-5.

58. See Elisabeth Tooker, *The League of the Iroquois: Its History, Politics, and Ritual*, in HANDBOOK, *supra* note 1, at 435. At the end of the eighteenth century, "the fire of the League was rekindled in the two places where the largest numbers of Iroquois had settled after the Revolution: at the Six Nations Reserve in Canada and at the Buffalo Creek Reservation [of the Seneca Nation] in the United States." *Id.*

forces began to assume a greater and greater role over internal affairs. Although the British and French colonies—through their military, economic and religious agents—long had been a corrosive influence on the *Haudenosaunee*,<sup>59</sup> the loss of land and disruption of society following the War had eliminated critical barriers against the forces of Western colonization.

Initially, with the establishment of the *Haudenosaunee* reservations,<sup>60</sup> the federal policy towards the *Haudenosaunee* was “vaguely benevolent” but nonetheless designed to effectuate the prevailing national sentiment that “civilization” of the native should be the fundamental objective.<sup>61</sup> Within a short time after their establishment, however, the reservation communities became “slums in the wilderness, displaying unacceptably high levels of drunkenness, of fighting and brawling, of instability of households, and of witchcraft accusation.”<sup>62</sup> The reason for this state of affairs was tied directly to the “fundamental incompatibility between Iroquois social structure and reser-

59. See Elisabeth Tooker, *The League of the Iroquois: Its History, Politics, and Ritual*, in HANDBOOK, *supra* note 1, at 430-35.

60. Aboriginal *Haudenosaunee* territory was radically transformed following the Revolutionary War through a series of land purchases. The federal government, the State and speculators all were involved in the process of obtaining title to *Haudenosaunee* lands. Some of these transactions were legal under federal law while others were illegal. As a result, every *Haudenosaunee* nation except the *Tuscaroras* have a lawsuit pending against the State. Conceptually, however, existing *Houdenosaunee* [sic] territories are simply the remnants of the aboriginal territory that has not been sold or taken. See generally WILLIAM STARNA & CHRISTOPHER VECSEY, *IROQUOIS LAND CLAIMS* (1988).

61. WALLACE, *supra* note 51, at 444-45. Wallace writes of the Federalist’s “optimistic philosophy:”

In this official view, the Indians were as capable of civilization as any other people and could be expected to scale the ladder of progress just as the ancestors of the Whites had. It was something of a moral duty to aid the Indians along the path to civilization by educating them. But coercive methods were not to be applied. Thus there was no effort to force conversion to Christianity, there was no intrusion of local law with respect to the formalities of marriage or the legitimacy of offspring, there was no garrison placed on the reserves to detect or punish crime as defined by the Whites. Congress merely passed legislation establishing a small fund to support efforts to civilize the Indian natives.

*Id.* at 445.

62. *Id.*

vation life.”<sup>63</sup> Indeed, the entirety of traditional *Haudenosaunee* life had been virtually destroyed with the establishment of the reservations:

Iroquois social structure was adapted to a situation in which males ranged widely on hunting, war, and diplomatic missions and females managed the villages and agriculture. While Indians could and did hunt off the reserve, the old days of grand-scale hunting and trading across half a continent were gone. No more war parties could go out except as auxiliaries of the U.S. Army. And diplomacy was reduced to annual conferences with the local Indian agent. The men, in effect, had been rendered politically powerless and now were jammed in what was for them—but not for many White—an intolerably crowded situation, where antipathies between men silently grew into deadly feuds and where sexual jealousies easily forced couples to separate. Although there was enough land for the women to farm as before by traditional methods, the men were left virtually unemployed much of the year.<sup>64</sup>

In this condition, the primary traditional institutions that had existed to hold *Haudenosaunee* society together—such as religion and government—could not properly function.<sup>65</sup> The missionaries and other Whites began to settle on and near the *Haudenosaunee* lands and, perhaps as a defense against all of this change, a new *Haudenosaunee* religion was spawned—the *Gaiwio*, or the Code of Hand-some Lake.<sup>66</sup> These events precipitated other changes in *Haudenosaunee* life—such as convincing the men that farm-ing was not “women’s work” and should be taken up—that helped to revitalize *Haudenosaunee* society during a

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63. *Id.*

64. *Id.*

65. *See id.* Wallace further writes:

To reduce the added pain and anxiety produced by these circumstances, the traditional religious rituals by themselves were inadequate. They were designed to provide cathartic relief to the stoic and self-deprived good hunter and to the bereaved kinsman, all expressed in a posture of thankfulness to and solidarity with the pantheon. But the ritual indulgence of dependency wishes, of aggressive fantasies, and of alcohol cravings was not helpful in a situation where there was already, because of the constraints of the reservation system, too much dependency, too much hostility, too much drunkenness.

*Id.*

66. *See id.* at 445-48.

time of considerable crisis.<sup>67</sup>

One of the most significant effects on the *Haudenosaunee* following the Revolutionary War was the emergence of New York State as the primary colonizing influence. During colonial times, New York had always assumed that it had a superior right to deal with the *Haudenosaunee*. In part this reflected the natural result of the two sovereigns being in such close proximity to each other. Trade, warfare and diplomatic relationships were established long before there existed a United States government. Indeed, the State and the federal government competed for many years for the right to treat with the *Haudenosaunee* and to extinguish Indian land title.<sup>68</sup> Against this historical backdrop, the State began to assert an even greater role in *Haudenosaunee* affairs after the Revolution. Its motivations were primarily economic—to obtain title to all remaining *Haudenosaunee* lands and eliminate the ability of the *Haudenosaunee* to interfere with the economic development of New York State.<sup>69</sup>

As part of this process, the State began to legislate with respect to *Haudenosaunee* internal affairs. Beginning in the early nineteenth century, the State legislature purported to

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67. The *Gaiwiiio's* influence was considerable:

At the very least, it can be said to have provided effective moral sanction for certain moral, technological, and social adaptations that the Iroquois had to make if they were to survive at all. More generally, it can be seen as having not only made possible the adoption of survival techniques but also enabled Iroquois people to do this in a time of crisis without losing contact with their past and without sacrificing their identity and self-respect as Indians.

*Id.* at 448

68. See Barbara Graymont, *New York State Indian Policy After the Revolution*, 57 N.Y. HIST. 438, 440 (1976) (explaining that the State's policy after the Revolution was to extinguish "any claim of the United States Congress to sovereignty over Indian affairs in the State of New York" and to extinguish "the title of the Indians to the soil"); HAUPTMAN, AMERICAN INDIAN POLICY, *supra* note 3, at 4-8 (highlighting the competition between State and federal authorities to secure relationships with the *Haudenosaunee* and to secure land from them); see, e.g., *Oneida Indian Nation of N.Y. v. New York*, 860 F.2d 1145 (2d Cir. 1988) (holding that the State had authority to extinguish Indian title under the Articles of Confederation).

69. See HAUPTMAN, AMERICAN INDIAN POLICY, *supra* note 3, at 3-4 ("Since 1777, American Indian-New York State relations have centered on land and jurisdictional questions. Although state policies were at times protective and often obsessively paternalistic in approach, one can conclude that more frequently than not New York State American Indian policies were designed to get at the Indian land base.") (footnote omitted).

ban the cutting of timber on Indian lands,<sup>70</sup> ban non-Indians from intruding on the reservations and authorize the county district attorneys to enforce these laws.<sup>71</sup> It also began to authorize non-Indians<sup>72</sup> to lease Allegany Reservation lands from the Senecas<sup>73</sup> and to impose taxes on lands ceded pursuant to treaties.<sup>73</sup>

In addition to perpetuating the State's economic interests, the legislature also began to address the educational and social welfare needs of the *Haudenosaunee*. As has been described, the early nineteenth century was a period of considerable social decay as the transition to reservation life occurred. Thus, in 1846, funds were provided for the establishment of school houses on the Allegany and Cattaraugus Reservations and later, in 1855, for the establishment of the State's first boarding school—the Thomas Asylum for Orphan and Destitute Indian Children.<sup>74</sup> The State Board of Charities was established to care for the Indian needy, a function which has continued for over 125 years under the aegis of the State Department of Social Services.<sup>75</sup> Thus, during the nineteenth century, the State had embarked upon a two-fold mission: to appease economic and political interests by continuing to press for title and control over *Haudenosaunee* lands and to placate the social reformers intent upon providing educational and social welfare "assistance."

Eventually, however, the State's concern for the welfare of the *Haudenosaunee* had evolved to what it considered to be its "Indian Problem."<sup>76</sup> There was a widespread belief amongst State officials and "friends" of the Indians that the *Haudenosaunee* way of life was depraved and barbaric and that something should be done to "civilize" them. A major investigation into the State's "Indian Problem," chaired by

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70. See An Act to Prevent Trespasses on Indian Lands Within this State, Apr. 2, 1813, ch. 91, 1813 N.Y.R.L. 554 (repealed 1909).

71. See An Act Respecting Intrusions on Indian Lands, Mar. 31, 1821, ch. 204, 1819-21 N.Y. Laws 183 (repealed 1909).

72. See *Hondorf v. Atwater*, 149 N.E. 986 (N.Y. 1894). See also The Seneca Nation Settlement Act of 1990, Pub. L. No. 101-503, §2, 104 Stat. 1292 (1990) (codified as amended at 25 U.S.C. § 1774).

73. See An Act in Relation to Roads and Bridges Within the Allegany and Delaware Creek Reservations, May 9, 1840, ch. 254, 1840 N.Y. Laws 201. This statute was declared invalid in *The New York Indians*, 72 U.S. 761 (1866).

74. See HAUPTMAN, AMERICAN INDIAN POLICY, *supra* note 3, at 9.

75. See *id.* at 10.

76. ASSEMBLY DOC. NO. 43, 78th Legis. Sess. 1 (N.Y. 1855).

Assemblyman J.S. Whipple of Salamanca, occurred in 1888.<sup>77</sup> The investigating committee explored and condemned every aspect of *Haudenosaunee* law, custom, land tenure, lifestyle and religious practice. Its conclusion about what could be done for the "good of the Indian," was unmistakably clear: "Exterminate the tribe and preserve the individual; make citizens of them and divide their lands in severalty."<sup>78</sup> As a result, much of the State's policy for dealing with the *Haudenosaunee* was shaped during a time when "Americanization" was the foremost consideration throughout the United States. This process entailed four separate policy objectives:

- (1) the Christianizing activities of missionaries on reservations in order to stamp out "paganism";
- (2) the exposure of the Indian to white Americans' ways through compulsory education and boarding schools such as Carlisle, Hampton, and Lincoln Institutes;
- (3) the break-up of tribal lands and allotment to individual Indians to instill personal initiative, allegedly required by the free enterprise system; and finally, in return for accepting land-in-severalty; and
- (4) the "rewarding" of Indians with United States citizenship.<sup>79</sup>

The "Whipple Report" confirmed all of these conclusions and set the direction of the State's Indian policies into the future.<sup>80</sup>

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77. WHIPPLE REPORT, *supra* note 17, at 3.

78. *See id.* at 68. The state's effort to promote the assimilation of the *Haudenosaunee* was not a local effort; the United States as a whole had accepted that the best thing that could be done for Indian people was to eliminate the tribal nature of their existence. *See* The General Allotment Act of 1887, 25 U.S.C. § 331 (1994). *See generally* Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 2 (1995); Alison 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. 774 (1997).

79. *See* HAUPTMAN, AMERICAN INDIAN POLICY, *supra* note 3, at 10.

80. *Id.* at 11-12. Another commission to investigate the "Indian Problem" was convened by Governor Theodore Roosevelt in 1900. *Id.* It concluded that "so far as legally possible, all jurisdiction over the Indians should be relegated to the National Government" and that "steps be taken for the allotment of their lands in severalty" under the provisions of the Dawes Act and that they be admitted to the full rights of American citizenship." UNITED STATES BOARD OF INDIAN COMMISSIONERS, 32ND ANN. REP. 1900 (1901).

2. *Nineteenth Century State Efforts to Transform Haudenosaunee Governance.* The State's nineteenth-century colonization policies had a critical effect upon *Haudenosaunee* governance and jurisdiction. As *Haudenosaunee* people became more assimilated into American society, there emerged various efforts within each of the *Haudenosaunee* nations to replace the traditional form of governance under the *Gayaneshogowa* with constitutional forms of government modeled after the American Constitution. These developments were supported by the State and its business and social reformer interests intent upon their two-fold mission of "civilizing" the Indians and otherwise making it easier to obtain the remaining *Haudenosaunee* lands. Unfortunately, these efforts to transform traditional government often were easily fueled by the misconduct of the traditional leaders. Thus, often at the request of assimilated *Haudenosaunee* people, at various times during the nineteenth century, the State promoted the establishment of Western elected forms of government within each of the *Haudenosaunee* nations.

a. *The Mohawk Nation.* The State's efforts to transform *Haudenosaunee* governance has had the greatest effect within the Mohawk and Seneca Nations. At the Mohawk Nation, the official government recognized by the United States for nearly two hundred years has been the one established pursuant to provisions of New York State law.<sup>81</sup> This historical and legal anomaly originates with the efforts of the Jesuits to assist the Mohawks in establishing elected representatives.<sup>82</sup> In the mid-eighteenth century, a group of Mohawks from *Kahnawake* left and established a new village further down the Saint Lawrence River at what became known as Saint Regis.<sup>83</sup> After the Revolutionary War, Onondagas and other Indians, including Abenakis,

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81. See William A. Starna, *The Repeal of Article 8: Law, Government, and Cultural Politics at Akwesasne*, 18 AMER. INDIAN L. REV. 297, 298 (1993).

82. See *id.* at 301.

83. See Elisabeth Tooker, *The League of the Iroquois: Its History, Politics, and Ritual*, in HANDBOOK, *supra* note 1, at 473. The village was started because of "exhaustion of land at Caughnawaga, a factional dispute there, and the desire of the French to establish an additional post on the Upper Saint Lawrence" and was named after a French missionary, Jean François Régis. See *id.*



migrated to Saint Regis.<sup>84</sup> And in 1802, the State enacted the first of several statutes providing for an elective form of government on the American "side," the Saint Regis Mohawk Tribal Council.<sup>85</sup>

As an historical record, it is unclear whether the State's action was taken at the request of the Saint Regis Mohawks or whether the State imposed its will unilaterally.<sup>86</sup> What is clear, however, is that since 1802, there has been support from within the *Akwesasne* community on the American "side" for an elected form of government based upon New York State law.<sup>87</sup> This has occurred despite the continued support by many Mohawks of the hereditary chiefs established in the traditional manner under the *Gayanashagowa*.<sup>88</sup> Indeed, in 1888 the Confederacy concluded that the Mohawks who had gone to Grand River following the American Revolution had abdicated their position in the Confederate Council and formally acknowledged that the traditional Mohawks at Saint Regis should serve as the Mohawk Nation in their stead.<sup>89</sup> Since

84. *See id.*

85. *See* N.Y. Indian Law §§ 100-12 (McKinney 1950 & Supp. 1997); May 18, 1892, ch. 679, 1892 N.Y. Laws 1573; An Act in Relation to the St. Regis Tribe of Indians in the County of Franklin, of Apr. 30, 1875, ch. 226, 1875 N.Y. Laws 215 (repealed 1909); An Act Relative to the Different Tribes and Nations of Indians within this State, Apr. 10, 1813, ch. 92, §§ 13-14, 1813 (repealed 1909); An Act for the Benefit of the St. Regis Indians, Mar. 26, 1802, ch. 50, 1802 N.Y. Laws 62 (repealed 1909).

86. *See* Starna, *supra* note 81, at 302.

87. *See id.* at 303-04 ("If the 1802 statute was unilaterally 'imposed' by New York State officials, it seems that many of the Indians at Saint Regis accepted and were involved in its creation.")

88. Starna writes that the traditional government has not always been viable:

There is little evidence that a traditional or life chiefs form of government was active to any significant degree on the American side in the decades before about 1885. However, a traditional government of twelve life chiefs continued to function on the Canadian reserve until 1888, when Canada took steps to impose its policies on the Saint Regis Mohawks living in Quebec and Ontario. In that year, an Order in Council was passed replacing the life chiefs with twelve elected councilors under the pretext of charges of malfeasance on the part of the chiefs. As with the elective government on the American side, this too was challenged by supporters of the life chiefs form of government, many of whom were said to be "from the American side of the line."

*See* Starna, *supra* note 81, at 306 n.53 (citation omitted); *see also* William N. Fenton & Elisabeth Tooker, *Mohawk*, in HANDBOOK, *supra* note 1, at 477.

89. *See* WHIPPLE REPORT, *supra* note 17, at 12; STARNA, *supra* note 81, at 305.

that time, the Confederacy has maintained that this group of Mohawks, known as the Mohawk Nation Council of Chiefs, is the legitimate Mohawk government.<sup>90</sup> Although there have been a few challenges over the last two hundred years by those supporting the traditional leadership to oust the elected government, none have successfully dislodged the Saint Regis Tribal Council from being officially recognized as the government of the Mohawk Nation by the State or the United States.<sup>91</sup>

b. *The Seneca Nation.* As with the Mohawk Nation, the State played a significant role in the transformation of Seneca Nation government in the mid-nineteenth century. In 1848, the traditional Seneca leaders provided for under the *Gayanashagowa* were overthrown and a constitutional

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90. See William N. Fenton & Elisabeth Tooker, *Mohawk*, in HANDBOOK, *supra* note 1, at 477. The Mohawk Nation Council strenuously asserts that it is the only legitimate government at *Akwesasne*:

The Mohawk Nation Council, its Chiefs, Clanmothers and Faithkeepers are not to be confused with the St. Regis (Mohawk) Tribal Council.

The St. Regis Tribal Council is a form of government that was forceably [sic] imposed upon the Akwesasne Mohawk people by New York State in 1892. Our people have consistently resisted and rebuked this form of government throughout its history. It has only shown significant consideration since 1972, when it gained federal recognition, and it began to administer much needed health, welfare and social service programs to this community.

The St. Regis Tribal Council exists because the United States Government has chosen to recognize "a government that it created", instead of the one that was given to the Mohawk People by the Creator. It is unfortunate that it has become the government recognized by New York State and the Federal government as the legal entity at *Akwesasne*. . . .

The St. Regis Tribal Council government that was created by New York State is not a sovereign nation. It is merely a creation of New York State. New York cannot create sovereign nations nor can it take away Sovereignty that is vested in the Mohawk Nation Council.

The Mohawk Nation Council is the real government of the Mohawk People. We urge anyone associated or dealing with the Mohawk Nation to beware of any misrepresentation or impersonations of the Mohawk Nation Council.

See *Mohawk Nation Council of Chiefs Homepage*, Oct. 9, 1998 <<http://www.slic.com/~mohawkna/mncc.htm>> (on file with author and the *Buffalo Law Review*).

91. See also Starna, *supra* note 81, at 305-07 (noting opposition movements in the 1880s, the 1930s and the 1940s).

republic, the Seneca Nation of Indians, was established.<sup>92</sup> Primarily, the effort to displace the traditional government of the Seneca Nation was spawned by the belief that the traditional leaders had betrayed the Seneca People. One of the main issues of contention related to whether the treaty annuities received from the federal and State governments should be distributed to the People directly or kept for governmental purposes.<sup>93</sup> It was widely believed that the chiefs were simply appropriating the annuities for themselves. The second major issue precipitating the Revolution was the acceptance of bribes by the chiefs<sup>94</sup> and their consequent agreement to sell all remaining Seneca lands and remove all Senecas in New York to Kansas under the 1838 Treaty of Buffalo Creek.<sup>95</sup>

In 1842, a so-called "Compromise Treaty" restored the Allegany and Cattaraugus Reservations to the Senecas by relinquishing claim to the Tonawanda and Buffalo Creek Reservations.<sup>96</sup> Three years later, however, the State, urged

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92. See Thomas Abler, *Factional Dispute and Party Conflict within the Seneca Nation 1845-1890: An Ethnohistorical Analysis* 93-149 (1969) (unpublished Ph.D. thesis, University of Toronto) (on file with author and the *Buffalo Law Review*) [hereinafter Abler, *Factional Dispute*].

93. See generally *id.* at 109-16. Abler concludes that while there were several issues that precipitated the revolution, "[i]t was the annuity question, particularly a change in Federal policy with respect to the annuity, which precipitated the 1848 revolution." *Id.* at 110.

94. Abler, writing about U.S. Interpreter Nathaniel T. Strong's account of the Treaty, describes some of the historical "confusion" about whether the chiefs were actually bribed:

Strong suggests, perhaps not without foundation, that the bribes presented to the chiefs for the 1838 treaty were simply the result of the long tradition in Indian diplomacy in which chiefs expected, and were expected, to receive gifts as a normal part of diplomatic relations.

It is likely that although the chiefs were given "gifts" in the 1830's as they had been in the two previous centuries, the system had still changed. In early historic times the chiefs were expected to distribute the gifts given them to their people (see for example the numerous quotations in the Jesuit Relations mentioning the relative poverty of chiefs or captains). Evidence suggests that the chiefs were the most highly acculturated portion of the Seneca community. It is likely that the Seneca chiefs and sachems no longer felt that the privileges of their office should be redistributed.

*Id.* at 98-99 (citation omitted).

95. See *The Treaty with the New York Indians* (also known as Buffalo Creek Treaty), June 11, 1838, 7 Stat. 550. See generally Abler, *Factional Dispute*, *supra* note 92, at 96-98.

96. See *Treaty with the Seneca* (also known as the Compromise Treaty), May 20, 1842, 7 Stat. 586. The notion that the 1842 Treaty of Buffalo Creek was

on by those Senecas disgusted with the traditional leadership, passed a law that fundamentally altered the Seneca government. The statute provided for new officers of the Seneca government—a clerk, a treasurer, six peacemakers and two marshals—to be selected from the traditional chiefs<sup>97</sup> and defined the duties of the existing chiefs and the new officers.<sup>98</sup> Not surprisingly, two factions of chiefs emerged—those in favor of the “Law” and those who were “anti-Law”—split along the lines of who had been put in power under the “Law.”<sup>99</sup>

By 1847, a compromise between the factions had emerged that called for no changes in the 1845 Law. Nonetheless, the State acted unilaterally to amend it to provide for the popular election of the positions of clerk,<sup>100</sup> treasurer,<sup>101</sup> marshal<sup>102</sup> and peacemaker<sup>103</sup> set forth under

a “compromise” is a myth. None of the Seneca chiefs at Allegany or Cattaraugus supported sacrificing the Buffalo Creek or Tonawanda Reservations to restore the claim to their own. It would be more correct to say that the 1842 Treaty was “supplemental” or “the New York Whig-Hicksite Friend Compromise of 1842 [ ] affected the Seneca.” See Laurence M. Hauptman, *The State’s Men, the Salvation Seekers, and the Seneca: The Supplemental Treaty of Buffalo Creek, 1842*, 78 N.Y. HIST. 51, 82 (Jan. 1997). Not surprisingly, the Senecas residing at Tonawanda refused to participate in the Compromise Treaty. They lobbied independently to secure title to their reservation and were successful; they obtained a treaty in 1857 that not only provided funds for them to buy out non-Indian claimants but also acknowledged them as an independent political entity. See *Treaty Between the United States and the Tonawanda Band of Seneca Indians*, Nov. 5, 1857, 11 Stat. 735.

97. See Act of May 8, 1845, ch. 150, § 5, 1845 N.Y. Laws 146, 149-50; see also Ablor, *Factional Dispute*, *supra* note 92, at 102-04.

98. See Act of May 8, 1845, ch. 150, § 5, 1845 N.Y. Laws 146, 149-50.

99. See Ablor, *Factional Dispute*, *supra* note 92, at 103.

100. See Act of Nov. 15, 1847, ch. 365, § 7, 1847 N.Y. Laws 464, 465-66; Act of Apr. 7, 1863, ch. 90, §§ 6, 7, 14, 1863 N.Y. Laws 135, 137-41, *amended by* Act of May 21, 1884 N.Y. Laws 381; Act of May 18, 1892, ch. 679, § 45, 1892 N.Y. Laws 1573, 1584-85 (codified at N.Y. INDIAN LAW § 45 (McKinney 1950 & Supp. 1997) (providing for the duties of the clerk)).

101. See Act of Nov. 15, 1847, ch. 365, § 6, 1847 N.Y. Laws 464, 464; Act of Apr. 7, 1863, ch. 90, § 5, 1863 N.Y. Laws 135, 136-37; Act of May 18, 1892, ch. 679, § 44, 1892 N.Y. Laws 1573, 1584, *amended by* Act of Mar. 27, 1893, ch. 229, § 44, 1893 N.Y. Laws 415, 420 (codified at N.Y. INDIAN LAW § 44 (McKinney 1950 & Supp. 1997)) (providing for the duties of the treasurer).

102. See Act of Nov. 15, 1847, ch. 365, § 1, 1847 N.Y. Laws 464, 464; Act of Apr. 7, 1863, ch. 90, § 1, 1863 N.Y. Laws 135, 135; Act of May 18, 1892, ch. 679, § 41, 1892 N.Y. Laws 1573, 1582, (codified at N.Y. INDIAN LAW § 41 (McKinney 1950 & Supp. 1997) (providing that the “Seneca nation shall have a marshal”)); see also Act of Nov. 15, 1847, ch. 365, § 13, 1847 N.Y. Laws 464, 468; Act of Apr. 7, 1863, ch. 90, §§ 12, 28 & 29, 1863 N.Y. Laws 135, 140-49; Act of May 18,

the earlier law.<sup>104</sup> Of these statutes and their contribution to the Seneca Revolution of 1848, Thomas Abler, a leading anthropologist on the Senecas, concludes:

The Act of 1845, amended in 1847, constitut[ed] the beginning of the extraordinary changes in the Seneca political system which reached their climax with the revolution of 1848. These acts of the New York State Legislature provided many of the important elements of the constitution adopted in 1848.<sup>105</sup>

On December 4, 1848, the Seneca Republic was established when a Constitution was adopted at the Longhouse at the Cattaraugus Reservation. The federal and State governments soon followed with their recognition of the new government.<sup>106</sup> Not surprisingly, the Constitution was not adopted with unanimous support. In the years immediately following its adoption, the "old" chiefs and their supporters (including the Orthodox Quakers) vigorously opposed the constitutional system. At one point early on, they even formed their own party, won the election, and tried to disband the constitutional system.<sup>107</sup> But Constitutional restrictions on the ability to amend the Constitution were a key determinant in the failure of the "Chiefs Party" to disband the new government. Perhaps most critically, the federal and State governments affirmed support for the new government, continued to reject efforts by the "Chiefs Party" to derecognize and even provided funds to support the electoral process.<sup>108</sup> Thus, "the Chiefs,

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1892, ch. 679, § 54, 1892 N.Y. Laws 1573, 1587-88, *amended by* Act of Mar. 27, 1893, ch. 229, § 54, 1893 N.Y. Laws 415, 423 (codified at N.Y. INDIAN LAW § 53 (McKinney 1950 & Supp. 1997) (providing for the duties of the marshals)).

103. *See* Act of Nov. 15, 1847, ch. 365, § 1, 1847 N.Y. Laws 464, 464; Act of Apr. 7, 1863, ch. 90, § 1, 1863 N.Y. Laws 135, 135; Act of May 18, 1892, ch. 679, § 41, 1892 N.Y. Laws 1573, 1582 (codified at N.Y. INDIAN LAW § 41 (McKinney 1950) (providing that the "Seneca nation shall have . . . three peacemakers")); *see also* Act of Nov. 15, 1847, ch. 365, § 9, 1847 N.Y. Laws 464, 467; Act of Apr. 7, 1863, ch. 90, § 8, 1863 N.Y. Laws 135, 139; Act of May 18, 1892, ch. 679, § 50, 1892 N.Y. Laws 1573, 1586, *amended by* Act of Mar. 27, 1893, ch. 229, § 50, 1893 N.Y. Laws 415, 422 (codified at N.Y. INDIAN LAW § 50 (McKinney 1950) (defining incompetency of peacemakers to hear cases)). *See generally* Act of May 10, 1915, ch. 560, § 46, 1915 N.Y. Laws 1741 (codified at N.Y. INDIAN LAW § 46 (McKinney & Supp. 1997) (defining the jurisdiction of the peacemakers courts)).

104. *See* Abler, *Factional Dispute*, *supra* note 92, at 104.

105. *Id.*

106. *See id.* at 121.

107. *See id.* at 132-46.

108. *See id.* at 127-29 (regarding 1849 attempt of "old" chiefs to invalidate

except for an attempt in 1864, never again made an attempt which seem[ed] to have been taken seriously to regain the reins of government."<sup>109</sup>

For 150 years, the Seneca Nation Constitution has remained the primary mechanism by which the Seneca People have handled official governmental affairs. Nonetheless, the nineteenth century State laws purporting to establish the Seneca Nation government, in addition to later provisions purporting to define the authority of the Nation President<sup>110</sup> and Council,<sup>111</sup> illegally remain a part of the State's laws and continue to serve as a source of confusion.<sup>112</sup> While the historical record is clear that the Seneca People adopted the American constitutional model for seemingly legitimate reasons—weakness and corruptness of the traditional leaders—the role of the federal and State governments, the missionaries, the social reformers in supporting this revolutionary process is unmistakable. This should be of little surprise, since

a strong factor in [the decision by federal and state officials to recognize the new Seneca government] was the outlook at the time . . . as to what constitute[d] a just and proper form of government . . . The republican form of government was to officials in Washington and Albany (as it was to the Quakers) without a doubt "progress" over the hereditary chiefs council.<sup>113</sup>

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recognition of new government); *id.* at 131 (regarding 1850 attempt); *id.* at 133-41 (regarding the 1851, 1852 and 1853 attempts after securing office); *id.* at 145-46 (regarding the 1855 attempt after the January Constitutional convention).

109. *Id.* at 147.

110. See Act of May 18, 1892, ch. 679, § 72, 1892 N.Y. Laws 1573, 1591-92, (codified at N.Y. INDIAN LAW § 72 (McKinney 1950)).

111. See Act of May 26, 1969, ch. 1022, § 1, 1969 N.Y. Laws.

112. See, e.g., N.Y. INDIAN LAW §§ 41, 44, 45, 46, 49, 53, 72, 73 (McKinney 1950 & Supp. 1997). These laws, like all other provisions of State law purporting to regulate internal tribal political affairs, are invalid as a matter of federal law. See, e.g., *Bowen v. Doyle*, 880 F. Supp. 99 (1995) (rejecting the authority of the New York State courts to exercise civil jurisdiction over internal Seneca political matters); *Williams v. Lee*, 358 U.S. 217 (1959) (rejecting state laws that interfere with the right of reservation Indians to make their own laws and live by them); *Worcester v. Georgia*, 31 U.S. 515 (1832) (rejecting the application of state laws within the Indian territory absent express Congressional consent).

113. See *Abler, Factional Dispute*, *supra* note 92, at 121. *Abler* also concludes that "the petitions of the chiefs do not attack this view. . . . Their petitions recognized the republican form of government as desirable, but put

c. *The Tonawanda Band of Senecas*. Subsequent to the Treaty of Buffalo Creek of 1842, the Senecas living on the Tonawanda Reservation continued to follow the *Gayana-shagowa* and govern themselves under the traditional form of government.<sup>114</sup> Under this Treaty,<sup>115</sup> however, the Tonawanda Senecas lost legal title to their land and spent the next fifteen years securing a new treaty with the United States to regain it.<sup>116</sup> This series of events, not surprisingly, drove a political wedge between the Senecas living at Tonawanda and the Senecas at Allegany and Cattaraugus.<sup>117</sup> With the Revolution against the traditional chiefs at Allegany and Cattaraugus and the establishment of the Seneca Nation of Indians, the Tonawanda Band of Seneca Indians became a separate recognized sovereign nation governed by a traditional Council of Chiefs.

Originally, the State Laws passed in 1847 applied to the Tonawanda Senecas. But following the restoration of Tonawanda Seneca lands, the State enacted new laws to transform the Tonawanda government. While the Council of Chiefs was maintained as a governing body, a number of elected positions were established.<sup>118</sup> These positions

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forward the opinion that the Seneca were not yet ready for such a government." *Id.* The degree to which the "Chiefs Party" either degraded themselves in their petitions, or allowed themselves to be degraded by their sponsors, is no doubt further testament to the degree to which capacity of the Seneca leadership had decayed:

We have our old customs to lean upon as a staff. New laws such as the white man has are not good for the Indian. They are big staff. So big that his small fingers cannot grasp it. When we have grown to be big enough we may lay aside our little stick, but, if it be snatched away now, we must fall and die. We do not think it good to burn the Council House before we can build the Court House. The Indian must be governed by their old customs until they can live under the laws of the white men. We fear our Great Father forgets how Young his Seneca children are. He commands then to run, when they can hardly stand in this new path.

*Id.* (citing from the 1849 petition of the Chiefs of the Seneca Nation to the President).

114. See Thomas S. Abler & Elisabeth Tooker, *Seneca*, in HANDBOOK, *supra* note 1, at 512.

115. See *supra* note 95 and accompanying text.

116. See Thomas S. Abler & Elisabeth Tooker, *Seneca*, in HANDBOOK, *supra* note 1, at 512.

117. The Senecas living at the Buffalo Creek Reservation relocated to the Cattaraugus Reservation and Six Nations Reserve. See *id.* at 511.

118. See *id.* at 512.

included three peacemakers<sup>119</sup> and three executive positions—a clerk,<sup>120</sup> a treasurer<sup>121</sup> and a marshal<sup>122</sup>—to be elected from the adult men annually. In addition, the State law defined the powers of the “council of the Tonawanda nation”<sup>123</sup> and provided that the chiefs could sit as an appellate court to hear appeals from the peacemakers court.<sup>124</sup>

It is not exactly clear how the State came to pass these laws on behalf of the Tonawanda Senecas, although it is entirely possible that it did so at their request. Indeed, when given the choice of whether the State or the federal government should hold title to their lands pursuant to the Treaty of 1857, they chose the State.<sup>125</sup> Nonetheless, it is

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119. See Act of Nov. 15, 1847, ch. 365, § 1, 1847 N.Y. Laws 464; Act of Apr. 7, 1863, ch. 90, § 1, 1863 N.Y. Laws 135; May 18, 1892, ch. 679, § 41, 1892 N.Y. Laws 1573, 1582 (codified at N.Y. INDIAN LAW § 41 (McKinney 1950) (providing that the “Tonawanda nation shall have . . . three peacemakers”)); see also Act of Nov. 15, 1847, ch. 365, § 9, 1847 N.Y. Laws 464, 467; Act of Apr. 7, 1863, ch. 90, § 8, 1863 N.Y. Laws 135, 139; May 18, 1892, ch. 679, § 50, 1892 N.Y. Laws 1573, 1586, amended by Act of Mar. 27, 1893, ch. 229, § 50, 1893 N.Y. Laws 415, 422 (codified at N.Y. INDIAN LAW § 49 (McKinney 1950) (defining incompetency of peacemakers to hear cases)).

120. See Act of Nov. 15, 1847, ch. 365, § 7, 1847 N.Y. Laws 464, 465; Act of Apr. 7, 1863, ch. 90, § 6, 1863 N.Y. Laws 135, 137-41, amended by Act of May 21, 1884, ch. 316, § 14, 1884 N.Y. Laws 381; May 18, 1892, ch. 679, § 45, 1892 N.Y. Laws 1573, 1584-85 (codified at N.Y. INDIAN LAW § 45 (McKinney 1950) (providing for the duties of the clerk)).

121. See Act of Nov. 15, 1847, ch. 365, § 6, 1847 N.Y. Laws 465; Act of Apr. 7, 1863, ch. 90, § 5, 1863 N.Y. Laws 136-37; May 18, 1892, ch. 679, § 44, 1892 N.Y. Laws 1573, 1584, amended by Act of Mar. 27, 1893, ch. 229, § 44, 1893 N.Y. Laws 420 (codified at N.Y. INDIAN LAW § 44 (McKinney 1950 & Supp. 1997) (providing for the duties of the treasurer)).

122. See Act of Nov. 15, 1847, ch. 365, § 1, 1847 N.Y. Laws 464; Act of Apr. 7, 1863, ch. 90, § 1, 1863 N.Y. Laws 135; May 18, 1892, ch. 679, § 41, 1892 N.Y. Laws 1573 (codified at N.Y. INDIAN LAW § 41 (McKinney 1950) (providing that the “Tonawanda nation shall have a marshal”)); see also Act of Nov. 15, 1847, ch. 365, § 13, 1847 N.Y. Laws 464; Act of Apr. 7, 1863, ch. 90, §§ 12, 28-29, 1863 N.Y. Laws 135; May 18, 1892, ch. 679, § 54, 1892 N.Y. Laws 415, amended by Act of Mar. 27, 1893, ch. 229, § 54, 1893 N.Y. Laws 415 (codified at N.Y. INDIAN LAW § 53 (McKinney 1950) (providing for the duties of the marshal)).

123. See Act of Apr. 25, 1871, ch. 703, § 3, 1871 N.Y. Laws 1534; May 18, 1892, ch. 679, § 80, 1892 N.Y. Laws 1593 (codified at N.Y. INDIAN LAW § 80 (McKinney 1950)).

124. See Act of Apr. 7, 1863, ch. 90, § 9, 1863 N.Y. Laws 139; May 18, 1892, ch. 679, § 52, 1892 N.Y. Laws 1587 (codified as amended at N.Y. INDIAN LAW § 51 (McKinney 1950 & Supp. 1998)).

125. See *United States v. National Gypsum Co.*, 49 F. Supp. 206, 208 (W.D.N.Y. 1942) (stating that title was originally vested in the Secretary of the Interior and later transferred to the New York State Controller), *rev'd*, 141 F.2d



unclear to what extent these laws have been relied upon in the twentieth century. By 1948, there was still an elected government of chiefs.<sup>126</sup> At some point, however, this government was abandoned. By the 1970s, the Tonawanda Seneca Council of Chiefs was comprised of sixteen members (eight Confederate chiefs and eight Band chiefs) who had been selected in accordance with the *Gayanashagowa*.<sup>127</sup>

d. *The Oneida Nation*. Political division within the Oneida Nation began in the mid-eighteenth century with the arrival of the missionary, Reverend Samuel Kirkland, who succeeded in converting the Oneida Warriors to Christianity.<sup>128</sup> Following the Revolutionary War, the Oneidas lost most of their land and continued to divide politically and spiritually with the arrival of another missionary, Eleazar Williams, who was able to convert all of the remaining "pagans" to Christianity and to convince many of them to relocate to Wisconsin.<sup>129</sup> By 1838, when the Treaty of Buffalo Creek was signed which called for the relocation of all *Haudenosaunee* people, hundreds of Oneidas had already left for the new settlement in Wisconsin. Other Oneidas during this time left for Ontario. Approximately two hundred remained in New York, many of whom began to live with the Onondagas.

In addition to its efforts to take Oneida land, the State also initiated other efforts to promote Oneida assimilation. The last significant taking of Oneida land occurred in 1842, when the State entered into a treaty with them that left twenty-three people with only thirty-two acres of communal land.<sup>130</sup> In 1843, the State passed a law providing for the allotment of this remaining Oneida land upon "the consent of a majority of the chiefs and head men of the said

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859 (2d Cir. 1944).

126. See *infra* note 167.

127. See Thomas S. Abler & Elisabeth Tooker, *Seneca*, in HANDBOOK, *supra* note 1, at 512-13.

128. See Jack Campisi, *Oneida*, in HANDBOOK, *supra* note 1, at 484.

129. See *id.* at 485.

130. See *United States v. Boylan*, 265 F. 165, 166-68 (2d Cir. 1920), *cert. denied*, 257 U.S. 614 (1921). The treaty occurred against the backdrop of many Oneidas leaving for Wisconsin and agreeing to "release, quit claim and forever renounce" to the Oneidas any interest in the remaining lands to those Oneidas "who do not intend to emigrate." Treaty Between the Orchard Party of the Oneida Indians and the State of New York, Art. 6, May 23, 1842, in WHIPPLE REPORT, *supra* note 17, at 358.

Indians."<sup>131</sup> This apparently did not occur, and the State enacted legislation to further divide not just Oneida, but all of the remaining *Haudenosaunee* lands.<sup>132</sup> This series of events had the effect of undermining the tribal relations of the remaining Oneida community and forced many to continue moving to the Onondaga Nation and surrounding White communities.<sup>133</sup> Thus, by 1889, the Oneidas were in such a fragmented condition that the infamous Whipple Committee was moved to comment that the Oneida reservation "was long since divided among the Indians there in severalty" and that they "have no tribal relations, and are without chiefs or other officers"<sup>134</sup>

While a few Oneidas did attempt to convey their interests in the remaining tribal lands, the State was unsuccessful in convincing all of them to convey the entirety of their territory.<sup>135</sup> In 1888, an Oneida, Isaac Honyoust, gave a mortgage to a non-Indian for a large portion of the remaining Oneida territory, a mortgage that was later upheld by a State court and which resulted in the Oneidas being "forcefully ejected and removed against their protest."<sup>136</sup> This mortgage, and the State laws purporting to authorize the land allotment, however, were invalidated in a federal court action brought by the United States which allowed the remaining Oneidas in New York to return to their thirty-two acres of federally recognized aboriginal land in 1921.<sup>137</sup>

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131. See Act of Apr. 18, 1843, ch. 185, 1843 N.Y. Laws 244.

132. See also Act of Apr. 11, 1849, ch. 420, §§ 7-10, 1849 N.Y. Laws 578; May 18, 1892, ch. 679, § 7, 1892 N.Y. Laws 1575, amended by Act of Feb. 27, 1962, ch. 60, § 15, 1962 N.Y. Laws 123 (codified as amended at N.Y. INDIAN LAW § 7 (McKinney 1950 & Supp. 1998)).

133. By 1972, it was estimated that approximately 600 Oneidas lived with the Onondagas. See Jack Campisi, *Oneida*, in HANDBOOK, *supra* note 1, at 489. The failure of the State to obtain federal approval of these land transactions with the Oneidas is the basis for the current Oneida land claims. See *Boylan*, 265 F. at 165-68.

134. See WHIPPLE REPORT, *supra* note 17, at 46.

135. See *Boylan*, 265 F. at 170.

136. See *id.* at 166-67; see also *Boylan v. George*, 117 N.Y.S. 573 (N.Y. App. Div. 1909).

137. See *Boylan*, 265 F. at 173-74. The dissent argued that the Oneidas were no longer "tribal Indians" and could thus not avail themselves of the protections afforded by federal law. *Id.* at 176 (Ward, dissenting).

e. *The Onondaga Nation*. At the beginning of the nineteenth century, the council fire was rekindled at Onondaga and community life was re-established. In 1811, the State passed a law providing for an Indian agent for the Onondagas, a position which still exists.<sup>138</sup> The primary function of the Indian agent was to distribute State annuities to "heads of families and individuals" and to "protect the rights and interests of the tribe of which he is agent."<sup>139</sup> In addition, the State also interfered with Onondaga affairs with the passing of laws governing the cutting of timber,<sup>140</sup> entering into valid contracts<sup>141</sup> and leasing of reservation lands.<sup>142</sup>

Despite some desire by State officials to do so in the nineteenth century, no legislation was enacted, however, to transform the Onondaga form of government. In 1889, the Whipple Committee—as part of its general mission to assimilate all of the *Haudenosaunee*—sought to eliminate all State laws acknowledging separate treatment of the Onondagas in order to force their absorption into American society.<sup>143</sup> The Committee was especially concerned about the "pagans . . . who control the government by what is known as the chief system."<sup>144</sup> In its estimation, the Committee reported that the "[Onondaga] government as it now exists, under the control and management of the pagan

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138. See Act of Mar. 29, 1811, ch. 79, 1811 N.Y. Laws 168 (current version at N.Y. INDIAN LAW § 20 (McKinney 1950 & Supp. 1998)).

139. See Act of Apr. 18, 1843, ch. 228, § 1, 1843 N.Y. Laws 310; Act of Apr. 2, 1857, ch. 233, §§ 2, 3, 5, 1857 N.Y. Laws 492; Act of Mar. 19, 1873, ch. 96, § 5, 1873 N.Y. Laws 174; May 18, 1892, ch. 679, § 20, 1892 N.Y. Laws 1579; Act of Feb. 3, 1927, ch. 16, § 21, 1927 N.Y. Laws 17, amended by Act of Apr. 6, 1961, ch. 355, § 1, 1961 N.Y. Laws 1305 (codified as amended at N.Y. INDIAN LAW § 21 (McKinney 1950 & Supp. 1998)).

140. See Act of Mar. 19, 1873, ch. 96, §§ 1, 2, 1873 N.Y. Laws 174; 18, 1892, ch. 679, § 22, 1892 N.Y. Laws 1580 (codified at N.Y. INDIAN LAW § 22 (McKinney 1950)).

141. See Act of Feb. 24, 1855, ch. 26, §§ 1, 2, 1855 N.Y. Laws 29; May 18, 1892, ch. 679, § 23, 1892 N.Y. Laws 1580 (codified at N.Y. INDIAN LAW § 23 (McKinney 1950)).

142. See Act of Mar. 19, 1873, ch. 96, § 4, 1873 N.Y. Laws 174; Act of Apr. 9, 1887, ch. 121, 1887 N.Y. Laws 131; May 18, 1892, ch. 679, § 24, 1892 N.Y. Laws 1580, amended by Act of Apr. 25, 1960, ch. 814, 1960 N.Y. Laws 2159 (codified as amended at N.Y. INDIAN LAW § 24 (McKinney 1950 & Supp. 1998)).

143. See WHIPPLE REPORT, *supra* note 17, at 78-79.

144. *Id.* at 42. The Committee bemoaned the fact that once one of the chiefs becomes a Christian, he "falls from grace" and is "immediately deposed and a pagan put in his place." *Id.*

chiefs, is corrupt and vicious; law and order are entirely foreign to it."<sup>145</sup> Nonetheless, these concerns were never translated into legislative action.

f. *The Cayuga Nation.* By virtue of their landless condition following the Revolutionary War, there is little evidence of the State's role in attempting to influence their governmental affairs. The only State legislation relating to the Cayugas during the nineteenth century addresses the payment of treaty annuities.<sup>146</sup>

g. *The Tuscarora Nation.* Following the Revolutionary War and the establishment of their reservation, the Tuscaroras abandoned their hunter-warrior existence and became increasingly agrarian and assimilated into the emerging White society that surrounded them.<sup>147</sup> Christian missionaries had a considerable impact in the early years of the nineteenth century, eventually precipitating a serious political conflict—again between the Christians and the “pagans”—that eventually led to the burning down of the Longhouse by the Christian faction.<sup>148</sup> By the end of the nineteenth century, fewer than one hundred Tuscaroras were unable to speak English, the number of churches had increased, and the “life of the Tuscaroras continued to become more like that of the Whites around them.”<sup>149</sup> The State was involved in this effort, primarily through the establishment and operation of schools,<sup>150</sup> but it is otherwise unclear the degree to which the State may have supported their social and religious transformation. Despite these changes, however, State officials lamented that the “old pagan spirit is somewhat prevalent on this reservation, and where that exists in any degree its influence is strongly felt

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145. *Id.* Moreover, in furtherance of this conclusion, the Committee reported that “the [Onondagas] have no courts, and no officers except the chiefs. There is no way to settle disputes among them except through the chiefs, and that is an arbitrary tribunal, without any authority of law whatsoever.” *Id.* at 44.

146. See Act of Apr. 11, 1849, ch. 355, §§ 1, 3-4, 1849 N.Y. Laws 576; Act of Mar. 28, 1888, ch. 84, § 7, 1888 N.Y. Laws 128; Act of June 13, 1889, ch. 473, 1889 N.Y. Laws 642 (repealed 1890).

147. See David Landy, *Tuscarora Among the Iroquois*, in HANDBOOK, *supra* note 1, at 521-22.

148. See *generally id.* at 522.

149. See *id.*

150. See WHIPPLE REPORT, *supra* note 17, at 47.

against all matters educational and moral."<sup>151</sup>

Politically, the Nation continued to be governed by the Council of Chiefs established in accordance with the *Gayanashagowa*.<sup>152</sup> Nonetheless, the State did take legislative action to regulate their internal affairs. In 1854, a number of laws were enacted to allow the Chiefs to allot tribal lands to individual members,<sup>153</sup> to authorize individual Indians to sell timber on their allotments "for the purpose of cultivation,"<sup>154</sup> to prevent Indians from cutting tribal timber without the consent of the Chiefs<sup>155</sup> and to authorize the Chiefs to coerce highway labor.<sup>156</sup> These laws appear to have been complied with to some extent and land allotment to individuals did apparently occur.<sup>157</sup>

It is not entirely clear whether the State took any direct action to transform Tuscarora governance, but there is some evidence that Tuscarora assimilation did have an effect on political affairs. To the displeasure of State officials, "if a chief becomes too modern in his habits and manner of living, or desires a change of government to conform more nearly with that of his white neighbor, he is

151. *Id.*

152. See David Landy, *Tuscarora Among the Iroquois*, in HANDBOOK, *supra* note 1, at 523; WHIPPLE REPORT, *supra* note 17, at 48. The Whipple Committee was of the view that "the power to install and depose chiefs rests with the Onondagas." *Id.*

153. See Act of Apr. 7, 1854, ch. 175, §§ 1, 5, 1854 N.Y. Laws 369; May 18, 1892, ch. 679, § 90, 1892 N.Y. Laws 1596 (codified at N.Y. INDIAN LAW § 95 (McKinney 1950)).

154. See Act of Apr. 7, 1854, ch. 175, § 2, 1854 N.Y. Laws 369; May 18, 1892, ch. 679, § 91, 1892 N.Y. Laws 1596 (codified at N.Y. INDIAN LAW § 96 (McKinney 1950)).

155. See Act of Apr. 7, 1854, ch. 175, §§ 3-4, 6, 1854 N.Y. Laws 369; May 18, 1892, ch. 679, §§ 92-93, 1892 N.Y. Laws 1596 (codified at N.Y. INDIAN LAW §§ 97-98 (McKinney 1950)).

156. See Act of Apr. 7, 1854, ch. 175, § 8, 1854 N.Y. Laws 371; May 18, 1892, ch. 679, § 94, 1892 N.Y. Laws 1597 (codified at N.Y. INDIAN LAW § 99 (McKinney 1950 & Supp. 1998)) (repealed 1971).

157. The WHIPPLE REPORT stated:

The lands are allotted to the individual Indians by the chiefs sitting in council. The Indian desiring land, makes application to the council, and if he is of age or is married, he is usually granted a small tract or parcel of land for his occupation and cultivation. The whole matter as to whether the applicant shall receive land, or whether he receive much or little, seems to rest in the discretion of the chiefs. This method of allotment is doubtless intended to conform to the provisions of section one of chapter 175 of the Laws of 1854.

WHIPPLE REPORT, *supra* note 17, at 49.

regarded as a dangerous person and is accordingly deposed.<sup>158</sup> This precipitated the predictable view of State officials that:

If the government by chiefs among the Indians could be destroyed, and they could hold their lands in severalty, and be citizens, there is not a doubt but in a very few years they would be thoroughly respectable and enterprising people, and an honor to that part of the country where they live.<sup>159</sup>

Nonetheless, by the end of the nineteenth century, State officials had to acknowledge that the tribal relations of the Tuscarora had continued and that complete assimilation would be difficult to achieve.<sup>160</sup> No State legislation was ever enacted to transform Tuscarora government.

3. *Twentieth Century Efforts to Obtain Jurisdiction Over Haudenosaunee Lands.* As part of the State legislature's late nineteenth and early twentieth century investigations into its "Indian Problem," there emerged a movement to obtain jurisdiction over the activities taking place within *Haudenosaunee* lands. In 1915, the State Constitutional Convention approved a referendum question (later rejected by voters) to abolish the Indian courts, transfer jurisdiction to the State courts, and extend all State laws over the *Haudenosaunee* except those prohibited by federal law.<sup>161</sup> During the next thirty years, State officials continued these efforts to obtain jurisdiction over *Haudenosaunee* lands.<sup>162</sup> Like the efforts of their predecessors during the nineteenth century, these efforts were fueled by "assimilationist goals, myopic philanthropy, a need for legal order, or less-than-noble motives of land and resource

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158. See *id.* at 48. The deposed chiefs were thought by State officials to be "among the most intelligent members of the tribe." *Id.*

159. See *id.*

160. The WHIPPLE REPORT's assessment of the Tuscarora concluded:

The Onondagas being the recognized head of the Six Nations, and having control of all the important matters of legislation, with power to install and depose chiefs at will, it makes little difference how well civilized the Tuscaroras may become, so long as they have a tribal government controlled by the chiefs, whose chiefs in turn controlled and governed by the pagan chiefs of the Onondagas.

WHIPPLE REPORT, *supra* note 17, at 49.

161. See HAUPTMAN, AMERICAN INDIAN POLICY, *supra* note 3, at 12.

162. See *id.* at 13.

acquisition.<sup>163</sup>

In the early years of the twentieth century, State officials became increasingly paranoid about the State's reservation activities in light of several federal and State court decisions which held that the State had no authority over *Haudenosaunee* lands.<sup>164</sup> Ultimately, in 1942, the Second Circuit Court of Appeals concluded in *United States v. Forness*,<sup>165</sup> that "state law does not apply to the Indians except so far as the United States has given its consent."<sup>166</sup>

The *Forness* decision was a dramatic blow against the State's colonization efforts and spurred State officials to take quick action to have Congress ratify its previously illegal assertions of authority. They could not have chosen a better time to do so. While the 1930s had been a brief period of federal support for tribal self-government,<sup>167</sup> American nationalism following World War II spurred a virulently assimilationist approach for dealing with Indian affairs that led to the beginning of the so-called Termination Era.<sup>168</sup> Thus, the message brought to the Congress by State officials—that the federal government should grant the State power over the Indian lands located within its borders—was perfectly consistent with the federal government's efforts to wholly abandon its responsibilities towards the Indian nations and to fully assimilate Indian people into American society.

In 1948, after several years of effort—and over the objection of almost all of the *Haudenosaunee* people<sup>169</sup>—the State finally prevailed when the Congress granted it full criminal jurisdiction over all *Haudenosaunee* lands.<sup>170</sup> In

163. *See id.*

164. *See United States v. Boylan*, 265 F. 165, 166-68 (2d Cir. 1920), *cert. denied*, 257 U.S. 614 (1921); *Patterson v. Seneca Nation*, 157 N.E. 734 (N.Y. 1927); *Mulkins v. Snow*, 133 N.E. 123 (N.Y. 1921).

165. 125 F.2d 928 (2d Cir. 1942).

166. *Id.* at 932.

167. *See Indian Reorganization Act of 1934*, 25 U.S.C. § 465 (1983).

168. *See H.R. Con. Res. 108*, 83d Cong. (1953). *See generally* LAURENCE M. HAUPTMAN, *THE IROQUOIS STRUGGLE FOR SURVIVAL: WORLD WAR II TO RED POWER 1-64* (1986) [hereinafter HAUPTMAN, *STRUGGLE FOR SURVIVAL*].

169. The only *Haudenosaunee* government to support the State's efforts was "the elected chiefs under state charter at Tonawanda." HAUPTMAN, *AMERICAN INDIAN POLICY*, *supra* note 3, at 17.

170. *See Act of July 2, 1948*, ch. 809, 62 Stat. 1224 (codified at 25 U.S.C. § 232 (1983)); *see Robert B. Porter, The Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233*, 27 HARV. J. ON LEG. 497, 518-33 (1990) [hereinafter *Jurisdictional Relationship*]

significant part, Congress enacted § 232 because the State, with the support of a handful of tribal members, had successfully made the claim that lawlessness was prevalent within *Haudenosaunee* communities.<sup>171</sup> Nonetheless, the legislation effectively eliminated *Haudenosaunee* lands for criminal jurisdiction purposes, meaning that the State had the legal authority to enforce its criminal laws within the Indian territory in the same way that it could anywhere else in the State.

The extension of state criminal jurisdiction was not the end of the State's intrusion into *Haudenosaunee* affairs. In 1950, Congress granted the State a partial measure of civil jurisdiction when it opened the State courts to lawsuits involving Indians that arose within *Haudenosaunee* territory.<sup>172</sup> Unlike § 232, this legislation was less concerned about health and safety, and more concerned about furthering "the gradual assimilation of the Indian population into the American way of life" through "the gradual but final complete removal of governmental supervision and control."<sup>173</sup> Thus, the State's plan, with Congressional support, was to extend the State's civil justice system and State laws over *Haudenosaunee* civil affairs and thus further the assimilation of the *Haudenosaunee* people into the State polity.

The enactment of § 232 and § 233, in addition to helping shape the federal government's future policy for dealing with State-Indian relations,<sup>174</sup> affirmed much of the authority that the State had previously been exercising over *Haudenosaunee* lands during the previous 150 years. The ultimate effect for the *Haudenosaunee*, however, was the formal and permanent intrusion of the State into the inner workings of the tribal criminal justice and dispute resolution processes. While the historical record is clear that the *Haudenosaunee* people had long become dependant upon the State with respect to a variety of internal matters, such as law enforcement, dispute resolution or education,

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171. See *Jurisdictional Relationship*, *supra* note 170, at 519.

172. See Act of Sept. 13, 1950, ch. 947, § 1, 64 Stat. 845 (codified at 25 U.S.C. § 233 (1983)); *Jurisdictional Relationship*, *supra* note 170, at 533-59.

173. H.R. REP. NO. 81-2780 (1950), reprinted in 1950 U.S.C.C.A.N. 3731, 3732; see also *Jurisdictional Relationship*, *supra* note 170, at 533-34.

174. See Act of Aug. 15, 1953, ch. 505, Pub. L. No. 83-280, 67 Stat. 588, 588-90 (codified as amended at 18 U.S.C. § 1162 (1984) and 28 U.S.C. § 1360 (1993)).



this dependence was spawned from the illegal actions taken by the State in the nineteenth century to further its aggressive colonizing agenda. Thus, the federal government's grant of criminal and civil jurisdictional authority to the State ratified this illegal colonization and cemented its role in the internal governmental affairs of the *Haudenosaunee* people.

### C. Dysfunction and the Modern Era

During the last fifty years, the *Haudenosaunee* people have continued to undergo considerable turmoil and change. With the enactment of § 232 and § 233, jurisdictional issues that had long been of concern to the federal and State government had substantially been settled. As a result, the source of contemporary problems facing the *Haudenosaunee* once again revolved around issues of land transfer and economic development.<sup>175</sup>

During the late 1950s to the early 1960s, three *Haudenosaunee* communities—Seneca, Mohawk and Tuscarora—lost territory as a result of the federal and State governments' economic development efforts. The Seneca Nation lost one-third of its Allegany Reservation—almost ten thousand acres—as a result of the federal government's condemnation action to construct the Kinzua Dam and reservoir on the Allegheny River.<sup>176</sup> The Mohawk community at *Akwesasne* lost land and had its ecosystem destroyed when the St. Lawrence power project was constructed and two heavily polluting multinational corporations—Reynolds Aluminum and General Motors—built large manufacturing facilities within a mile of their territory.<sup>177</sup> And the Tuscarora Nation lost 550 acres of its territory due to the State's efforts to build a reservoir for the Niagara River power project.<sup>178</sup>

These events all caused significant disruptions in the way of life within these nations. For example, regarding the taking of the Allegany Reservation, Professor Hauptman

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175. See HAUPTMAN, AMERICAN INDIAN POLICY, *supra* note 3, at 17 ("Since the 'jurisdictional question' had largely been resolved in 1948 and 1950, although not to the Indians' liking, land issues once again came to the fore, serving as the backdrop of New York State-Indian relations after 1950.").

176. See HAUPTMAN, STRUGGLE FOR SURVIVAL, *supra* note 168, at 88-89.

177. See generally *id.* at 123-50.

178. See generally *id.* at 151-78.

writes:

The Seneca Nation's unsuccessful fight to save their ancestral lands was the most tragic event in their contemporary history. The building of the 125 million-dollar Kinzua Dam broke a federal-Iroquois treaty, the Canandaigua Treaty of 1794; flooded more than 9,000 acres of Seneca lands; destroyed the old Cold Spring Longhouse, the ceremonial center of Seneca traditional life; caused the removal of 130 Indian families from the "take area"; and resulted in the relocation of these same families from widely spaced rural surroundings to two suburban-styled housing clusters, one at Steamburg and the other at Jimersontown adjacent to the city of Salamanca . . . . Even today, more than twenty years after the flooding of their homeland began, Seneca elders have difficulty speaking of this modern time of troubles . . . . To them, the relocation and removal of Seneca families from the "take area" was their second "Trail of Tears," comparable only to these same Indians' loss of and removal from the Buffalo Creek Reservation in the first half of the nineteenth century.<sup>179</sup>

While the effects of the land takings at *Akwesasne* and Tuscarora were also significant,<sup>180</sup> the only remedy offered for the direct and indirect losses associated with these destructive actions was cash compensation.<sup>181</sup> As Chief

179. *Id.* at 87-90.

180. Professor Hauptman writes of the effect on these communities:

The construction of the Saint Lawrence Seaway and the building of the reservoir at Tuscarora . . . set in motion changes in Iroquoia that drastically affect Indian life today. By changing the course of the mighty Saint Lawrence and Niagara Rivers, the [developing Canadian and American governments] did more than condemn Indian lands. They industrialized the Saint Lawrence and Niagara frontier regions. By thus transforming this area, they also brought problems of environmental pollution which weakened Indian self-sufficiency and virtually destroyed the Indian fishing and dairy cattle industries.

*Id.* at 123.

181. At the time, the compensation paid to the Seneca Nation for taking one-third of Allegany Reservation was considered generous:

In compensation, Congress awarded the Seneca Nation 15,000,573 dollars by a law passed, belatedly, in 1964. This act provided 1,289,060 dollars for direct damages caused by land loss; 945,573 dollars for indirect damages, compensating the Indians for relocation expenses, loss of timber, and destruction of wildlife; 387,023 dollars for "cemetery relocation"; 250,000 dollars for Indian legal and appraisal fees; and 12,128,917 dollars for "rehabilitation," which was directed at meeting the Senecas' urgent need for community buildings, economic development, education, and housing.

HAUPTMAN, STRUGGLE FOR SURVIVAL, *supra* note 168, at 89. The Mohawks at *Akwesasne* received little as the result of their claims, primarily due to land

Clinton Rickard of the Tuscarora Nation summed up this series of events: "The [state] got its reservoir and we were left with the scars that will never heal."<sup>182</sup>

The tragedies that occurred at Seneca, Mohawk and Tuscarora were spawned from the effort to satisfy the development needs of the outside world. Like every other significant conflict that has occurred between the *Haudenosaunee* and the Americans since the Revolutionary War, the struggle for *Haudenosaunee* survival has turned on the ability to repel the forces of American capitalism. In the 1950s and 1960s, this force was reflected by the "need" for massive public works projects that consumed *Haudenosaunee* lands and disrupted *Haudenosaunee* communities. While there was little success resisting these encroachments, the threats to the *Haudenosaunee* during this time period, were external in origin but with significant internal effects.

During the last thirty years, however, the problems arising within the *Haudenosaunee* communities have increasingly been the result of internal conflict. Factionalism has made it impossible to forge the compromises necessary to work collectively. This factionalism, unfortunately, has not been the result of mere political disagreement or tribal infighting; it has proved to be the most destructive kind. During the last ten years, violence and killing have become outlets for the redress of political and economic disagreements. The remainder of this section will briefly describe some of the most significant problems arising within each of the *Haudenosaunee* nations and the Confederacy in recent years and will examine the impact of these problems on the continued ability of the *Haudenosaunee* to self-govern.<sup>183</sup>

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ownership issues (particularly over Barnhart Island) being unsuccessfully litigated in the past. *See id.* at 146-47. The Tuscarora Nation received \$850,000 dollars, individual members losing land were also compensated and individuals not losing land each received \$800 dollars. *See id.* at 175.

182. *Id.*

183. While there is much that could be written about the disagreements and disputes arising within each of the *Haudenosaunee* nations, most of such conflict would simply be part of the routine affairs of any society and not of any significant long-term effect. The most educational conflicts worth looking at are those that escape the relative sanctity of a tribal community and become public knowledge to the outside world. Thus, the following section will be limited to those significant problems that have risen to the level of being reported publicly by the disputing parties, that is, primarily matters that have been taken to the

1. *The Mohawk Nation*. Because of its unique location on the international border, *Akwesasne* Mohawks have long had a unique economic opportunity—smuggling goods between the Canada and the United States. With different social and taxation policies in effect on either side of the border (both nationally and by province or State), some Mohawks have long been able to exploit these policy differences for economic benefit. During the American prohibition era in the 1920s, it is rumored that liquor was smuggled into the United States from Canada. In the 1970s, a few enterprising Mohawk “Entrepreneurs” established large scale “international free trade” operations in heating oil, building supplies and cigarettes, the latter of which was called “buttlegging.”<sup>184</sup> The cigarette trade generated millions of dollars to mostly private individuals and set the stage for the development of even more aggressive economic development activity.

By far the most significant problem facing the Mohawk Nation in recent years has been the battle over the establishment of casino gambling businesses. Spawned by a brawl on June 6, 1989, this conflict developed into an open civil war between the various factions of Mohawks that lasted eleven months and eventually resulted in the deaths of two men.<sup>185</sup>

The Mohawk civil war had its origins in the emergence of the tribally- and privately-owned gambling operations that began in the early 1980s. In 1983, the Saint Regis Mohawk Tribal Council began a high-stakes bingo operation.<sup>186</sup> Eventually, a number of Mohawk “Entrepreneurs” established privately owned gambling casinos over the considerable opposition of many traditional Mohawk people and State and federal law enforcement agencies. By 1987, anti-gambling Mohawks took the unusual step of asking the New York State police and FBI to shut down these private gaming halls and, in

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federal and state courts, to the federal Bureau of Indian Affairs and to the media.

184. See generally RICK HORNUNG, *ONE NATION UNDER THE GUN* 22-25 (1991). The “buttlegging” process involved the purchase of truckloads of cigarettes by Mohawks in Kahnawake and then distributed in the United States through clearing points at *Akwesasne*. See *id.*

185. See *id.* at 167-72 (reporting that the deaths of Matthew Pyke, Jr. and Harry Edwards, Jr. occurred on May 1, 1990 after an all-night firefight).

186. See *id.* at 17.

unprecedented raids, the State and federal authorities carried out this request.<sup>187</sup>

By 1989, the Mohawk gambling conflict had intensified with the emergence of three main factions at odds over the issue.<sup>188</sup> First there was an anti-gambling group (Antis), led by a rare coalition of traditional Mohawk Nation leadership, Canadian-side Mohawk Council of *Akwesasne* leadership and one of the Chiefs from the elected St. Regis Mohawk Tribal Council. Second, there were Entrepreneurs, who simply sought to keep their casinos open for business. Third, there was the Warrior Society which proclaimed itself the protector of Mohawk sovereignty and which aligned with the Entrepreneurs to resist the established Mohawk and non-Indian authorities and, some would say, to simply gain a share of the wealth.<sup>189</sup>

Beginning in mid-1989, the conflict amongst these factions generated increasingly frequent public protests and episodes of violence, including beatings, drive-by shootings, riots and armed stand-offs with the State police.<sup>190</sup> The State police responded with raids on the gambling halls, blocking off all roads leading into and out of *Akwesasne* and arresting many of the Warriors.<sup>191</sup> In response, the Antis and the Warriors threatened violence against each other, with the Antis blocking all of the main roads and bridges.

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187. See *id.* at 278. State police raids on entrepreneur casinos occurred on December 16, 1987, September 14, 1988 and June 6, 1989. These entrepreneurs were eventually convicted of a variety of federal gambling offenses. See *United States v. Cook*, 922 F.2d 1026 (2d Cir. 1991) (affirming the convictions of Roderick Cook, Eli Tarbell, Anthony Laughing, Gerald Laughing, James Joseph Burns and Peter Burns, Sr.).

188. See *id.* at 18.

189. For a detailed history of the antecedent and contemporary Haudenosaunee Warrior Society from the perspective of the Confederacy, see *Haudenosaunee Homepage*, October 8, 1998 <[http://sixnations.buffnet.net/Threats\\_to\\_Traditional\\_Governments/](http://sixnations.buffnet.net/Threats_to_Traditional_Governments/)> (on file with author and the *Buffalo Law Review*). The Confederacy, through both of the Longhouses at Onondaga and the Six Nations Reserve, stated that the positions of "head warrior" and "war chief" were abolished under the Great Law and that there were no authorized warrior societies. Nonetheless, the Warrior Society did exist outside the Longhouse and was involved in both internal and external conflicts through the various Mohawk territories and the Oneida territory in New York. In 1991, the Mohawk Warrior Society received a share of a \$250,000 Human Rights Award from Libyan dictator Moammar Gadhafi. See HORNUNG, *supra* note 184, at 280.

190. See HORNUNG, *supra* note 184, at 34-65.

191. See *id.* at 34-65.

The Warriors eventually assumed responsibility for public safety within the territory, accepted and acknowledged by the State police, an event which further heightened divisions.<sup>192</sup>

The conflicts at *Akwesasne* continued into 1990 and spread to other Mohawk communities. Mohawks at *Kanesatake* intensified a protest against the expansion of the Oka Golf Club into a Mohawk burial ground and Mohawks at *Ganienkeh* were accused of shooting down a National Guard helicopter. Eventually, both events led to armed standoffs between the Warriors and outside law enforcement, including the mobilization of four thousand Canadian federal troops at *Kanesatake* to end the blockade of the main bridge leading into Montreal. Despite repeated requests from the Anti leadership to invade *Akwesasne* and secure the peace, Governor Mario Cuomo and the State police refused to take any action. The tragedy of events at *Akwesasne* culminated at the end of April with rioting, firebombing, shootouts, rammings and beatings.<sup>193</sup> On May 1, two Mohawk men were shot and killed.<sup>194</sup> Hundreds of Canadian provincial police and State police, with thousands of Canadian and National Guard troops on standby, immediately moved in to secure peace within the reservation.

The violence and conflict over economic development at *Akwesasne*, however, were not solely caused by the emergence of the Entrepreneurs and the Warrior Society. While these influences were significant contributions, to be sure, they occurred against the backdrop of a total absence of unified Mohawk government. As has been discussed above, primarily because of the State's effort to transform Mohawk governance in the early nineteenth century, the existence of the international boundary running through the territory, and the incomplete nature of the governmental transformation from traditional to elected form, there has not been unified tribal government at *Akwesasne* for almost two hundred years.

In the modern era, three different groups claim official tribal governmental authority at *Akwesasne*: (1) the Saint

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192. See *id.* at 99.

193. See *id.* at 155-56.

194. See *id.* 164, 167-69 (describing the shooting of twenty-two year old Mathew Pyke, Jr. and the discovery of the body of thirty-two year old Harry Edwards, Jr.).

Regis Mohawk Tribal Council (SRMT), the elected tribal government officially recognized by the United States, (2) the Mohawks aligned with the Confederacy who claim authority over *Akwesasne* as the traditional Mohawk Nation Council of Chiefs,<sup>195</sup> but who are themselves divided based on support for gambling,<sup>196</sup> and (3) the tribal government established under Canadian federal law to govern that part of *Akwesasne* located on the Canadian "side"—the Mohawk Band Council of *Akwesasne* (MCA).<sup>197</sup>

The lack of governmental unification fueled the underlying tensions associated with the Entrepreneur and Warrior activities. The Mohawk Nation Council and the MCA opposed gambling, but a majority of the three chief SRMT supported it. This lack of governmental cohesion provided ample opportunity for the Warriors and the

195. See *Mohawk Nation Council of Chiefs Homepage*, Oct. 9, 1998 <<http://www.slic.com/~mohwkna/mncc.htm>> (on file with author and the *Buffalo Law Review*).

196. The "traditional" Mohawks are divided between those who adhere to the *Gaiwio*, which reflects the official position of the Confederacy, and those who reject it, mainly the entrepreneur aligned Warriors.

[T]here's another group of traditionalists—mainly members of the Warriors Society—who reject the *Gaiwio*. . . .

They say Grand Council Chiefs are mixing the Code of Handsome Lake with the Great Law, which they follow.

The result is a complicated religious split among the tribes, with pro-gambling Christians and traditionalists who reject the *Gaiwio* on one side, and anti-gambling Christians and traditionalists who follow *Gaiwio* on the other.

Janet Grazma, *Separate Paths; Gambling Controversy Divides Ancient Indian Confederacy*, SYRACUSE HERALD-AM., Oct. 15, 1995, at 3. The *Gaiwio* proscribes opposition to gambling, and so faith has become a divisive issue.

That division didn't affect the Grand Council until the 1990 crisis at *Akwesasne*, when Loran Thompson was removed as a chief because he embraced gambling. The Longhouse at *Akwesasne* was split down the Handsome Lake line.

When the Mohawks erected a new longhouse last year, Thompson took over the old one. He and his supporters hold traditional ceremonies there to honor the earth and the Creator, but don't preach the *Gaiwio*. "It's those people that follow the Code that are trying to dictate to the rest of us their morals and spiritual beliefs," Thompson said. "It's trickling down from the *Gaiwio* preachers who . . . don't realize there's a difference between the Great Law and the Code of Handsome Lake."

*Id.*

197. See *The Mohawk Council of Akwesasne*, Nov. 3, 1998 <<http://www.glenet.ca/mca>> (spot: MCA Administration) (on file with author and the *Buffalo Law Review*) [hereinafter *MCA Homepage*].

Entrepreneurs to develop a foothold in the political and economic life of *Akwesasne*. Indeed, it may have been solely due to the absence of any real tribal government that these factions emerged in as strong a fashion as they did in the first place. Only when the situation had deteriorated to the point that Mohawks began killing each other was any kind of governmental structure established at *Akwesasne*. The tragedy for Mohawk self-government, however, was that this structure was from a wholly external source and took the form of foreign law enforcement agencies.

Since the end of the Mohawk civil war in 1990, the private casinos have been shut down, with the Entrepreneurs developing a new market in liquor smuggling. Many of these Entrepreneurs have been indicted by federal officials under the Racketeering Influenced and Corrupt Organizations Act (RICO) for their smuggling activities, claiming they made almost \$700 million over a four year period running cigarettes and liquor across the international boundary.<sup>198</sup> Among those indicted was L. David Jacobs, a former SRMT chief who was alleged to have been paid off by the Entrepreneurs to exercise the powers of his office to prevent interference with their activities.<sup>199</sup>

Regarding governmental affairs, the Mohawks have continued to be divided but have taken some efforts to try to resolve their governmental problems. Unfortunately, in doing so, the problem has only worsened in the short run with the emergence of yet another faction claiming to exercise governmental authority.

In 1995, an important governmental development

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198. See John O'Brien, *Feds Crack \$687 Million Border Smuggling Ring; Twenty-One People are Charged with Conspiring to Defraud the U.S. and Canadian Governments. "This Is Bigger Than Al Capone," Said Agent*, POST-STANDARD (Syracuse), June 24, 1997, at A1; *Federal Charges Reduced In NNY; A Dozen People Had Been Accused of Smuggling Cigarettes and Liquor in Canada*, POST-STANDARD (Syracuse), Oct. 10, 1998, at B5 (dismissing counts of aiding outbound smugglers, preserving charges of money-laundering and defrauding the U.S. government and rejecting the defense that Mohawk sovereignty precluded federal prosecution).

199. Jacobs later pleaded guilty to the charges, admitting that he received a \$3000 kickback for every truckload of liquor that went through *Akwesasne*. See John O'Brien, *Ex-Mohawk Chief Admits Racketeering*, POST-STANDARD (Syracuse), Oct. 7, 1998, at B2 (reporting that seven other defendants also pleaded guilty to the smuggling charges, twelve were scheduled to go to trial and one remained a fugitive).



occurred when a Constitution was adopted by the members of the Saint Regis Mohawk Tribe<sup>200</sup> for purposes of replacing the State Indian law as the legal basis for the Saint Regis Mohawk Tribal Council. Immediately following the referendum to adopt the new Constitution on June 1, a dispute arose as to whether it had been validly adopted.<sup>201</sup> This dispute spawned a petition drive to have the new Constitution withdrawn.<sup>202</sup> To resolve the dispute, a referendum on the question of whether the Constitution was valid was scheduled for June 1996, which was also to be the very first election to be held under the new Constitution.<sup>203</sup>

At this election, a new Council was selected, but the voters overwhelmingly indicated that they thought the Constitution was invalid.<sup>204</sup> This produced the amazing possibility that new officials had been elected into office but that the government that the new officials were to serve had been withdrawn. Upon a petition for clarification being filed with the new Saint Regis Mohawk Tribal Court, it was immediately ordered that the referendum question and process were invalid and, thus, that the results were merely "advisory" and of no legal effect.<sup>205</sup> Within days of the decision, the Tribal Council, acting "under pressure, threat, and duress from a vocal group of community members," sought to decertify the 1995 Tribal Council certification of the Constitution's adoption. In response, the Tribal Court

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200. See CONSTITUTION OF THE SAINT REGIS MOHAWK TRIBE *ON-KWA-IA-NEREN-SHE-RA* (OUR LAWS) (approved June 6, 1995) (on file with author and the *Buffalo Law Review*).

201. Article XIX of the Constitution required that 51% of the vote was required for ratification. Apparently, the percentage of those approving the Constitution was somewhere between 50.50% and 50.99%, thus raising the question whether 51% or more approval was required. The resolution was to hold a referendum.

202. See *Lazore v. Saint Regis Mohawk Tribal Council and Election Board*, No. 96CI0080 (S.R.M.T.C. June 7, 1996) (Lazore I) (indicating that between 900 and 1000 petitions were filed to determine the validity of the Constitution) (on file with author and the *Buffalo Law Review*).

203. See *id.* at 1 (noting that the question posed was "Is the Tribal Constitution of the Saint Regis Mohawk Tribe valid?").

204. See *id.* at 3.

205. The court held that "[a]s worded, the referendum question is by its terms advisory and cannot be construed as binding as to amend or repeal the Tribal Constitution." *Id.* at 6. Moreover, the court determined that "[t]he question presented must fail as to its outcome simply because 30% of the voters did not vote on an advisory question involving the Tribal Constitution." *Id.*

ruled that the effort to decertify the Constitution was invalid.<sup>206</sup> In so holding, the Court concluded that:

Tribal Councils may not violate Tribal Court decisions which interpret and construe the Tribal Constitution. While there may indeed have been significant numbers which pressed in an aggressive manner for repeal or change of the political structure during community meetings following the Lazore I decision, the lawful requirements for change or amendment cannot be arbitrarily disregarded. The safeguards for amendment to the Constitution are designed to protect the community from just such political action.<sup>207</sup>

The net result of the Court's decision was to remove the officials who had previously been in office, validate the election of the officials elected in June 1996 and restore the legality of the Constitution.

Nonetheless, the Court's decision was not unanimously adhered to, and a new faction emerged opposing the constitutional system. This new faction, the "Peoples Government," claimed to carry lawful governmental authority on the grounds that those elected to serve under the Constitution had been elected to serve an illegal government. Eventually the dispute over the legitimacy of the Constitution was taken to the Bureau of Indian Affairs, which refused to interfere with the Tribal Court's determinations.<sup>208</sup> In declining to amend the Tribal Court's decisions on these paramount issues of Mohawk constitutional law and refusing to overrule the Acting Area Director's decision to stay out of Mohawk affairs, the BIA's appellate review board stated that the "appellants seek a particularly egregious form of interference in tribal affairs" by the federal government.<sup>209</sup>

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206. See *Lazore v. Saint Regis Mohawk Tribal Council and Election Board*, No. 96CI0080 (S.R.M.T.C. July 12, 1996) (Lazore II) (holding that issuing the decertification resolution under duress invalidated it and that such resolution violated the Constitution because "[c]ertification of the adoption of a tribal constitution is a special confirming act of the will of the people and thus may not be subsequently rescinded like other legislative acts") (on file with author and the *Buffalo Law Review*).

207. *Id.* at 3.

208. See Letter from Franklin Keel, Eastern Area Director (Acting) to Paul Thompson (July 26, 1996).

209. See *Smoke v. Acting Eastern Area Director, BIA*, 30 I.B.I.A. 31, 34 (1996) ("Order Docketing Appeal and Affirming Decision"); see also 30 I.B.I.A. 90 (Oct. 31, 1996) ("Order Denying Reconsideration"); 31 I.B.I.A. 99 (1997)

During the last two elections (1997 and 1998), the problem of the "People's Government" faction appears to have resolved itself. The successful candidates for Tribal Council and executive officer positions in these elections were the named plaintiffs in the BIA action attacking the federal government's recognition of the new Mohawk Constitution.<sup>210</sup> While it would be of little surprise that these individuals might have campaigned on a slogan of rescinding the new Constitution once elected, it would be an even greater surprise if they actually did so now that they have been elected to the very government positions they had vigorously opposed.

While it is surely too soon to draw any hard conclusions, the recent elections provide some evidence that there may be a closing of the political chasms at *Akwesasne*. Any system that can have the effect of transforming those opposed to a system into participants willing to perpetuate the system may hold the key to any future governmental development. Moreover, the new Constitution makes provision for participation by all Mohawks living at *Akwesasne*, including those living on the Canadian "side."<sup>211</sup> If fully implemented, this new Constitution could present the possibility of unifying yet another political faction, the Mohawk Band Council, with the Saint Regis Mohawk Tribe. Nonetheless, any long term hope of establishing strong unified government at *Akwesasne* will be dependent upon finding a way to bridge the gap between those willing to accept a democratic Mohawk elected government with those who maintain adherence to the *Gayanashagowa*. Until that time, it is likely that government division will ensure that the long term interests of the Mohawk people will continue to be subordinated to political and economic factionalism.

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("Order Dismissing Appeal as Moot"); 31 I.B.I.A. 121 (1997) ("Order Denying Reconsideration").

210. See *Smoke*, 30 I.B.I.A. at 31 ("Appellants are Hilda Smoke, Alma Ransom, Paul Thompson, John Bigtree, Jr., Bryan Garrow, Barbara Lazore, and Carol Herne."). Currently, the Tribal Council members are Garrow, Lazore, Ransom, Smoke and Thompson. Bigtree is the Vice Chief Executive Officer.

211. See *Thomas v. Saint Regis Mohawk Tribal Council*, No. 96CI0080 (S.R.M.T.C. June 7, 1996) (holding that the Saint Regis Mohawk Constitution allows for participation by Mohawks on the Canadian "side" to participate in the government and that provisions of the Tribal Election and Voting Act providing only for participation by Mohawks on the American "side" were invalid).

2. *The Oneida Indian Nation of New York.* The contemporary history of the New York Oneidas is one characterized by years of governmental disorganization and conflict and a very recent period of phenomenal growth and development. Much of underlying conflict has taken place against the backdrop of maintaining control over the remaining thirty-two acres of aboriginal Oneida territory and the Oneida land claim to five million acres of Central New York State.<sup>212</sup>

Between 1948 and 1975, the Oneidas were governed in accordance with a Constitution adopted on February 4, 1948.<sup>213</sup> The ruling body, the Oneida Indian Nation Executive Committee, was recognized by the United States as the official governing body of the New York Oneidas.<sup>214</sup> For many years, however, considerable division existed between the Executive Committee and a "traditionalist faction" of Oneidas known as the "Marble Hill Oneidas."<sup>215</sup>

Responding to this governmental division and claims by the Marble Hill Oneidas to be the legitimate leadership of the New York Oneidas, the United States withdrew its recognition of the Executive Committee on December 18, 1975.<sup>216</sup> The Bureau of Indian Affairs engaged in earnest efforts following its withdrawal of recognition to help the Oneidas formulate a new tribal government. These efforts, ultimately unsuccessful, included facilitating meetings of the disputing factions and conducting a mail poll on the question of leadership.<sup>217</sup> In 1975, the BIA, with the consent of the disputing factions, sought to administer a process by which a legitimate Oneida leadership could be recognized.<sup>218</sup> In particular, the BIA agreed to recognize the Executive Committee as the official leadership if it could demonstrate that it had the support of a bare majority of Oneida adults.<sup>219</sup> In terms of raw numbers, the Executive

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212. See Arlinda F. Locklear, *The Oneida Land Claims: A Legal Overview*, in *IROQUOIS LAND CLAIMS*, *supra* note 60, at 146.

213. See *Oneida Indian Nation of N.Y. v. Clark*, 593 F. Supp. 257, 260 (N.D.N.Y. 1984).

214. See *id.*

215. See *id.* at 259.

216. See *id.* at 260; see also BUREAU OF INDIAN AFFAIRS, *THE GOVERNMENTAL IMPASSE OF THE NEW YORK ONEIDA NATION, 1975 TO PRESENT 2* (1985) (on file with author and *Buffalo Law Review*) [hereinafter *GOVERNMENTAL IMPASSE*].

217. See *GOVERNMENTAL IMPASSE*, *supra* note 216, at 2.

218. See *Clark*, 593 F. Supp. at 260-61.

219. The procedure outlined by the BIA required the Executive Committee

Committee was able to prove this but as the result of missing filing deadlines and other procedural errors, it failed to demonstrate enough support to obtain recognition.<sup>220</sup> As a result, the Oneidas continued to remain without organization and without a form of government recognized by either the federal government or the Oneidas themselves. Subsequent efforts by BIA officials between 1980 and 1985 to help organize the Oneidas were without effect.<sup>221</sup>

In 1977, Arthur Ray Halbritter, originally a member of the "traditional faction" of "Marble Hill Oneidas,"<sup>222</sup> and two other men, were designated by members of their faction to serve as "interim representatives of their government while the Nation developed a traditional government form."<sup>223</sup>

to collect affidavits of support over a period of 90 days. If affidavits were received from "fifty (50) percent plus one of the New York Oneidas over eighteen (18) named on the BIA list," then the BIA would recognize the Executive Committee as the leaders and accept the 1948 Constitution as the lawful governing document of the New York Oneidas. If not, then the status quo—non-recognition—would be maintained. *See id.*

220. In addition to demonstrating support for its leadership, the Executive Committee also had to demonstrate that its supporters had a copy of the 1948 Constitution or had access to it. They did not do so and it proved disastrous to their case. Apparently, they did have the numbers:

To meet the requirement that 50% plus one of all federally certified adult Oneidas supported the Executive Committee and the 1948 National Constitution, affidavits supporting the Executive Committee were required from 223 New York Oneidas. On or before March 11, 1980, [the agreed upon deadline,] the Executive Committee submitted to the Department 253 individual affidavits, 23 of which were invalid on their face. It is undisputed that one of the necessary supplemental affidavits was submitted on March 14, 1980, three days after the March 11, 1980 deadline. This supplemental affidavit was required to validate thirty-three individual affidavits. As a result of the untimely submission of the supplemental affidavit, the Department invalidated the thirty-three individual affidavits, thereby reducing the number of valid individual affidavits to 197, well below the 223 needed to establish the Executive Committee as the governing body of the New York Oneidas. . . . The Government, therefore, declared that the affidavit process had been unsuccessful.

*Clark*, 593 F. Supp. at 261-62 (footnotes omitted).

221. *See* GOVERNMENTAL IMPASSE, *supra* note 216, at 4.

222. *See Clark*, 593 F. Supp. at 261-62 (stating that Ray Halbritter was a named defendant-intervenor in this action).

223. *See* *Shenandoah v. United States*, No. 96-CV-258(RSP/GJD), 1997 WL 214947, at \*1 (N.D.N.Y. Apr. 14, 1997); *see also* David Tobin, *A Legacy for his People; Ray Halbritter Uses Business and Political Savvy to Capitalize on the Oneida Nation's Sovereign Status*, POST-STANDARD (Syracuse), Oct. 9, 1995, at A4 (indicating that in 1975, Halbritter, as a member and spokesperson for the

Despite subsequent efforts by the BIA to establish an Oneida government, Halbritter actively sought and obtained the support of the Grand Council of the *Haudenosaunee* Confederacy in his effort to establish an Oneida government.<sup>224</sup> In the years that followed, Halbritter began to rebuild the Oneida Nation, including the generation of tribal income through its bingo hall and the pursuit of its land claim.<sup>225</sup> He also moved to concentrate his political power.<sup>226</sup> In 1987, the Department of the Interior accepted the plan for a “traditional Haudenosaunee government” with Halbritter being recognized as an “interim representative[ ].”<sup>227</sup>

Although Halbritter and his supporters had successfully overthrown the former “Executive Committee” on the grounds of reestablishing a traditional Oneida Nation government, there emerged a new source of conflict from within the traditional Oneida community and the Grand Council. These members asserted that, from the time Halbritter was recognized by the Grand Council and the United States as interim representative in 1987, he had “disregarded traditional Oneida law and instead assumed power as the Oneida Nation Representative.”<sup>228</sup> As a result, these members initiated efforts to remove Halbritter from

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Oneida Warrior Society, had led a coup to overthrow the previously recognized Oneida leader, Jacob Thomas).

224. See Tobin, *supra* note 224, at A4.

By defending the Oneidas’ traditional sovereignty, Ray Halbritter won the favor of Iroquois Confederacy leaders. In 1977, they recognized him as one of the three Oneida representatives to the Grand Council, the ruling body of the Iroquois Confederacy. As far as the Grand Council was concerned, Halbritter and the two other representatives were the Oneidas’ leaders.

*Id.* While it appears that the Confederacy only recognized the Oneidas’ decision to designate Halbritter as one of their leaders, any suggestion that the Confederacy named Halbritter the Oneida leader is strenuously disputed. See *Oneida People Choose Leaders; All 3 Oneida Clans Selected Ray Halbritter*, SYRACUSE HERALD-AM., May 11, 1997, at D2 (Diane Stirling, Director of Communications, Oneida Indian Nation, emphasizing that “Halbritter was not put in office by the Grand Council”) [hereinafter *Clans Selected Halbritter*].

225. See *Clans Selected Halbritter*, *supra* note 224, at D2.

226. In 1986, Halbritter and his cousin, Don Marks, also known as Don Markeiwicz, led approximately forty Warriors through the Hotel Syracuse, where the BIA was conducting yet another effort to organize the Oneidas, and stole the ballot box on the grounds that elections were against the traditional way of selecting leaders. See *id.*

227. See *Shenandoah*, 1997 WL 214947, at \*1.

228. *Id.*

power.

The leadership dispute spawned a power struggle over control of the Nation's thirty-two acre territory, the operation and management of a bingo hall that had been in operation since 1985 and the distribution of the bingo hall revenues.<sup>229</sup> Dissension and turmoil continued to build and the bingo hall ceased operations in late 1987. The Warriors Society, fueled by the efforts of outsiders, turned its efforts against Halbritter.<sup>230</sup> In response, Halbritter filed a lawsuit in federal court to prevent further disruption of the Nation's businesses.<sup>231</sup> Halbritter's opponents then proceeded to obtain control of over \$60,000 in bingo proceeds, which they distributed to themselves and others. Violence emerged in early 1988 when a Halbritter family business was damaged, two Oneidas were assaulted and the bingo hall was broken into. Finally, the dispute resulted in the bingo hall being burned down.<sup>232</sup>

In 1993, a dramatic series of events occurred. On April 25, the *Haudenosaunee* Grand Council removed Halbritter as the "interim representative" of the Oneida Nation.<sup>233</sup> Notice of this withdrawal of support was sent to Assistant Secretary of the Interior for Indian Affairs Ada Deer and on August 10, 1997 the United States withdrew its recognition of Halbritter as the Oneida Nation Representative.<sup>234</sup> The very next day, however, the Interior Department stayed its decision pending further review.<sup>235</sup>

The Interior Department initially required that a referendum should be conducted to determine who should be the Oneida Nation representative.<sup>236</sup> In response, Halbritter proposed an alternate scheme utilizing "statements of support" from Oneida members that the Interior

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229. See *United States v. Markeiwicz*, 978 F.2d 786, 793-95 (2d Cir. 1992).

230. See *id.* at 794.

231. See *Oneida Indian Nation of N.Y. v. Hill*, No. 88-CV-29, 1988 WL 9302, at \*1 (N.D.N.Y. 1988).

232. See *Markeiwicz*, 978 F.2d at 795. Originally, the defendants were convicted for such offenses as conspiracy to steal tribal funds, theft of tribal funds, rioting, arson, jury tampering, criminal contempt and perjury. See *id.* at 786. Certain convictions for conspiracy to receive stolen funds and perjury were thrown out on appeal. See *id.*

233. *Id.*

234. See *Shenandoah v. United States*, No. 96-CV-258(RSP/GJD), 1997 WL 214947, at \*1 (N.D.N.Y. Apr. 14, 1997).

235. See *id.*

236. See *id.*

Department accepted as a fair and effective means of evaluating "his support among the Oneidas."<sup>237</sup> Halbritter was able to prevail under this procedure and on February 4, 1994, he was "unconditionally recognize[d]" by the United States as the Oneida Nation Representative until such time as he resigned or was removed.<sup>238</sup>

Not surprisingly, this did not end the factional disputes within the Oneida Nation. Following the Interior Department's recognition action, Halbritter's clan, the Wolf Clan, issued warnings to him and began "a traditional process to remove him from power."<sup>239</sup> This occurred on May 20, 1995 and on the following day, a meeting was held—alleged to be "a duly convened meeting of the Oneida Nation"—that purported to remove him as Oneida leader.<sup>240</sup> Upon notice to Halbritter, this decision was approved by the Grand Council on June 4, 1995.<sup>241</sup> While the Grand Council sent letters to the Interior Department notifying the United States of its decision, no action has since been taken.<sup>242</sup> Most likely, the Department has failed to take action because most Oneidas appear to continue to support Halbritter as their representative and because the Confederacy's prior role was only that of recognizing his authority.<sup>243</sup> Nonetheless, today there are Oneidas who do not recognize Halbritter as an Oneida leader and who claim that the Confederacy retains control over Oneida territory until traditional Oneida leaders are selected.<sup>244</sup>

237. See *id.*

238. See Letter from Ada Deer to Raymond Halbritter (Feb. 4, 1994) (on file with author and *Buffalo Law Review*); see *Shenandoah*, 1997 WL 214947, at \*1.

239. See *Shenandoah*, 1997 WL 214947, at \*1.

240. *Id.* (quoting allegation made by the plaintiffs).

241. See *id.*

242. See *id.*

243. See *Clans Selected Halbritter*, *supra* note 224, at D2.

244. See *Shenandoah*, 1997 WL 214947, at \*1. Doug George-Kanentiio, a former editor of AKWESASNE NOTES and defender of the Confederacy, has argued that:

Currently no Oneida male leader has been given a title name. There are no Oneida *rotiiane* [condoled Confederacy chiefs] upon their sacred homelands since no individual has been found who meets the qualifications.

According to the Haudenosaunee Confederacy since the Oneida Nation, as a traditional governing body, does not exist its status is held in trust by the Iroquois as a whole in much the same way as the US federal government retained national sovereignty during the Civil War.

The Grand Council of the Confederacy reserves the right to make a



Since Halbritter was established as the Oneida leader—the first recognized in almost twenty years—he has done much to promote Oneida reorganization and economic development.<sup>245</sup> Most significantly, he led the Oneidas to become the first *Haudenosaunee* nation to enter into a Class III gaming compact with New York State to construct and operate a high stakes casino.<sup>246</sup> This enterprise has allowed for the establishment of other Nation businesses and the employment of several thousand people in Central New York.<sup>247</sup>

It is this development that appears to have fueled much of the political conflict within the Oneida Nation.<sup>248</sup> In 1996, suit was filed against the United States, Halbritter and Marilyn John (a clanmother) in federal district court by Oneida members calling themselves the “Traditional People of the Oneida Nation.”<sup>249</sup> This suit sought to enjoin construction and development of the gambling casino to be built on Oneida lands and to prevent the federal government’s “continued [recognition of] Halbritter as the Oneida Nation Representative in violation of Oneida Nation sovereignty.”<sup>250</sup> The suit also sought an order directing Halbritter to provide an accounting of all Nation assets under his control and to return control of all Nation businesses.<sup>251</sup> Finally, plaintiffs alleged that Halbritter and

final approval of any candidate selected by the Oneidas (or any other Iroquois nation) to hold one of the *rotitane* titles.

Doug George-Kanentiio, *Oneida Nation Facts and Figures*, AKWESASNE NOTES: A JOURNAL OF NATIVE AND NATURAL PEOPLES, Mar. 31, 1996, at 85.

245. See *Oneida Indian Nation*, Oct. 9, 1998 <<http://one-web.org/oneida/>> (spot: Introduction) (on file with author and the *Buffalo Law Review*) [hereinafter *Oneida Nation Homepage*].

246. See *Today is Opening Day for Casino*, BUFF. NEWS, July 20, 1993, at A8.

247. See *Oneida Nation Homepage*, Oct. 9, 1998 <<http://one-web.org/oneida/anindex.html>> (on file with author and the *Buffalo Law Review*).

248. See generally David Tobin, *Making Dollars and Dissent; Ray Halbritter Has Been Dogged by Opposition Almost from the Beginning*, POST-STANDARD (Syracuse), Oct. 10, 1995, at A4.

249. See *Shenandoah v. United States*, No. 96-CV-258(RSP/GJD), 1997 WL 214947, at \*1 (N.D.N.Y. Apr. 14, 1997).

250. *Id.* at \*2. The suit also alleged the following illegalities by the Interior Department: (1) that it failed to prepare an environmental impact statement on the casino’s development; (2) that it approved the land lease in violation of the Indian Long-Term Leasing Act, 25 U.S.C. §415; (3) that it failed to approve the bank loan agreement; and (4) that it violated the plaintiff’s civil rights by virtue of continued recognition of Halbritter. See *id.*

251. See *id.*

John violated their rights set forth under the Indian Civil Rights Act (ICRA), in particular, that they were entitled to a writ of habeas corpus under 25 U.S.C. § 1303 because defendants had detained them and deprived them of their liberty.<sup>252</sup>

The court dismissed all claims against the federal government, Halbritter and John, primarily on the grounds that the Oneida Nation itself was a necessary and indispensable party to the suit that could not be joined due to its sovereign immunity.<sup>253</sup> The court also rejected plaintiffs' claim that their rights under the ICRA had been violated and that a writ of habeas corpus was required. It is this particular claim that reveals much about the political conflict occurring within the Oneida Nation.

Plaintiffs alleged that Halbritter and John convicted them of treasonous activities, banned them from Nation territory, revoked their tribal membership and benefits and deprived them of their "voice," thus preventing them from "participating in the Nation's political process and the Nation's religious, cultural and social events."<sup>254</sup> These allegations were not denied by the defendants; rather, their defense was that these facts were insufficient to establish a claim under the ICRA.<sup>255</sup>

In *Poodry v. Tonawanda Band of Seneca Indians*,<sup>256</sup> the plaintiffs had been banished by the tribal leadership and had successfully argued that their banishment constituted a "severe actual or potential restraint on liberty" under the ICRA so as to justify *habeas* review of the banishment by the federal court.<sup>257</sup> The *Shenandoah* plaintiffs argued that the actions taken by Halbritter and John also were

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252. *See id.*

253. *Shenandoah*, 1997 WL 214947, at \*6. Interestingly, in an attempt to circumvent the sovereign immunity defense, the plaintiffs amended their complaint to include a waiver of sovereign immunity on the grounds that they, not Halbritter, had the lawful authority over the Oneida Nation to make such a waiver. *See id.* at \*6. The court easily dispensed with the argument, stating that "if plaintiffs possessed authority to waive sovereign immunity, then they also would possess the power to themselves fashion the relief they seek from the district court." *Id.*

254. *Id.* at \*7 (quoting Am. Compl. ¶ 179).

255. *See id.* ("[D]efendants challenge the sufficiency of the jurisdictional facts that plaintiffs allege rather than the facts themselves.").

256. 85 F.3d 874 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 610 (1996); *see* discussion *infra* notes 302-10.

257. *Id.* at 880.

sufficient to justify *habeas* review. The facts were disputed as to whether any actual banishment had occurred. Defendants argued that the plaintiffs' "loss of political rights and privileges and economic injuries [was] insufficient to constitute banishment, especially because plaintiffs retained many of their benefits as Oneida Nation members and continue[d] to reside on Oneida Nation territory."<sup>258</sup>

The court evaluated the relative severity of the punishment inflicted on plaintiffs against the banishment inflicted on the plaintiffs in *Poodry*, and concluded that the punishment inflicted in *Poodry* was "much more severe."<sup>259</sup> It found no facts similar to that in *Poodry* (such as banishment, attempted removal from the reservation or lost utility service and health care). Moreover, it found that the punishments imposed were not permanent and that there was a remedy for their rights to be restored.<sup>260</sup> The court concluded that, while the plaintiffs lost their "voices," there was no loss of tribal membership, and, at worst, "plaintiffs' allegations constitute[d] economic loss or the temporary loss of privileges."<sup>261</sup> Thus,

The allegations in the complaint do not constitute a sufficiently severe restraint on their liberties. . . . Until such time as plaintiffs suffer actual banishment rather than the essential banishment they allege, their remedies lie within the political process of the sovereign Oneida Nation and not the confines of the federal district court.<sup>262</sup>

Despite the serious internal political conflict reflected by the *Shenandoah* case, the Oneida Nation today has

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258. *Shenandoah*, 1997 WL 214947, at \*8. Halbritter and John also alleged that the plaintiffs failed to exhaust their internal tribal remedies before seeking collateral federal court review. While the court did not address this issue, it stated, "[a]lthough plaintiffs alleged that the tribal remedies, which involve appearing before the Men's Council, are futile, defendants characterize the futility argument as speculative because (1) plaintiffs affirmatively boycotted the proceedings; and (2) other members appearing before the Men's Council have had their voices restored." *Id.*

259. *Id.*

260. *Id.* at \*8 & n.7 ("Halbritter and John offered a process to restore plaintiffs' voices at meetings of the Men's Council. At one of these meetings defendant Halbritter told plaintiff Leonard Babcock that his punishment did not constitute banishment.").

261. *Shenandoah*, 1997 WL 214947, at \*9.

262. *Id.*

demonstrated a capacity for sustained development greater than any other *Haudenosaunee* nation. The casino has generated considerable capital that has allowed the Nation to secure both its political and economic position. All major economic activity within the Nation is nationalized and so there is no conflict between an "Entrepreneurs" class and the government. While Oneida development has not come without controversy both from within<sup>263</sup> and outside the Oneida Nation,<sup>264</sup> there has been phenomenal economic success. As a result, unprecedented community development has occurred,<sup>265</sup> and, perhaps most importantly, the Oneidas have been able to repurchase over seven thousand acres of their aboriginal territory, the most significant expansion of territory by any *Haudenosaunee* nation since the American Revolution.<sup>266</sup>

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263. See *id.*; see also Todd Lightly, *Oneida Tribal Police Spied on Dissidents*, SYRACUSE HERALD-AM., Dec. 7, 1997, at A1; Paul Lipkowitz, *Oneida Indian Nation Drops Civil Suit: Nation Representative Ray Halbritter Brought the Complaint against his Cousin and Former Aide Over a Letter that a Court Later Ruled Was a Forgery*, POST-STANDARD (Syracuse), Aug. 26, 1998, at B1.

264. Oneida County officials complained about *Oneida* lands being take off the tax roles; See, e.g., Cayuga Indian Nation of N.Y. v. Cuomo, 565 F. Supp. 1297 (N.D.N.Y. 1983); David L. Shaw, *Cayugas: Let 7,000 Pay Rent to Tribe The New York Group Now Opposes Eviction of Private Landowner from the 64,000 Acre Claim*, POST-STANDARD (Syracuse), Sept. 17, 1998, at B1.

265. The Oneida Nation's growth has been significant. Halbritter describes:

We feed our elders and are able now to conduct our ceremonies on a regular basis. The first building we built with our profits as a nation was a council house, which is our spiritual and governmental meeting place. We have since then built a cook house, a health services center, a cultural center and museum, a recreational center, a swimming pool, a bath house, a children's playground, a gymnasium, and a lacrosse box. Using our own money we also have established scholarship programs, medical, dental, and optical services, job training and legal assistance programs, elder meals programs, and other beneficial services for our people. We have established a police force, paved our roads, built a septic system, consecrated a burial ground, opened a youth center, and built housing for our people, and with the opening of the casino have become one of the major economic powers in Central New York State and one of the largest employers in the Central New York region. In the short run, we will build more housing, design a senior citizens center, institute day care, and expand our existing programs. In the future, we will be limited only by our imaginations.

Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT'L L. & POL. 531, 568-69 (1994) (footnotes omitted).

266. See Paul Lipkowitz, *Oneida Nation's Holdings Grow; The Tribe Buys 1,000 Acres Across Route 46 From the 32-Acre Territory the Oneidas Have Lived*

The most obvious reason for Oneida development has been the emergence of Halbritter as the dominant Oneida leader. Halbritter has thought long and hard about the Oneida past, present and future<sup>267</sup> and has developed a philosophy for focusing Oneida development that acknowledges a break with past practices.<sup>268</sup> In short, this philosophy views "economic power as the crux of sovereignty and political power."<sup>269</sup> Halbritter's belief is that, "[e]conomic power in this society, and in this world, is the real power that is necessary to make change and to empower oneself. It is the means to reach the ends of sovereignty."<sup>270</sup>

It is this philosophy, perhaps, that contributes to some of the deep divisions within the Oneida people. It is also surely the case that, while the Oneida Nation is characterized as a traditional form of government, the central role that Halbritter plays in the Men's Council and in the execution of Nation political and economic affairs is a novel but controversial refinement in the history of

*on for Centuries*, POST-STANDARD (Syracuse), Sept. 4, 1998, at B3.

267. In writing about the years of struggle working with other Oneidas to become recognized, Halbritter explains:

We saw that our resources were extremely limited, and that we were at a great disadvantage in asserting our sovereignty and jurisdiction selectively. We came to the realization that rather than seeking the help of government agencies and departments, or of other countries and Indian nations, or of private persons and charitable groups, we needed to empower ourselves as a people and to develop our own resources. We could not allow these outside groups, whether political bodies or charities, liberal or conservative, our enemies or our friends, to define for us what our lives should be. We could not claim to be truly sovereign and yet remain dependant on others. We would have to make the difference in our futures and in our lives.

Halbritter & McSloy, *supra* note 255, at 560-61 (footnotes omitted).

268. Halbritter explains:

As traditional Haudenosaunee people, we are told to just continue with things the way they are, to continue with our ceremonies and traditions, and we have done that, retaining and revitalizing our language, our culture, and our traditional governmental structure. But it seemed that in the world in which we lived, given the tremendous distribution and sources of power arrayed against us, coupled with events like the fire and the armed confrontations, there had to be something more. And so our people decided collectively to begin an effort to empower ourselves, to take control of our lives, our people, our land, and our future.

*Id.* at 561.

269. *Id.* at 564.

270. *Id.* at 564-65.

*Haudenosaunee* government.<sup>271</sup> As a result, many Oneidas—who proclaim themselves as the “real” traditional government—oppose Halbritter and the Nation he has developed.<sup>272</sup> Leadership disputes are common to newly emerging nations and it must be remembered that the Oneidas have been organized for only twenty years. Only time will tell whether the remaining divisions within the Oneida Nation will continue or dissipate.

3. *The Onondaga Nation.* For hundreds of years, the Onondagas have served as the “Keepers of the Fire”—a name reflecting their role as primary keepers of the faith in the *Gayanashagowa*. As a result of this role, the Onondaga personality is one characterized by conservatism.<sup>273</sup> As a general matter, this conservatism has played an important role in helping the Onondagas maintain a society with the strongest connections to the *Gayanashagowa* and the traditional way of life associated with it. Accordingly, the traditional government of chiefs in council has remained in place to the present day.

A modern example of how the Onondagas have sought to perpetuate their way of life is reflected by a 1975 attempt to have non-Indians removed from Onondaga Territory.<sup>274</sup> The purpose of the removal was that the “Council of Chiefs wanted the reservation, from generation to generation, to consist of full-blooded Indians, and not to have the line of

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271. See generally George-Kanentiio, *supra* note 244 (describing the traditional organization of the *Haudenosaunee* government).

272. *Shenandoah v. United States*, No. 96-CV-258, 1997 WL 214947, at \*1 (N.D.N.Y. Apr. 14, 1997); see also George-Kanentiio, *supra* note 244, at 86.

273. See Harold Blau et al., *Onondaga*, in HANDBOOK, *supra* note 1, at 497 (In the nineteenth century, “[c]hristianity attracted few *Onondagas* . . . [t]he Longhouse continued to attract the largest number of followers”), at 499 (“The *Onondaga* chiefs . . . the keepers of the fire and fierce protectors of the faith, the traditional *Iroquois* beliefs, ceremonies, and practices embodied in the Longhouse religion.”).

274. See *Hennessy v. Dimmler*, 394 N.Y.S.2d 786 (Onondaga Co. Ct. 1977). The “non-Indians” who the Onondaga Chiefs sought to have removed were spouses of Onondagas and non-member Indians. See *id.* at 789. Two of the respondents testified that after receiving permission from the chiefs to live at Onondaga, they “built [their] house on land cleared with [their] own hands.” The court noted that the “product and accumulations of their adult lives are inextricably bound to the land on which they live, and there is no practical way to liquidate their investment in the property and establish comparable homes elsewhere.” *Id.*

descent 'watered down' by the influx of white persons.<sup>275</sup> Rather than invoke the State's Indian Law providing for such removal, the Onondaga Chiefs invoked the protective provisions of the Treaty of Canandaigua and petitioned the United States Attorney General's Office to remove the non-Indians from Onondaga territory.<sup>276</sup> Eventually, the matter was transferred to the Onondaga County court, which addressed the case on the merits and declined to order the removal of those respondents who remained in the territory throughout the litigation.<sup>277</sup> Although the litigation was unsuccessful, this action highlights the degree to which the Onondaga chiefs value their traditional way of life.

In recent years, however, Onondaga society has been suffering through serious internal conflict associated with the emergence of entrepreneurial economic development. In the early 1980s, the first privately owned gas stations and smokeshops opened in the Onondaga Territory selling products at significantly discounted prices due to the lack of State sales tax.<sup>278</sup> The Onondaga chiefs, recognizing that the ability of individual Onondagas to sell goods without collecting State sales taxes was wholly dependent upon the Onondaga Nation's sovereign rights, imposed its own sales tax on this business activity.<sup>279</sup> While the Entrepreneurs

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275. *Id.*

276. *See id.* at 787-89 (explaining the original request to the Attorney General, its referral to the Department of the Interior, its subsequent referral to the Onondaga County district attorney, further authorization from the Onondagas to the Office of the President and subsequent review by the Onondaga county court). The purpose for doing so was that "the Indians were jealously guarding their rights under various treaties with the United States of America . . . and they were not about to take any action on their own in the Courts of the State of New York which could possibly jeopardize any of their treaty relations." *Hennessey*, 394 N.Y.S.2d at 788.

277. *See id.* at 792. The court held that the "attempt to evict those particular individuals and thereby deprive them of homes, the bulk of their personal property and their financial security is violative of the [Indian Civil Rights Act] in several respects." *Id.* at 791. The case was decided before *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), in which the Supreme Court held that the Indian Civil Rights Act did not provide a cause of action outside of tribal forums. Nonetheless, the *Hennessey* Court ordered the removal of those respondents who simply argued that they had moved off the reservation since the action was filed. *See Hennessey*, 394 N.Y.S.2d at 792.

278. *See* Brian Carr, *State of the Nations No End in Sight for High-Stakes Onondaga Dispute Rift in Indian Nation is About More Than Just Money*, SYRACUSE HERALD-AM., Mar. 31, 1994, at A1.

279. *See id.* The Onondaga sales tax on cigarettes was twenty-five cents per pack, which was still less than half of the amount of the State sales tax.

initially paid the taxes, they stopped paying the Nation in 1988 after a dispute with the Chiefs over whether the Chiefs should provide an accounting of the tax revenue.<sup>280</sup> After discussions failed to resolve the impasse, in 1993, the Chiefs shut down the businesses by barricading them with junked cars and concrete barriers.<sup>281</sup>

The business owners took the position that they did not "want to see the Onondaga Nation split,"<sup>282</sup> but that they "had put their businesses on the line for the people" and that, in any event, their actions were "not undermining government."<sup>283</sup> Instead, they believed that they were "trying to bring the nation back to what it should be."<sup>284</sup> The Chiefs strongly disagreed, saying that "[y]ou do not make the Great Law stronger by arguing disputes in the white man's court, and that is the first place they ran to after the decision [to barricade] came down in the Long House."<sup>285</sup> But there was a conscious decision by the Chiefs at the time not to provoke a confrontation with the Entrepreneurs. They stated, "If we did what the city of Syracuse does and put a big padlock (on the businesses) there would have been a big fight, and the sheriffs would have come in and arrested everybody. That's not the way the Great Law operates. We are not to fight."<sup>286</sup>

Nonetheless, from this economic and political disagreement an internal dispute emerged that has begun to tear Onondaga society apart.<sup>287</sup> In 1994, following the

280. *See id.* The businesses maintained that the tax revenue that would otherwise be paid to the Nation was put into escrow.

281. *See id.*

282. *Id.* (quoting statement of business owner Ken Papineau).

283. *Id.* (quoting statement of business owner Michelle Papineau).

284. Carr, *supra* note 278, at A1.

285. *Id.* (quoting statement of Chief Irving Powless, Jr.).

286. *Id.*

287. In the year following the blockade, discussions between the two sides ended, tribal laws were passed requiring business owners to live within the Onondaga Nation, and a "dozen reports [were] made of vandalism, shots fired through doors and windows, [and] electricity [being] shut off. On occasion, the sheriff's department has sent a SWAT team to the barricades when arguments erupt." *See id.*

The rhetoric associated with the dispute reveals the building animosity. Janice Lambert, a supporter of the business owners, said the dispute has lasted so long because "[t]his is the first time anybody stood up to the nation. A lot of people wanted to but were scared to. I think it's that people are getting better educated now and are willing to stand up for what they believe in." Chief Powless responded, "These people think that because they run a business they



barricading of the private businesses, four of the owners were banished from the Nation.<sup>288</sup> These individuals and a few others later purchased land and sought to establish their own tribal territory with their own tribal government.<sup>289</sup> One of the promoters, banished Onondaga Kenneth Papineau, stated, "[w]e want a government that people have a voice in."<sup>290</sup> But it was also strongly believed that the real purpose of the new community was to develop casino gaming as had occurred at the *Oneida* Nation.<sup>291</sup>

Eventually, the banished business owners re-established their businesses in Onondaga Territory and again began to sell tax-free products in defiance of the Onondaga tribal laws. The issue again came to head in 1998, when the Chiefs ordered and carried out the destruction and burning of four illegal smokeshops.<sup>292</sup> One of the banished business owners responded that, "They didn't break us. They didn't defeat us. We're still here, and we're not done . . . . Our spirit is too strong to be defeated by something like that."<sup>293</sup>

These actions all symbolize the degree of conflict and strife now emerging within the Onondaga Nation. Although the government of the Onondaga Nation remains very stable, the Nation appears to be at the front end of a period of internal conflict that will increasingly focus on the way in which the Onondaga Nation governs itself. Although it is

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should be the dictators in how the money is spent. That doesn't happen in any government." *Id.*

288. See Brian Carr, *Business Owners Ask Grand Council to Convene Chiefs Wait: Their Heritage is Questioned*, SYRACUSE HERALD-J., June 17, 1994, at B1; The Onondagas banished were Oliver Hill, Donald Rockwell and Ken and Veronica Papineau.

289. See Robert L. Smith et al., *Land Deal: Housing or Chance to Gamble? Leaders of a Dissident Group of Onondagas Says Their Pompeii Land Purchase is an Effort to Build a Better Nation*, POST-STANDARD (Syracuse), Feb. 24, 1996, at A1. It was reported that nine Onondagas purchased five hundred acres of land in Pompey, New York, formed an "interim government" under a constitution and invited other Onondagas to "join them and help elect chiefs." *Id.*

290. *Id.*

291. See *id.* The attorney handling the land transaction for the breakaway Onondagas was the same attorney who made a presentation at Jamesville Grave for a business partnership to "help design a new constitution for a new nation, negotiate a gaming compact with New York, and build and run a \$300 million casino." *Id.*

292. See Mary Margaret Earl & John Grau, *Feud Erupts in Flames on Onondaga Nation; Defiant Smoke Shops are Confronted and Destroyed*, POST-STANDARD (Syracuse), Mar. 3, 1998, at A1.

293. *Id.* (quoting statement of Michelle Papineau).

not possible to determine exactly how much support there is to change the form of government, at one point the business owners alleged to have half of the adult Onondagas supporting them.<sup>294</sup> Of course, on the other hand, there has not been a mass exodus from Onondaga to reform a new Onondaga Nation on the Pompey property. Nonetheless, the fact that the Chiefs have resorted to such extreme measures as condemnation of property and banishment as remedies, and that the Entrepreneurs show no signs of relinquishing their fight, suggests that the problems existing within the Onondaga Nation are unlikely to be resolved soon or easily.

4. *The Cayuga Nation*. Since 1795, the Cayugas in New York have been landless and without the ability to engage in meaningful governmental activity. As a general matter, they have been living within other *Haudenosaunee* territories, mainly at the Cattaraugus Territory of the Seneca Nation, and scattered throughout the cities and rural areas of upstate New York.<sup>295</sup> Despite the lack of a land base, however, the Cayugas have retained a traditional government and have remained part of the Confederacy and its functioning.<sup>296</sup> The foremost governmental activity engaged in by the Cayuga Nation during the last twenty years has been the pursuit of the Cayuga Nation's land claim.<sup>297</sup>

Recently, however, there have emerged divisions within the Cayuga Nation leadership. This conflict results from a

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294. See Brian Carr, *supra* note 278, at A1 ("Veronica Papineau . . . said the business owners had petitions signed by more than 150 of the 305 adults on the nation that supported their cause.").

295. The Cayugas lost their remaining 100 acre territory in 1795, but retained three small tracts. A one-square mile tract and a two-square mile tract were lost in 1807. A one-square mile tract originally granted to the Cayuga Chief Fish Carrier was lost in 1841.

296. See *Haudenosaunee Homepage*, Oct. 9, 1998 <[http://sixnations.buffnet.net/Culture/welcome.html?acticle=who\\_we\\_are](http://sixnations.buffnet.net/Culture/welcome.html?acticle=who_we_are)> (on file with author and the *Buffalo Law Review*).

297. See *Cayuga Nation of N.Y. v. Cuomo*, 730 F. Supp. 485 (N.D.N.Y. 1990) (Cayuga III); *Cayuga Nation of N.Y. v. Cuomo*, 758 F. Supp. 107 (N.D.N.Y. 1991) (Cayuga IV); *Cayuga Nation of N.Y. v. Cuomo*, 771 F. Supp. 19 (N.D.N.Y. 1991) (Cayuga V) (determining that each of the defendants in the action except the State of New York are liable for the improper conveyance of approximately 64,000 acres of from the Cayugas between 1795 and 1807); see also Chris Lavin, *Responses to the Cayuga Nation Land Claim*, in *IROQUOIS LAND CLAIMS*, *supra*, note 60, at 87.

controversy over a recent tax agreement signed between the Confederacy and the State—which was executed by Chief Vernon Issac on behalf of the Cayuga Nation—and the purchase of land by other Cayugas led by Chief Frank Bonamie.<sup>298</sup> In response to entering into the tax agreement on behalf of the Nation without his consent, Chief Bonamie chose to “disassociate” himself from Chief Issac and his administration.<sup>299</sup> Chief Issac, in turn, removed Chief Bonamie from his position as “Wolf Clan Representative or Pine Tree Chief for the Wolf Clan.”<sup>300</sup> Chief Isaac’s removal decision was confirmed by the *Haudenosaunee Confederacy*<sup>301</sup> and acknowledged by the United States.<sup>302</sup> Accordingly, the Cayuga Nation now has only one official federally recognized representative. This series of events has left the Cayugas deeply divided, jeopardizing the pursuit of their land claim.<sup>303</sup>

5. *The Seneca Nation of Indians.* In the modern era, the Seneca Nation has been at the the forefront of governmental and economic development within the *Haudenosaunee* nations. It has also experienced considerable turmoil, both as the result of external and internal causes. Significant changes within the Seneca Nation began to occur in the late 1950s and 1960s with the

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298. See Daniel Lovell, *Leadership Disputes Plague Cayuga Indians; Court Struggle is Half Won but Leaders Wage Ongoing Dispute*, THE CITIZEN (Auburn, N.Y.), Apr. 9, 1998, at A1.

299. See Letter from Frank C. Bonamie, Pine Tree Chief, to Vernon Issac, Cayuga Indian Nation Chief (Apr. 4, 1997) (on file with author and the *Buffalo Law Review*).

300. See Letter from Vernon Issac, Cayuga Indian Nation Chief, to Frank Bonamie, Pine Tree Chief (June 24, 1997) (on file with author and the *Buffalo Law Review*). Apparently this action was taken on the authority that Chief Issac is the only remaining condoleed Cayuga Confederate Chief. See Letter from Dean White, Field Representative, Bureau of Indian Affairs, to Dr. Michael M. Campbell, J.D. (Aug. 28, 1995) (on file with author and the *Buffalo Law Review*).

301. See Letter from the Grand Council of the Haudenosaunee regarding Frank Bonamie (Feb. 28, 1998) (on file with author and the *Buffalo Law Review*).

302. In addition, at least one Pine Tree Chief has been stripped of his title merely for questioning the actions taken by the traditional leaders. See Letter from Kevin Gover, Assistant Secretary of the Interior, Bureau of Indian Affairs to Frank C. Bonamie (May 12, 1998) (on file with author and the *Buffalo Law Review*).

303. See Lovell, *supra* 298, at A1.

condemnation of one-third of the Allegany Reservation and the relocation of three hundred people by the United States for the construction of the Kinzua dam and reservoir.

With the loss of these lands came millions of dollars of federal money in the 1970s, in the form of compensation and economic development assistance. In conjunction with additional funds made available through the federal government's Self-Determination Policy, this cash infusion rapidly expanded the function of the Seneca Nation government in the lives of the Seneca People. Social service programs, job training programs, health clinics and housing projects were just a few of the new responsibilities taken on by the Nation government.<sup>304</sup> In only twenty years—from 1960 until 1980—Nation government employment increased from three to four hundred.

This early development was not without internal controversy. In 1972, the Seneca Nation sought to enter into a joint venture with Fisher-Price Toys, Inc. for the construction of a toy factory on the Cattaraugus Reservation. A group of Senecas opposed to the development filed suit against the Seneca Nation and its elected officials in federal district court to enjoin the project.<sup>305</sup> The Nation, in a sophisticated transaction, was attempting to utilize some of the monies awarded to it from the Kinzua Dam settlement.<sup>306</sup> As part of the transaction,

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304. See generally O'BRIEN, *supra* note 7.

305. See *Seneca Constitutional Rights Org. v. George*, 348 F. Supp. 48 (W.D.N.Y. 1972) (denying plaintiff's motion for a preliminary injunction and concluding that 25 U.S.C. § 1302 implicitly waived the Seneca Nation's sovereign immunity); *Seneca Constitutional Rights Org. v. George*, 348 F. Supp. 51 (W.D.N.Y. 1972) (dismissing the complaint for failure to state a claim upon which relief can be granted).

306. The transaction was advanced for its time. As the court described it: The toy factory contemplated by the agreement would cost \$6,000,000. Under the agreement, the Seneca Nation would apply to the federal Economic Development Administration for a grant in the amount of \$1,300,000 for development of the expanded industrial park. It would also invest in the development of the expanded park additional funds, estimated to amount to \$250,000, available to it under Section 4 of the Seneca Rehabilitation Act of 1964, Pub. L. No. 88-533, § 4, 78 Stat. 738. In addition, the Nation would apply to the Economic Development Administration for a loan in the amount of \$3,900,000 to finance 65% of the cost of the factory. Fisher-Price would invest the remaining 35%, or \$2,100,000. The Nation would have title to the plant and unencumbered ownership at the end of the lease period, during which time it would receive an annual rental fee of approximately \$40,000.

the Nation Council determined that it would need to condemn land use interests held by Nation members under Nation law,<sup>307</sup> which naturally proved controversial and served as the basis of the litigation.<sup>308</sup> The plaintiffs raised a number of different grounds for relief focusing on Seneca tribal law.<sup>309</sup> The court held that the Seneca Nation could be sued<sup>310</sup> but recognized that its review was limited to ICRA issues, not Seneca tribal law.<sup>311</sup> Nonetheless, the court proceeded to analyze these issues of Seneca law and

*Seneca Constitutional Rights Org.*, 348 F. Supp. at 54-55 (footnote omitted).

307. The court described the condemnation process as follows:

On May 13, 1972, the Seneca Council enacted an ordinance for the acquisition of property in connection with the expansion of the industrial park. The ordinance provides procedures for condemnation of land and vests jurisdiction over such proceedings in the Peacemaker's Court. Under the ordinance, the Court cannot exercise jurisdiction unless the Nation shows that it has made a good faith effort to negotiate for the purchase of the property at a fair valuation thereof.

On June 10, 1972, the Council adopted a resolution authorizing the acquisition by condemnation of the use interests in a parcel of land which it deems to be required for the expansion of the industrial park.

*See id.* at 55.

308. For example, one aspect of the litigation turned on the dispute over the anticipated condemnation of plaintiff Mary Kennedy's land. The court explained that, "[t]here is a dispute between the parties over Mary Kennedy's situation. The Seneca defendants contend that her interest has been acquired by negotiation, while the plaintiffs assert that the interest was acquired by fraud."

*See id.* at 55 n.3.

309. These claims were that the Indian Civil Rights Act was violated because: (1) direct appeals to the Council infringed upon the right to a fair trial, (2) the Seneca Council was "illegally constituted" due to "election irregularities," (3) the Seneca Constitution does not authorize the Fisher-Price contract, (4) the Seneca Nation lacks the power of eminent domain, and (5) the proposed condemnation would be a taking for nonpublic use without just compensation.

*See id.* at 57.

310. This case arose prior to the Supreme Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), which upheld tribal sovereign immunity in federal court actions arising under the Indian Civil Rights Act.

311. The court stated:

It should be noted at the outset of the discussion of these claims that the jurisdiction of the court under 25 U.S.C. § 1302 is limited to enforcing the prohibitions contained therein. It does not extend to ensuring compliance with provisions of Seneca law, including the Seneca Constitution, by instrumentalities of the Seneca Constitution unless failure to comply constitutes a violation of the guarantees enumerated in the section. Likewise, a provision of the Seneca Constitution can be overturned by this court only if it violates the provisions of 25 U.S.C. § 1302.

*See Seneca Constitutional Rights Org.*, 348 F. Supp. at 57-58

concluded that the complaint should be dismissed for failure to state a claim.<sup>312</sup>

Another major controversy during the 1970s involved the State's efforts to condemn part of the Allegany Reservation for a highway right-of-way—a dramatic act coming only a decade after the federal government's taking of Seneca land for the Kinzua Reservoir.<sup>313</sup> The State's effort precipitated both external and internal conflict. As has long been the case on these issues, Senecas were deeply divided, with many of the view that allowing the highway to go through would be another major treaty violation and concession of the Nation's sovereignty. Others were of the view that the highway was inevitable and that the Nation should try to negotiate and get whatever it could out of a bad situation.

The controversy could have been avoided, however, because the State was once again acting in bad faith to exercise its authority over Indian land—here its eminent domain power—that had long been denied it under federal law.<sup>314</sup> In the federal action filed and won by the Nation, the court emphasized the fact that “the State [was] attempting to reargue questions which have been decided to the contrary in numerous other cases.”<sup>315</sup> These arguments included the position that the State had power to impose its authority over Indian lands, a position which had been

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312. Regarding “appeals to the council,” the court said that it did not believe that “due process forbids a tribe from employing such a procedure.” *Id.* Regarding “election irregularities and fraud, including the purchase of votes,” the court first questioned its jurisdiction over the issue but concluded that the factual assertions were incomplete. Regarding the “Council’s power to contract,” the court rejected application of provisions of the Seneca constitution and held that “[d]ue process of law does not require a government to submit a treaty, let alone a contract, to a referendum of the populace, nor does it prohibit the government from annually expending more money than it takes in.” *Id.* at 59; On the question of the Seneca Nation’s eminent domain power, the court concluded that because the Seneca Nation was a sovereign, the power of eminent domain was an “offspring of political necessity, and it is inseparable from sovereignty, unless denied it by fundamental law.” *Id.* at 60 (citing *Kohl v. United States*, 91 U.S. 367, 371-72 (1886)). Finally, the court rejected the “public use and just compensation” claim as premature since no taking had actually occurred. *Id.*

313. *See Seneca Nation of Indians v. New York*, 397 F. Supp. 685 (W.D.N.Y. 1975).

314. *See id.* at 686.

315. *See id.* at 686-87.

rejected in 1942,<sup>316</sup> and that the federal Non-Intercourse Act did not apply to New York because of its status as one of the original thirteen colonies, a position which had been rejected only a year earlier by the United States Supreme Court.<sup>317</sup>

As with the other *Haudenosaunee* nations, the 1980s ushered in the era of the Entrepreneur and a focus on economic development. A few Senecas built their own smokeshops and gas stations and began to sell tax-free cigarettes and gasoline to non-Indians in Seneca territory.<sup>318</sup> In addition to individual Entrepreneurs, the Seneca Nation itself also entered the cigarette and gas business eventually generating enough funds to launch a high-stakes bingo operation. Development continued, and, by the late 1980s, many individual Senecas and the Seneca Nation government had become fully committed to furthering private and public economic development.

These developments also generated controversy. In 1986, a dispute arose between two of the early Entrepreneurs, Robert Hoag, a former President of the Nation, and Maurice John, to whom the Seneca Council had granted the exclusive distributorship of cigarettes within the Nation.<sup>319</sup> At different times, each had been able to secure such a right from the Seneca Council, but John's alleged right was prior in time and he sued Hoag, the Seneca Nation and all Seneca elected officials in *State* court.<sup>320</sup> The action was dismissed as to the Nation and its

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316. See *United v. Forness*, 125 F.2d 928 (2d Cir. 1942).

317. See *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974).

318. Non-Indian commerce within the Seneca Nation is significant. The City of Salamanca is located almost entirely within the Allegany Reservation and both the Allegany and Cattaraugus Reservations have major four-lane highways running through them. See *Campbell Oil, Inc. v. Chu*, 485 N.Y.S.2d 948 (Alb. Co. Sup. Ct. 1985) (noting that Seneca entrepreneur Maurice John was involved in tax-free sales of gas and cigarettes at least as early as 1983). One early Seneca businessman Barry Snyder, Sr. had done so well that he was accused of owing the State \$6.3 million in sales taxes on transactions with non-Indians. See Agnes Palazetti, *Seneca Still Refuse to Pay Tax; Snyder Denounces \$6.3 Million Judgment for State*, BUFF. NEWS, Apr. 10, 1992; *Snyder v. Wetzler*, 603 N.Y.S.2d 910 (N.Y. App. Div. 1993), *aff'd*, 644 N.E.2d 1369 (N.Y. 1994). Snyder also unsuccessfully attempted to conduct gambling activity at his business in 1987. *People v. Snyder*, 532 N.Y.S.2d 827 (Erie Co. Sup. Ct. 1998).

319. See *John v. Hoag*, 500 N.Y.S.2d 950 (Cattaraugus Co. Sup. Ct. 1986).

320. The lawsuit was originally brought in the Nation's Peacemakers Court. While John was able to obtain a temporary restraining order enjoining Hoag's sales activities, he failed to prosecute the action in that forum. See *id.* at 955-56,

officials on the grounds of sovereign immunity.<sup>321</sup> Nonetheless, a cause of action arising within Seneca territory, involving Seneca parties, the Seneca government, Seneca elected officials and concerning an interpretation of Seneca law, had been taken to the New York State courts for redress.

By the late 1980s, issues associated with economic development within the Seneca Nation had continued to generate controversy. This controversy was not so much over whether there should be development, but rather who would control it. A major conflict developed in 1989 when the Nation government sought to impose its own sales tax on the private businesses and enter into an agreement with the State to forbear the State's enforcement of its taxes.<sup>322</sup> This move was supported by many Senecas who thought that the rights allowing State tax-free sales to occur within the Nation were public rights and that the Entrepreneurs should pay for the privilege. Not surprisingly, the Entrepreneurs were enraged by this tax and vigorously opposed it. They failed to stop it within the Nation, but successfully lobbied against it at the State level where approval was also required.<sup>323</sup> This action, in addition to Nation efforts to develop a business code to regulate development, fueled the brewing internal conflict and set the stage for even greater adversity in the 1990s.

The Entrepreneurs were able to capitalize on the resistance of the Seneca public to any form of taxation and began to take control of the Seneca Nation government. By 1992, they had secured all but one of the positions within the Council and Executive branches.<sup>324</sup> Controversy and division continued to escalate after the government developed strong pro-business policies and secretly attempted to institute Class III casino gaming in 1993.<sup>325</sup>

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321. See *id.* at 953-56.

322. See Sam Howe Verhovek, *Reservation's Taxes May End Detours for Cheap Gas*, N.Y. TIMES, Jan. 19, 1989, at B1.

323. See Jon R. Sorensen, *Seneca Sales Tax Looks Dead*, BUFF. NEWS, Mar. 8, 1990, at 1D.

324. Agnes Palazetti, *Senecas Elect Snyder to Presidency: His Party Makes a Strong Showing*, BUFF. NEWS, Nov. 4, 1992, at B9.

325. See Agnes Palazetti, *Senecas Want to Build Casino in WNY: Will Seek State OK to Use Lands Once Owned by Indians*, BUFF. NEWS, July 23, 1993, at A1; *Casino Opponents Shut Down Gas Station, Mini-Mart*, BUFF. NEWS, July 24, 1993, at A1 (stating protest activity was fueled because the Council's action



By 1994, there was a backlash against the Entrepreneurs with the election of anti-Entrepreneur candidates to Nation offices. Dennis Bowen, Sr., who had lived at the Navajo Nation for the previous twenty-five years, won the Nation presidency with only thirty percent of the vote in a unprecedented field of eight candidates beating the Entrepreneur candidate by only three votes.<sup>326</sup> Bowen's election was fueled by considerable pent-up hostility against the Entrepreneurs and he acted upon it. Naively, he thought that he had a mandate to govern and he singlehandedly sought to demolish the Entrepreneur political machine.<sup>327</sup> He filed suit in the Nation's Peacemaker's Court to validate his actions,<sup>328</sup> but his political opponents, led by Ross John, Sr., filed suit in State court to enjoin him from acting.<sup>329</sup> The State court asserted jurisdiction over these matters of internal Seneca government and politics<sup>330</sup> and even entertained jailing Bowen for contempt of its orders.<sup>331</sup> Eventually, however, Bowen successfully moved the federal district court to

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"was done in a very sneaky way . . . People were at the special tribal council meeting Wednesday, but it was only after most of them had left—around 11:30 p.m.—that the Council brought up the casino resolution."); *Snyder Deems Seneca Casino a "Dead" Issue: Cites Safety of the People as the Primary Reason for Canceling Gaming Plans*, BUFF. NEWS, Aug. 1, 1993, at A1.

326. See Agnes Palazetti, *Seneca Insurgent Captures Presidency: Incumbent Party Keeps Other Top Seats: Effect on Nation's Businesses Remains Unclear*, BUFF. NEWS, Nov. 2, 1994, at B5.

327. Bowen took the following actions within days of taking office, allegedly in violation of the Nation's constitution and laws:

[A]ttempting to remove and replace Ross John, Sr. as a Councilor; (2) attempting to remove and replace Arthur John as a Councilor; (3) seizing and occupying one of the Nation's administrative buildings thereby preventing Nation officials from conducting business; (4) attempting to terminate the Nation's Human Resource Director Geraldine Memmo; (5) attempting to terminate Gaming Enterprises CEO Maxine Jimerson; (6) conducting an improper Council meeting on November 12, 1994; (7) attempting to rescind the Nation's Governmental Law without approval of the Council; and (8) attempting to terminate all department heads in the Nation's government.

Bowen v. Doyle, 880 F. Supp. 99, 107 (W.D.N.Y. 1995).

328. See *id.* at 106-07.

329. See *id.* at 107 (stating the state court complaint did not mention the existence of the Peacemakers Court action).

330. See *id.* at 109. The state court even issued an order directing that certain Council members be allowed to sit in Council, staying actions taken by the Council at its November meeting, and concluding that it was "uncertain or unpredictable as to what might be accomplished in the Peacemaker Court." *Id.*

331. See *id.* at 109.

enjoin the State court from exercising jurisdiction over the dispute.<sup>332</sup> Unfortunately, this decision had little effect of resolving the underlying dispute and on March 25, 1995, three people were killed during a firefight between the opposing factions.<sup>333</sup>

Eventually, the violence associated with the Seneca civil war subsided. But the aftereffects have continued. Another anti-Entrepreneur candidate, Michael Schindler, was elected president in 1996 but was unable to move the Seneca Nation in any coherent direction. Recently, the Seneca People have authorized the Nation government to begin the process of pursuing the development of a Class III gaming compact with the State and the construction of a high-stakes casino.<sup>334</sup> Although this authority was granted by referendum, it was approved by only a slight margin and only for the purpose of negotiating a compact with the State. Unfortunately, this development does not suggest that the Seneca Nation is entering a new period of stability. Tensions remain high over the casino issue and it is not likely that any consensus will emerge on either this issue or the course of any future Seneca Nation development.

6. *The Tonawanda Band of Senecas.* The Senecas of the Tonawanda Reservation have also experienced considerable turmoil in recent years. The most significant example arises out of the banishment of five tribal members who sought to overthrow the traditional government of chiefs in 1991.

The banishments arose out of allegations made by a few Tonawanda Seneca members that the Council of Chiefs had acted improperly in the administration of Band affairs.<sup>335</sup> As a response against the alleged misdeeds, these individuals sought to establish their own government.<sup>336</sup> The Council of

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332. See *id.* at 138.

333. See Agnes Palazzetti, *Three Killed in Gunbattle Triggered by Seneca Feud*, BUFF. NEWS, Mar. 26, 1995, at A1.

334. See Agnes Palazzetti, *Senecas Approve Casino Gambling but Nation's President Voids Vote*, BUFF. NEWS, May 3, 1998, at A1; *Senecas Tackle Vote Fallout*, BUFF. NEWS, May 4, 1998, at A1 (indicating that gambling referendum was valid).

335. See *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996). The allegations against the Chiefs accused them of "misusing tribal funds, suspending tribal elections, excluding members of the Council of Chiefs from the tribe's business affairs, and burning tribal records." *Id.* at 877-78.

336. "Allegedly, in consultation with other members of the tribe, the

Chiefs, however, concluded that this was an act of treason and ordered their banishment from Tonawanda Seneca territory.<sup>337</sup> Efforts were taken by the Chiefs and their supporters to enforce the banishment, including an unsuccessful attempt to physically remove the banished individuals,<sup>338</sup> physical harassment<sup>339</sup> and denial of medical and utility services.<sup>340</sup> The conflict was exacerbated in light of allegations that one of the clan mothers, in accordance with the *Gayanashagowa*, had "dehorned," or removed, one of the Chiefs.<sup>341</sup>

In response, the banished individuals filed a lawsuit against the Council of Chiefs and the Tonawanda Band in federal court alleging various violations of the ICRA.<sup>342</sup>

petitioners formed an Interim General Council of the Tonawanda Band." *See id.* at 878. It is unknown to what extent, if any, these individuals may have relied upon the State Indian Law as support for their efforts. *See supra* Part I.B.2.c.

337. The banishment order was issued on January 24, 1992, and read as follows:

It is with a great deal of sorrow that we inform you that you are now banished from the territories of the Tonawanda Band of the Seneca Nation. You are to leave now and never return.

According to the customs and usage of the Tonawanda Band of the Seneca Nation and the HAUDENOSAUNEE, no warnings are required before banishment for acts of murder, rape, or treason.

Your actions to overthrow, or otherwise bring about the removal of, the traditional government at the Tonawanda Band of Seneca Nation, and further by becoming a member of the Interim General Council, are considered treason. Therefore, banishment is required.

According to the customs and usage of the Tonawanda Band of Seneca Nation and the HAUDENOSAUNEE, your name is removed from the tribal rolls, your Indian name is taken away, and your lands will become the responsibility of the Council of Chiefs. You are now stripped of your Indian citizenship and permanently lose any and all rights afforded our members.

**YOU MUST LEAVE IMMEDIATELY AND WE WILL WALK WITH YOU TO THE OUTER BORDERS OF OUR TERRITORY.**

*Poodry*, 85 F.3d at 878.

338. *See id.*

339. "After this initial attempt to remove the petitioners from the reservation, the respondents and persons purporting to act on their behalf allegedly continued to harass and assault the petitioners and their family members, attacking petitioner LaFromboise on Main Street in Akron and 'stoning' petitioner Peters." *See id.*

340. *See id.*

341. *See id.* at 878-79.

342. During a conversation on the TRIBALLAW Listserv on this issue, one of the individuals banished, Susan LaFromboise, explained her view of the underlying facts of the banishment: "Five of us were singled out for banishment

Ordinarily, the ICRA does not provide for any federal cause of action against tribal officials unless an individual is being "detained."<sup>343</sup> The question raised by the petitioners, however, was whether their banishment constituted a deprivation of liberty sufficient to trigger federal court *habeas corpus* review. The district court held that the petitioners' banishment was not such a sufficient deprivation of liberty. The Second Circuit Court of Appeals, however, reversed this ruling and held that the banishment decision rendered by Tonawanda Council of Chiefs could be reviewed by the federal court.<sup>344</sup>

The *Poodry* decision was unprecedented and goes to the very heart of whether an Indian tribe has the inherent authority to determine its own membership. The actions

because the chiefs thought that if we were removed the rebellion would die down and the people would forget about it and they could continue, but it hasn't worked out that way, it only made everyone mad." E-mail from aicfs@pce.net to multiple recipients of list triballaw@thecity.sfs.edu (Aug. 11, 1997, 8:56 a.m.) (on file with author and the *Buffalo Law Review*). The ICRA lawsuit was filed because, "There needs to be some protection for the people from renegade tribal councils . . . . At this point, I really couldn't agree that the remedy might be take [sic]." Laura proposed that Susan:

[o]rganize within. The ripples may take awhile to spread, but if you're starting with truth, and staying with truth, and truly honoring your own ancestors and traditions, it WILL come around. U.S. to determine who's right gives up your sovereignty; and illegal actions to fight illegal actions may give you short term gain, but doesn't work in the long haul.

bear@epix.net to multiple recipients of list triballaw@thecity.sfs.edu (Aug. 12, 2:05 p.m.).

343. See 25 U.S.C. § 1303 (1994) (authorizing federal suit for a writ of habeas corpus to test the detention of any person by an Indian nation); see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

344. The court concluded:

[T]he existence of the orders of permanent banishment alone—even absent attempts to enforce them—would be sufficient to satisfy the jurisdictional prerequisites for habeas corpus. We deal here not with a modest fine or a short suspension of a privilege—found not to satisfy the custody requirement of habeas relief—but with the coerced and peremptory deprivation of the petitioner's membership in the tribe and their social and cultural affiliation. To determine the severity of the sanction, we need only look to the orders of banishment themselves, which suggest that banishment is imposed (without notice) only for the most severe of crimes: murder, rape, and treason . . . We believe that Congress could not have intended to permit a tribe to circumvent ICRA's habeas provision by permanently banishing, rather than imprisoning, members "convicted" of the offense of treason.

*Poodry*, 85 F.3d at 895.

taken by all of the parties to precipitate federal court review undoubtedly has jeopardized Tonawanda Seneca sovereignty. As this litigation continues on remand to the federal district court, there has been no resolution of the underlying issues and it is unlikely that such will occur in the near future.

7. *The Tuscarora Nation.* The Tuscarora Nation has not been immune to the difficulties facing the other *Haudenosaunee* nations in the modern era. Like the other nations, these problems have focused on the emergence of capitalism and the conflict associated with economic development.

In 1987, Tuscarora Entrepreneurs, associated as the "Tuscarora Warriors Bingo Commission" and led by Joseph Anderson and Jerry Chew, sought to establish a privately owned "high stakes commercial bingo enterprise" within Tuscarora territory despite the prohibition against any and all such gaming activity within the Nation ordered by the Tuscarora Council of Chiefs.<sup>345</sup> The opening of the bingo hall generated considerable controversy within the Nation and spurred the Chiefs to enforce the tribal anti-gambling law.<sup>346</sup> The Nation, however, did not have a police force, and, as a result, the Chiefs deputized tribal members to enforce Nation law.<sup>347</sup> At various times, these deputies clashed with up to 170 pro-gambling and anti-gambling supporters protesting at the bingo site. The "confrontations became violent at times and, eventually, State and local police, at times numbering more than one hundred, had to be deployed to keep the peace and prevent interference with traffic."<sup>348</sup> The violence escalated<sup>349</sup> with considerable questions arising as to the validity of the Nation's anti-gambling law and the purported deputation.<sup>350</sup>

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345. See *People ex rel. Abrams v. Anderson*, 529 N.Y.S.2d 917, 917 (N.Y. App. Div. 1988).

346. See *id.*

347. See *id.*

348. See *id.*

349. At one point, there was "an attack upon [Commission President] Jerry Chew by one protestor and various fights between other protestors and bingo employees. Those incidents resulted in 12 arrests on one occasion and 14 arrests on another." *Id.* at 921.

350. In support of a motion to vacate a temporary restraining order against the bingo games, the Commission submitted affidavits from Chief Webster Cusick, the tribe's representative to the Iroquois Confederacy, and Hattie

Eventually, two lawsuits were filed in State court. The first was an action by the Tuscarora Warriors Business Commission and Joseph Anderson for injunctive and monetary relief against those individuals picketing the bingo operation, including those who had been deputized to enforce the Nation's anti-gambling law.<sup>351</sup> The second was an action by the State Attorney General for an injunction to enforce the Tuscarora anti-gambling law on behalf of the Nation.<sup>352</sup> Originally, the court granted a preliminary injunction in both actions.<sup>353</sup> But the appellate court dismissed the action brought by the Attorney General on the grounds that he "lack[ed] standing to enjoin conduct which is illegal under the laws of the quasi-sovereign Tuscarora nation."<sup>354</sup> Moreover, despite ample evidence in the record that the Chiefs acted in an official capacity when they deputized tribal members, the court sustained the injunction in the private action. It so held on the grounds that it had not been adequately established by the defendants that "the tribe has a validly enacted anti-gambling law, that the Council of Chiefs is the proper legislative body of the tribe, that defendants are duly designated law enforcement officials, or that defendants were acting in that capacity in interfering with the bingo operation."<sup>355</sup> Eventually, however, the Nation prevailed in this matter and the gambling activities ceased.<sup>356</sup>

The conflict over economic development within the Tuscarora Nation, however, did not end. Anderson continued to press his economic development plans within the Nation, including the construction of a cigarette manufacturing plant.<sup>357</sup> In 1993, in an effort to forestall

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Williams, Beaver Clan Mother, which stated that "the Council had not validly enacted an anti-bingo law in accordance with tribal custom" and that the anti-bingo protestors were "not acting as official representatives of the tribe." *Id.*

351. *See id.* at 919.

352. *See id.* at 920.

353. *See id.* at 920, 921.

354. *See id.* at 921.

355. *See id.* at 922.

356. *See Work Project Continues on Tuscarora Reservation*, BUFF. NEWS, May 3, 1998, at A1; *Senecas Tackle Vote Fallout*, BUFF. NEWS, Aug. 13, 1998, at ("Anderson's attempts to hold bingo games near his main trading post and gasoline station on Saunders Settlement Road met with long and violent protests about two years ago. Numerous bingo games were held there, but the protestors eventually won, and Anderson suspended the games.").

357. *See generally* Lou Michel, *Power Crisis Still Simmers on Tuscarora*

Anderson and other Tuscarora Entrepreneurs from developing their businesses, the Council of Chiefs barred the local utility company from instituting new service without their permission.<sup>358</sup> This led Anderson to initiate a new round of litigation against the utility company.<sup>359</sup>

By 1994, Anderson had developed a new plan for effectuating business development within the Tuscarora Nation—he initiated efforts to overthrow the Council of Chiefs and to establish a new form of government, the “Tuscarora Tribal Business Council.”<sup>360</sup> One of the first acts of the new “government” was to authorize bingo games to be conducted.<sup>361</sup> Anderson stated that the reason for doing so was “because we knew we had to do something that would get us the attention we needed to have a government on our reservation that the people have a voice in.”<sup>362</sup> Nonetheless, within days of opening the bingo games, the Council of Chiefs had notified the federal government’s National Indian Gaming Commission, which issued a cease and desist order against Anderson’s bingo hall.<sup>363</sup> Anderson complied, arguing that the issuance of the order “opens the way for us to go to court and hopefully get a government of the people.”<sup>364</sup> The Chiefs, however, proceeded to banish Anderson from the Tuscarora Nation.<sup>365</sup> Eventually, the bingo games were shut down.

In addition to the conflict between the Tuscarora government and the Entrepreneurs, there also appears to have been conflict emerging within the Council of Chiefs. In early 1996, in response to the conflict occurring within the Nation, the BIA Area Director sought a meeting with the Chiefs for the “opportunity to reconfirm the tribe’s

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*Reservation; Justice Dept. Seeks Solution As Some Go Without Electricity*, BUFF. NEWS, Apr. 9, 1995, at B4.

358. *See id.*

359. *See Anderson Suit Approved Against Niagara Mohawk*, BUFF. NEWS, July 23, 1996, at B4.

360. *See Agnes Palazzetti, Rebels Launch Campaign to Remove Tribal Chiefs: Want Federal Bureau of Indian Affairs to Recognize New Governing Bodies*, BUFF. NEWS, Mar. 27, 1994, at B5.

361. *See id.*

362. *See id.*

363. *See id.*

364. *See id.*

365. *See Michel, supra* note 357, at B4 (“Kenneth Patterson, a member of the Council of Chiefs, said ‘Anderson has been banished from the tribe.’”).

leadership and to discuss other issues of mutual interest.”<sup>366</sup> After the meeting—which six of the eight Tuscarora Chiefs attended—the BIA Field Representative in New York communicated in a letter that Chief Leo Henry would be the spokesperson for the Council of Chiefs.<sup>367</sup> This designation had apparently been the practice in the past, but the Field Representative’s letter indicated that only majority rule was required for deliberations by the Council of Chiefs.<sup>368</sup> Chief Webster Cusick objected to this position claiming that it had the effect of being a “radical departure from, and intrusion upon, traditional Tuscarora and Iroquois government” and also depriving him of “his traditional authority, derived from his status as Chief of the Snipe Clan, to be the spokesman for the Council of Chiefs.”<sup>369</sup> Ultimately, the Interior Board of Indian Appeals affirmed its decision to recognize Chief Henry as the Tuscarora spokesperson.<sup>370</sup> Nonetheless, it appears that this dispute had been generated by years of infighting within the Council of Chiefs, perhaps as the result of Chief Cusick’s support for the Entrepreneurs.<sup>371</sup>

8. *The Confederacy*. Despite a variety of challenges during the last 225 years, the *Haudenosaunee* Confederacy

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366. See *Cusick v. Acting E. Area Dir.*, 31 I.B.I.A. 255 (Nov. 17, 1997).

367. See *Cusick*, 31 I.B.I.A. at 256 (quoting Letter from Dean White, Field Representative, BIA to Chief Leo Henry (June 3, 1996) (on file with author and the *Buffalo Law Review*)).

368. The letter provided:

[T]he [BIA] has to respect the majority view of the council when dealing with traditional Native American governmental entities where no written government ordinances exist. It is not reasonable to expect that unanimous agreement should be required by all members of a council for all matters of deliberation before them.

Letter from Dean White, Field Representative, BIA to Chief Leo Henry (June 3, 1996) (on file with author and the *Buffalo Law Review*).

369. See *id.*

370. The Interior Board of Indian Appeals held that “[t]he Area Director’s acceptance of Chief Henry as the principal spokesperson of the Council of Chiefs does not prescribe a new form of Tuscarora government. It does not divest the Council of Chiefs of its governmental authority. It does not alter the composition of the Council or impede in any way the ability of the Council to conduct business as it sees fit.” See *id.* at 258.

371. In *People v. Anderson*, Chief Cusick provided an affidavit on behalf of the Entrepreneurs that the Tuscarora anti-gambling law had not been lawfully enacted and that the protestors were not duly authorized tribal representatives. 529 N.Y.S.2d at 921.



continues to exist as an alliance of Indigenous nations exercising governmental authority with respect to domestic, federal and international affairs.<sup>372</sup> Traditionally, the Confederacy was governed by a Confederate, or Grand, Council comprised of fifty *royanier* from throughout the Six Nations, including the *Tadadaho*, who presides. In recent years however, not all titles have been allocated to sit in the Confederate Council.<sup>373</sup> As has been discussed, all *Haudenosaunee* peoples maintain some degree of participation in Confederacy political affairs, although not all *Haudenosaunee* nations do.<sup>374</sup> Only the Onondaga, Cayuga and Tuscarora Nations officially have maintained undivided participation in the Confederacy. While some Mohawks, Oneidas and Senecas have continued to participate formally, others from those nations have developed alternative forms of government.

The official Confederacy position is that “[n]one of the nations of the Confederacy has ever declared themselves separate from the Confederacy.”<sup>375</sup> However, it fully concedes that many *Haudenosaunee* people have established separate governments apart from it.<sup>376</sup> Official policy of the Confederacy provides that:

The Seneca Nation of Indians, the Mohawk Tribal Council, the People’s government of Akwesasne, the Oneida Nation government of Ray Halbritter and Six Nations Band Council at Ohsweken, the Oneida Band Council at Southwold, the elected Mohawk governments at Oka, Deseronto, Gibson, Cornwall Island

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372. See generally, *Haudenosaunee Homepage*, Oct. 8, 1998 <<http://sixnations.buffnet.net/culture/Welcome.html?>> (on file with author and the *Buffalo Law Review*).

373. See *Haudenosaunee Homepage*, Oct. 8, 1998 <[http://sixnations.buffnet.net/culture/welcome.html?article=roll\\_of\\_chiefs](http://sixnations.buffnet.net/culture/welcome.html?article=roll_of_chiefs)> (on file with author and *Buffalo Law Review*); *Haudenosaunee Homepage*, Oct. 8, 1998 <[http://sixnations.buffnet.net/culture/Welcome.html?article=grand\\_council](http://sixnations.buffnet.net/culture/Welcome.html?article=grand_council)> (on file with author and the *Buffalo Law Review*).

374. The official position of the Confederacy on its membership is that “[t]he Oneidas . . . continued to send their delegates to the Council, and the Tuscarora remain firmly attached to the Confederacy. The Onondagas, Senecas, Cayugas and Mohawks continue to hold their positions within the Confederation.” *Haudenosaunee Homepage*, Oct. 8, 1998 <[http://sixnations.buffnet.net/Grand\\_Council/Welcome.html?article=settlement\\_act](http://sixnations.buffnet.net/Grand_Council/Welcome.html?article=settlement_act)> (on file with author and the *Buffalo Law Review*) (emphasis added).

375. See *id.*

376. *Haudenosaunee Homepage*, Oct. 8, 1998 <[http://sixnations.buffnet.net/Grand\\_Council/Welcome.html?article=settlement\\_act](http://sixnations.buffnet.net/Grand_Council/Welcome.html?article=settlement_act)> (on file with author and the *Buffalo Law Review*) (emphasis added).

and Kanawake and Oneida Nation of Wisconsin operate under the regulatory authority of the United States or the government of Canada, and are not considered part of the Grand Council.<sup>377</sup>

While the basis for this statement appears properly rooted in the effect that colonization has had on the *Haudenosaunee* people,<sup>378</sup> there is no official explanation given for why the people living under these other governments have continued to do so.

The fact that there are governments comprised of *Haudenosaunee* people operating outside of the Confederacy has generated considerable friction over the years. On various policy matters and conflicts with the State and federal governments, the Confederacy continues to maintain its position that it speaks for all *Haudenosaunee* peoples regardless of governmental form. This frequently has caused conflict with the other governments representing *Haudenosaunee* people that take the position that they have a voice independent of the Confederacy. This is especially problematic when dealing with non-Indians who have little knowledge or understanding of the governmental division that exists amongst *Haudenosaunee* peoples.

In the modern era, the Confederacy, led by the Onondagas, has continued to assert itself in the internal and external affairs of the *Haudenosaunee*. Internally, the Confederacy has taken efforts to repel the influence of the Entrepreneurs and the Warrior Society within the Confederacy aligned nations.<sup>379</sup> Not surprisingly, these efforts have generated considerable controversy.

The most recent effort by the Confederacy to defend its

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377. *Haudenosaunee Homepage*, Oct. 8, 1998 <[http://sixnations.buffnet.net/Grand\\_Council/Welcome.html?article=settlement\\_act](http://sixnations.buffnet.net/Grand_Council/Welcome.html?article=settlement_act)> (on file with author and the *Buffalo Law Review*).

378. *See id.* ("Although the Haudenosaunee have been severely disrupted by the Westward expansion of the United States, the subsequent surrounding of our lands, and the attempts to devour our people, the Confederacy continues to function.").

379. Under the heading of "Threats to Traditional Governments," the Confederacy's Homepage highlights, in a thirty-one page analysis, "The Anti-Sovereignty Actions of the Warrior Society" (focusing on the Mohawk and Oneida Warrior Societies) and the "Anti-Sovereignty Actions of the Business Owners Veronica and Kenneth Papineau, Oliver Hill, and Donald Rockwell." *See Haudenosaunee Homepage*, Oct. 8, 1998 <[http://sixnations.buffnet.net/threats\\_to\\_Traditional\\_Governments](http://sixnations.buffnet.net/threats_to_Traditional_Governments)> (on file with author and the *Buffalo Law Review*).

sovereignty from internal and external threats has involved its attempt to enter into an agreement with the State to regulate cigarette transactions within the Mohawk, Onondaga, Tonawanda and Tuscarora nations.<sup>380</sup> The State has long sought to tax these on-reservation transactions with non-Indians. Similarly, the tribal governments have long sought to regulate the Entrepreneurs. While the Confederacy entered into this agreement to address taxation issues, the Seneca Nation and the Saint Regis Mohawk Tribal Council refused to do so. The Oneida Nation entered into its own separate agreement with the State.<sup>381</sup>

Immediately following the announcement of the agreement on April 1, 1997, it immediately came under attack by the Entrepreneurs, the Warrior Society, and other *Haudenosaunee* people who either objected to the terms or the process by which of the agreement came about.<sup>382</sup> From the Entrepreneur perspective, there was much to complain about. The power of the agreement was based upon the Confederacy's reliance on the State's ability to prevent wholesale supplies from reaching any reservation business not sanctioned by the tribal government.<sup>383</sup> The fundamental problem with the agreement, however, was not

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380. See *Trade and Commerce Agreement Between the State of New York and the Haudenosaunee and the State of New York*, DAYBREAK, Apr. 1, 1997, at 11. This agreement would have recognized the Confederacy and the leadership of the party nations—the *Onondaga*, the *Tonawanda Seneca*, the *Tuscarora*, and the *Cayuga*—as the exclusive distributors of tobacco products within their territories. Motor fuel sales would be prohibited. In effect, the agreement would have enforced State regulations governing the distribution and taxation of these products against everyone except the governments of these Nations and their licensees. This plan would have “squeezed out” all of the existing non-Indian wholesalers and forced their Indian retail customers—the political opponents of the chiefs—to purchase their wholesale products from the tribal governments. The tribal government agreed to raise retail prices, which would have resolved both the Confederacy's problem of the Entrepreneurs not turning over any proceeds to the government, as well as the State's problem of bootlegging and retail prices being too low.

381. See Erik Kriss, *It's Legal, Costlier to Buy Tax-Free Goods from Indians; Five Nations, State Reach 30-Day Compromise: Indians Can Continue to Avoid Paying Sales Tax*, SYRACUSE HERALD-AM., Apr. 1, 1997, at C1.

382. See *id.*

383. Conceptually, the agreement was based upon the Seneca Nation Wholesale Distribution Law (enacted in October, 1994 and since amended and called the Trade and Commerce Law), that would have established the Seneca Nation as the exclusive distributor of gasoline and cigarettes in Seneca territory. See Robert B. Porter, *The State Won't Win by Ignoring the Sovereignty of the Senecas and the Other Indian Nations*, BUFF. NEWS, Mar. 28, 1997, at B2.

necessarily its terms, but that it apparently was developed without any notice or participation of those it purported to regulate.<sup>384</sup> Moreover, the agreement anticipated that the State rather than the Confederacy itself, would carry out much of the Confederacy's administrative obligations.<sup>385</sup> In short, the agreement was perceived as a short-sighted political deal with the State to make an end-run around the Entrepreneurs at the expense of tribal sovereignty.

As a result, resistance against the agreement raged for several weeks throughout the *Haudenosaunee* territories. Cigarette and gasoline supplies withered and hundreds of *Haudenosaunee* people were thrown out of work. In protest, Senecas conducted tire-burning demonstrations against the agreement and, on occasion, two major four-lane highways running throughout the territory were shut down.<sup>386</sup> Onondagas and others opposed to the agreement clashed with the State police.<sup>387</sup> Finally, after six weeks of mounting public pressure, Governor Pataki withdrew support for the agreement and abandoned future efforts to impose State

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384. See Tim Johnson, *New York State and Indian Tax Agreement Controversial*, 14 NATIVE AMERICAS 8 ("The fact that the agreement was signed after secret negotiations and verification that virtually no one in any of the communities who stood to be affected was consulted in formal processes or even informed as to its ultimate terms has put the Indian leadership in a boiling cauldron.").

385. The agreement called for the Confederacy to apply State tax-exempt stamps to cigarettes on an interim basis, (§ II.A.), to provide a full accounting to the State of the cigarettes owned by the Haudenosaunee (§ II.A.), to authorize a state designated compliance officer (Art. IV.), and to otherwise share sales information with the State (Art. III). See Trade and Commerce Agreement Between the State of New York and the Haudenosaunee and the State of New York, *supra* note 380, at 11.

386. See Anthony Cardinale & Donna Snyder, *Senecas Demand Meeting with Cuomo, Indians Close Section of Highway Sales Tax*, BUFF. NEWS, July 17, 1992, at A1. A similar effort by the State to shut down these no-tax sales occurred in June, 1992. Hundreds of Senecas shut down the New York State Thruway and Route 17, the two major four-lane highways running through Western New York State, and the state retreated. See *Protests by Seneca Indians Close Road in Western N.Y.*, SYRACUSE HERALD-J., Apr. 3, 1997, at A1.

387. See Robert L. Smith, *Indian Nations and State Near Commerce Agreement*, SYRACUSE HERALD-AM., May 20, 1997, at A10

Opponents of an impending commerce agreement—who drove in from all parts of the state and from Canada—gathered along the nation's stretch of Interstate 81 for a protest rally early Sunday afternoon. Some from a group of about 65 people walked onto the highway, then moved off the road into a nearby yard. State police then moved in with clubs, hitting some protestors and arresting 24 people.

*Id.*

taxes on reservation transactions with non-Indians.<sup>388</sup>

This episode, rather than affirming the Confederacy's role in regulating intergovernmental affairs with the State, has resulted in a further erosion of confidence in the Confederacy leadership. While the concept behind the agreement appears sound, and those who support the Confederacy thought it was a good idea,<sup>389</sup> this was an insufficient basis for dealing with an established class of Entrepreneurs who would stand to lose millions if the agreement had been fully implemented. While it might have been possible to induce the Entrepreneurs to accept some kind of agreement with the proper safeguards, the obvious ploy to form an alliance with the State to attack the Entrepreneurs without sufficient notice was a serious departure from the time honored process of government by consensus required under the *Gayanashagowa*.

9. *Summary of Recent Events*. The foregoing survey of the public record of the major *Haudenosaunee* political and economic conflicts during the last thirty years dramatically highlights the deep internal divisions that exist within each of the *Haudenosaunee* nations. These conflicts are not the garden variety type of political disputes common in any vibrant democracy. That these conflicts have even escalated to the point that they have become publicized to the outside world is evidence enough of their magnitude. But violence and killing is slowly replacing deliberation and reason as the foundational principle of *Haudenosaunee* government. Indeed, the very nature of the conflicts that one now sees occurring within each of the *Haudenosaunee* nations raises the question of whether there even is such a thing as a nation within those territories at all. Factionalism, rather than nationalism, has become the defining characteristic of

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388. See Agnes Palazetti, *Indians Win Tax Battle; Pataki Orders Repeal of Rule on Gas, Cigarette Levy*, BUFF. NEWS, May 23, 1997, at A1; see also Erik Kriss, *Reservation Merchants Fear Fallout From Gov's Decision*, SYRACUSE HERALD-AM., May 25, 1997, at A8.

389. See Doug George-Kanentiio, *Trade Compact Helps State-Iroquois Relations*, SYRACUSE HERALD-AM., Apr. 6, 1997, at C3; Robert L. Smith, *Pataki's Flip-Flop on Taxes Emboldens Foes of Iroquois Traditional Chiefs: Warrior Predicts struggle Against Leaders Who Negotiated with N.Y.*, SYRACUSE HERALD-AM., May 25, 1997, at A1 ("Iroquois intellectuals such as John Mohawk and Oren Lyons, professors at the State University of New York at Buffalo, quickly endorsed the compact.").

modern *Haudenosaunee* society.

No nation has been immune to this conflict. The Mohawks have been divided over their form of government for more than two hundred years. Three different groups claim governmental authority and, in doing so, they each deny the others any objective legitimacy. The Oneidas, while the most developed of all the *Haudenosaunee* nations, have made progress despite the obstacle of there being many Oneidas who outright reject the legitimacy of the recognized leadership and who have "lost their voices" as a result of their dissent. Perhaps most significantly, the Cayugas, who have long suffered the effects of being landless for two hundred years, have now chosen to fight over leadership at a time when their land claim has reached a critical stage. And the Onondaga, Tonawanda Seneca and Tuscarora nations, while historically the most tied to the *Gayanashagowa* and *Haudenosaunee* traditions, have all felt it necessary in recent years to resort to banishment to deal with the transgressions of some of their members. These transgressions are not insignificant—those banished have engaged in nothing less than revolutionary activity. Add in the fact that the Mohawks and the Senecas have each taken to killing each other over political and economic disputes and the fact that banishment has emerged within the more traditional nations completes the cycle of what can only be thought of as a modern form of cannibalism. In short, *Haudenosaunee* people in the modern era are willing and able to sacrifice one another and their nation's sovereignty in furtherance of their personal, political and economic agendas. As a result, government within every *Haudenosaunee* nation and throughout the Confederacy simply has failed to a considerable degree.

The following section will explore some of the reasons why this has occurred.

## II. WHAT ARE THE REASONS FOR HAUDENOSAUNEE GOVERNMENTAL DYSFUNCTION?<sup>390</sup>

There are no doubt many reasons to explain why the

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390. See generally Robert B. Porter, *A Vision of Nation Building*, 13 *NATIVE AMERICAS* 52 (1996); see also Robert B. Porter *Strengthening Tribal Sovereignty Through Government Reform: What Are The Issues?*, 7 *KAN. J.L. & PUB. POL'Y* 72 (1997).

*Haudenosaunee* currently are afflicted with such a great degree of division and dysfunction.<sup>391</sup> Fundamentally, however, my view is that these problems are all related to the colonization of the *Haudenosaunee* people that has occurred during the last several hundred years. While this colonization process has affected *Haudenosaunee* life in innumerable ways, I would like to look at four in which I believe there is a direct link to the dysfunction that now exists in *Haudenosaunee* government: (1) the changing of *Haudenosaunee* conceptions of society and identity, (2) the transformation of *Haudenosaunee* economic philosophy, (3) the altering of *Haudenosaunee* political philosophy, and (4) the corrosive influence of modern American society.

#### A. *The Change in Haudenosaunee Society and Identity*

American colonization has meant that the Indigenous people of this continent have undergone a variety of forced, assimilated and consciously accepted changes during the last five hundred years. This is as true for the *Haudenosaunee* people as it is for other Indigenous peoples. As a result of this colonization however, the *Haudenosaunee* of today are a more culturally diverse people than have ever existed before.

To be sure, cultural transformation is a law of nature that cannot be violated. For hundreds of years prior to the coming of the White Man, the *Haudenosaunee* had regular interactions with the other Indian nations through trading, diplomacy, war and conquest. These interactions all had identifiable effects on the *Haudenosaunee* way of life. As the people bartered, entered into new agreements or endured the violence of war, the underlying character of what it meant to be Cayuga, or Mohawk, Oneida changed ever so slightly. One of the more obvious examples of this process was the practice of adopting into *Haudenosaunee* society the people of the nations that had been conquered or subjugated.<sup>392</sup>

But while *Haudenosaunee* identity has always changed with regularity, this process at one time occurred in an

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391. See Grazma, *supra* note 196 ("Modern-day Iroquois blame white influence for virtually all the Indians' problems: alcoholism, diabetes from eating processed foods, health problems from pollution and an identity crisis caused by the loss of their languages and customs.").

392. See Jack Campisi, *Oneida*, in HANDBOOK, *supra* note 1, at 482.

evolutionary manner. Changes occurred under the full control of the *Haudenosaunee*, and they occurred in a manner not radically dissimilar to the essence of *Haudenosaunee* notions of community and identity. Accordingly, this allowed for new influences to be gradually accommodated and incorporated with no significant effect on the fundamental core of what it meant to be *Haudenosaunee*. The *Gayanshogowa*, the family and social structure and the overall way of life of the *Haudenosaunee* people were strong and sufficiently established enough to repel undesired influences and to absorb those consciously thought to be of benefit to the broader community.

This survival mechanism, however, was disrupted by the dramatic increase in European immigration into the *Haudenosaunee* territory during the eighteenth and nineteenth centuries. As before, there continued to be interaction with these new immigrants. But unlike the previous experiences, the intensity of this colonization made it extremely difficult to fully absorb the changes into the *Haudenosaunee* collective identity.

The end of *Haudenosaunee* unity during the American Revolutionary War precipitated the end of the natural barrier against cultural change—territorial integrity. With the loss of almost all lands and military capacity by the beginning of the nineteenth century, the *Haudenosaunee* people were virtually defenseless against the onslaught of cultural, social and economic change that was to follow. With such radical changes in such a short period of time, the social decay that soon followed was of little surprise.

Against this backdrop, the State's efforts to transform the *Haudenosaunee* into "civilized" members of American society was easily facilitated. This was true both because of the inherent weakness of *Haudenosaunee* society at the time and because of the inherently caustic influences that were introduced by the colonizing nations, governments, entrepreneurs and Christian social reformers.

These influences included such things as liquor, Christianity and Western education. Liquor was an early disruptive force and was particularly effective because it clouded the "good mind" and interfered with the ability to reason. Men on hunting forays would routinely buy rum with the proceeds and never deliver the necessary food and durable goods that otherwise would have been obtained. Christianity was disruptive because it introduced a new



spiritual practice into the Confederacy that interfered with the near-spiritual harmony of the *Gayanashagowa*, the traditional ceremonies and the lives of the *Haudenosaunee* people.<sup>393</sup> State officials were well aware of the effect of Christian religion on Indigenous people and knew that it would help break down tribal bonds.<sup>394</sup> Both of these influences made the People more individualistic; liquor, because it initially induced pleasure, and Christianity, because it promised individual salvation and eternal life.<sup>395</sup> These, and other factors, caused personal concerns to be elevated above family, clan, village, nation and Confederacy. This selfishness, which had been so effectively dealt with by the Peacemaker when he delivered the Great Law, was a disease reintroduced into *Haudenosaunee* society by the European immigrants.

Another significant colonizing influence on *Haudenosaunee* people was Western education. State officials held the view—prevalant at the time—that the *Haudenosaunee* people were simply savages in need of “civilization.” This anticipated a process that could best achieve radical transformation of *Haudenosaunee* culture and identity. Euro-Americans knew that the most effective method for doing so was to manipulate the hearts and minds of the children. Thus, considerable effort and expense was incurred in building schools, hiring teachers and supporting missionary activity directed toward accomplishing these objectives. By the end of the nineteenth century, every *Haudenosaunee* nation had some children being educated by the State. Although most State officials and other people involved in this effort surely believed that they were doing the right thing, their intent clearly was to use Western education as a tool to disrupt *Haudenosaunee* traditional social fabric, erode tribal

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393. See *supra* Part II.A.; see also Jacqueline Goodman-Draper, *The Development of Underdevelopment at Akwesasne: Cultural and Economic Subversion*, 53 AMER. J. ECON. & SOC. 41, 45 (1994) (“The institution of Christianity was another major factor in the undermining of collectivism, thus disrupting Mohawk culture.”).

394. See WHIPPLE REPORT, *supra* note 17.

395. The introduction of Christianity had a variety of other transformative effects. For example, “[t]he Jesuits promoted individualism, male superiority over women, and hierarchical political organization, using such strategies as taking children away from their parents, haranguing men to be masters of ‘their’ women, and promoting the moral superiority of monogamy as the only honorable state of matrimony.” Goodman-Draper, *supra* note 393, at 45.

identity, and facilitate the assimilation of *Haudenosaunee* people into American society.

These and similar policies all had a considerable effect on *Haudenosaunee* society and precipitated great changes in what it meant to be a *Haudenosaunee* person. Identity was transformed, not as the result of some conscious effort to improve one's life or way of life, but through a unilaterally imposed, often forced, process of social engineering orchestrated by State officials and Christian social reformers.

### B. *The Transformation of Haudenosaunee Economic Philosophy*

The forces of American colonization have also been directed at transforming the *Haudenosaunee* economy and thus have worked considerable changes in the way in which *Haudenosaunee* people conceive of providing the basic means of survival.

Aboriginally, *Haudenosaunee* economic philosophy was geared towards of one thing—peaceful survival. Pursuing food—through farming, hunting and fishing—were primary activities in pre-colonial *Haudenosaunee* societies and considerable time and effort was required by all in order to ensure the survival of the community.<sup>396</sup> In an economy geared towards survival, the satisfaction of basic human needs is the only requirement. Pursuing that which is in excess of what may be necessary to survive is wasteful and may even be dangerous.

In contrast, the American economic system—capitalism—is fundamentally at odds with this traditional *Haudenosaunee* economic philosophy. American society is predicated upon the economic philosophy that emphasizes the better merit of the individual rather than the good of the community. With capitalism, individuals seek to generate profits—i.e. wealth in excess of what is necessary to provide for one's basic needs—by reallocating and developing natural resources, human resources and financial resources. Thus, profit is generated by

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396. See Goodman-Draper, *supra* note 393, at 43 ("Before contact with Whites, Mohawk Indians were an agricultural people—growing corn, beans and squash—which they supplemented with hunting and fishing . . . . The focus of the traditional way of life during this period was collectivist, not individualist.").

participating in a competitive market system in which acquisitive desires are met through the buying and selling of goods and services. Those able to sell their products for more than they paid usually as the result of wealth being created by improving the underlying resources, succeed. Success, so the theory goes, means greater choices and opportunities, and thereby freedom.

The primary virtue of capitalism is that it provides almost unlimited opportunity and freedom for those able to compete within the system. It does, however, have considerable downside effects. These include the tendency to exploit the natural, human, and financial resources that are its raw materials, the tendency to produce wide disparities in individual wealth and the erosion and destruction of communal values and emotional relationships.

Eventually, however, during the seventeenth century, *Haudenosaunee* people, came to know a form of capitalism—trade—and critical changes in *Haudenosaunee* society began to occur.<sup>397</sup> The wildly abundant furs found in nature allowed for lucrative and easy trade for the White Man's durable goods. Indeed, by the mid-eighteenth century, it may even have been the case that some *Haudenosaunee* people had a more prosperous lifestyle than their White neighbors.<sup>398</sup> But trading was not a neutral process, and it had the effect of eroding the communal nature of *Haudenosaunee* society.<sup>399</sup> Trapping was an individualistic pursuit that induced the break-up of the

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397. See William Fenton & Elisabeth Tooker, *Mohawk*, in HANDBOOK, *supra* note 1, at 473-74 (regarding Mohawk fur trading); Jack Campisi, *Oneida*, in HANDBOOK, *supra* note 1, at 481-82 (regarding Oneida fur trading and its impact on Oneida society); Harold Blau et al., *Onondaga*, in HANDBOOK, *supra* note 1, at 493-94 (regarding Onondaga participation in the diplomacy of the fur trade); Marian E. White et al., *Cayuga*, in HANDBOOK, *supra* note 1, at 501 (regarding Cayuga participation in the fur trade); Thomas S. Abler & Elisabeth Tooker, *Seneca*, in HANDBOOK, *supra* note 1, at 506 (regarding Seneca fur trading activities).

398. See William Fenton & Elisabeth Tooker, *Mohawk*, in HANDBOOK, *supra* note 1, at 475 ("Those Mohawks who had remained in the Mohawk Valley had prospered, so much so that at the time of the American Revolution it was said that they lived considerably better than most White farmers in the valley.")

399. See Goodman-Draper, *supra* note 393, at 44 ("Mohawk participation in the fur trade as well as Christianity's intrusion into tribal life were major contributors to the dissolution of the traditional, collectivist Native way of life.")

family unit.<sup>400</sup> Moreover, it not only provided those things that might be needed, but also those things that were in excess of basic needs, thereby disrupting the distribution of and those goods and services within the community.<sup>401</sup> As a result, then, *Haudenosaunee* involvement in the fur trade “led to the onset of private property, individualism and the destruction of collectivism.”<sup>402</sup>

Despite the early exposure to capitalism and the rapid expansion of the American economy following the Revolutionary War, the *Haudenosaunee* people avoided the full transformative effect of participating in a capitalist economy. Significantly, most *Haudenosaunee* people until very recently have participated in the American economic system outside of their home communities. Ironworking, railroading and other similar employment typically engaged in by *Haudenosaunee* men generated needed income but were activities that occurred primarily beyond territorial borders.<sup>403</sup> This kind of economic activity was consistent with the activities that *Haudenosaunee* men had long engaged in before the coming of the White Man—hunting and warfare—activities that took place far from home and for long periods of time with the spoils eventually sent back home to the women, children and elders. Thus, other than some commercial farming, leasing land to non-Indians, and maybe some border smuggling activities at *Akwesasne*, the *Haudenosaunee* territories remained economically isolated and undeveloped until as late as the 1950s.<sup>404</sup>

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400. See *id.* at 44-45 (“[T]ending a fur trapline was a more individual type of activity than hunting, fishing or agricultural pursuits. This in turn, affected the family units, breaking them up into smaller entities, approaching the ‘nuclear family,’ detracting from the longhouse collective.”).

401. See *id.* at 45 (“[T]he process of trapping began to undermine the collective contribution of each individual to household needs. Such a lifestyle meant individual nuclear families, rather than the household as a whole, might now reap the private gains of the fur trade.”).

402. See *id.*

403. See, e.g., William Fenton & Elisabeth Tooker, *Mohawk*, in HANDBOOK, *supra* note 1, at 478.

404. The reason for this so-called “underdevelopment,” or the process by which the *Haudenosaunee* nations became economically dependent “satellites” of American economic interests, is explained by Professor Goodman-Draper in reference to *Akwesasne*:

Mohawk history between the 17th and 19th century, and even until the present, has been a chronicle of Indian underdevelopment. *Akwesasne* has contributed to the growth of the “metropolis,” (expanding corporate and government interests) by relinquishing its land and resources,

Since that time, however, the whole of *Haudenosaunee* society has been thrust into the twentieth century American economy. The most dramatic examples of this process have occurred at the Mohawk, Tuscarora and Seneca Nations. At *Akwesasne*, the Saint Lawrence Seaway and the related corporate development transformed the previously isolated economic existence. At Tuscarora, the State condemned part of the reservation for the Niagara River power project. And perhaps most dramatically of all, the United States condemned one-third of the Seneca Nation's Allegany Reservation for the construction of the Kinzua Dam and its reservoir. These events forced the *Haudenosaunee* people living within those nations to confront the ugly reality of American economic development on a scale that can only compare to the original loss of land at the end of the eighteenth century.

As a result of these dramatic events, the economic existence of the Mohawk, Tuscarora and the Seneca Nations was changed significantly. Each of these Nations and its members received some amount of financial compensation for its losses, with the Senecas, by virtue of the greatest loss, receiving the most. These settlement funds served as a base from which the Mohawks—through the Saint Regis Mohawk Tribal Council—and the Seneca Nation began to expand governmental capacity and promote a variety of development activities. The efforts were fueled by millions of dollars of federal money available through the Self-Determination and Education Assistance Act of 1975. Social service programs were established, homes were built, and jobs were created within these nations as the result of this federal aid.

The Onondaga, Tonawanda Seneca and Tuscarora nations, by virtue of their stronger connection to the Confederacy and its traditions, did not pursue this course of development. Onondaga Faithkeeper Oren Lyons reflected this view when he said that *Haudenosaunee* people may be poor by American society's standards, but that land and sovereignty allow for more security and freedom than most Americans:

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resulting in the tribe's increasing dependence on these larger interests . . . Without an economic base, upheld by traditional political and economic values, Mohawks have been continually forced onto the path of disruption and dependence.

Goodman-Draper, *supra* note 393, at 54 (emphasis added).

The fact that we don't have to pay mortgages and taxes is the only difference we have out there, and that's much too precious to give up . . . [a]nd if you are going to compare standards of being poor, you'll find much worse conditions in downtown Syracuse. . . . We don't have street people out here [at Onondaga]. People are taken care of and they have a home base. The security of Indian people lies in their land,<sup>405</sup> and by having that security it raises them above any level of poor.

Primarily as a result of this philosophy, these nations have long maintained an undeveloped state despite external transformative pressures. In addition, the Cayugas and the Oneidas, virtually landless and torn apart by their inability to agree upon a form of government, were incapable of any type of development. As a result, the *Haudenosaunee* people outside of the Mohawk and Seneca Nations continued to provide for themselves through small scale reservation economic activity or off-reservation employment and, thus, their communities remained outside the mainstream of the American economic system.

Despite the relative "head start" of the Mohawks and Senecas in the development process, all *Haudenosaunee* economies changed dramatically in the 1980s with the emergence of the first *Haudenosaunee* Entrepreneurs selling tax-free cigarettes and gasoline. Suddenly, non-Indians began to travel to *Haudenosaunee* territories in significant numbers. Money was being generated by a handful of businesses in unprecedented amounts. Jobs were being created. New businesses began to sprout and the tribal governments themselves (again at Mohawk and Seneca, but also Oneida after their reformation) started their own businesses—bingo halls and smokeshops—to generate tribal government revenue. No Nation, including the more economically conservative Onondagas, Tonawanda Senecas, and Tuscaroras, was immune to this blooming of capitalism on the reservation. After the Oneidas established their casino in 1993, the entrepreneurial spirit intensified throughout all of the other *Haudenosaunee* nations.

This new economic philosophy appears to either rationalize or ignore the long-term effects associated with adopting the White Man's economic system. There is a repeated cry—especially from the Entrepreneurs that the

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405. Grazma, *supra* note 196, at 3.

*Haudenosaunee* are terribly poor—even though the last Census indicated that the *Haudenosaunee* were some of the wealthiest Indians in the United States—and that capitalism is a necessary evil that must be adopted in order to revitalize *Haudenosaunee* society. An example of this philosophy comes from Loran Thompson, a pro-gambling follower of the *Gayanashagowa*, who believes that “holier than thou’ anti-gambling Iroquois can’t see that casinos, despite some of the unsavory qualities, are far more tolerable to many of their people than joblessness and hopelessness.”<sup>406</sup> This is in stark contrast to the view of someone like Oren Lyons, who believes that gambling is an unacceptable solution to poverty if it means giving up control over the land and providing income to the State.<sup>407</sup>

This contrast in views, however, may explain why the emergence of this *Haudenosaunee* philosophy of entrepreneurial capitalism coincides with the emergence of the destructive internal conflict that now plagues every *Haudenosaunee* nation. While some positive changes have resulted from this development—the gainful employment of hundreds of *Haudenosaunee* people, the general improvement in the material well-being of community members, and the provision of important governmental services—the long term benefit of now having the first *Haudenosaunee* millionaires is difficult to discern. People have been killed, others have been permanently banished from their homeland, and family, clan, and tribal relationships have been severely damaged. While capitalism has long had an impact on the *Haudenosaunee*, recent developments that have allowed it to affect the most inner working of *Haudenosaunee* society has inflicted a terrible cost.

The pursuit of excess material wealth by *Haudenosaunee* Entrepreneurs has considerably strained, and in some cases torn, the fabric of *Haudenosaunee*

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406. Thompson poses an interesting hypothetical, supposedly symbolic of the modern *Haudenosaunee* dilemma:

Let’s say you’re in the middle of the ocean and Jaws is swimming about you, and one hand is reaching out to save you, the hand of the devil himself. . . Are you going to take it? If you do, it doesn’t mean you’re his disciple. But these people would rather drown.

*Id.* Thompson makes no mention of the possibility that once “saved,” the devil might want something in return.

407. *Id.*

governance. The first phase of capitalism that is occurring within *Haudenosaunee* society is a mirror image of the first phase of American corporate capitalism—the Industrial Revolution characterized by the sweat shop and the robber baron. Some Entrepreneurs pay minimal wages to their workers, with no benefits or insurance, and refuse to pay their governments for the privilege of doing business. In this way, the Entrepreneurs within *Haudenosaunee* society have not yet appreciated the need for a strong tribal government to better support and regulate business development to ensure their survival in an outside world comprised of even more experienced Entrepreneurs intent upon destroying their competitive advantages. Indeed, rather than seek to strengthen tribal government some *Haudenosaunee* Entrepreneurs have taken just the opposite course of action—to ensure that whatever tribal governments might exist within their home territory remains weak and ineffective and unable to exert any authority over them.

The notable exception to this formulation has been the Oneida Nation. There, while the historic conflict between traditional *Haudenosaunee* economic philosophy and American economic philosophy does exist, capitalism has become the official economic philosophy within the Oneida Nation government. Indeed, it might be said that the most defining characteristic of the revitalized Oneida Nation is its commitment to pursuing economic development. Unlike the other *Haudenosaunee* Nations, all economic activity within the Oneida Nation is nationalized—there are no individual Entrepreneurs and the overall impression conveyed by the Nation is that of a successful American corporation.<sup>408</sup> In essence, the Nation itself has become increasingly merged with conceptions of economy. While not all Oneidas would share this view, those who reject this economic philosophy appear to be in the minority. Thus, of all of the *Haudenosaunee* nations, the Oneida Nation appears to have had most assimilated the economic philosophy of the dominant society.

### C. *The Altering of Haudenosaunee Political Philosophy*

Associated with the changes in *Haudenosaunee* society,

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408. See generally ONEIDA NATION ANNUAL REPORT (1998).



identity and economy have been changes in the long held political philosophy of *Haudenosaunee* people.

The State educational system established in the *Haudenosaunee* territories during the nineteenth century was designed to convey, among other things, the fundamental value tenets of American political philosophy—that individual freedom is primary that government must exist to protect individual rights from encroachment from others, that government must be hierarchical in structure and that women should have no role in political life.

This philosophy is in stark contrast to the traditional political philosophy reflected by the *Gayanashagowa*. While individual freedom has long been respected and deferred to as an important component of our collective survival, the *Gayanashagowa* was designed to achieve a collective peace for the betterment of all members of society, because that is what gives strength, which is needed for survival. The pursuit of peace, power, health, and righteousness, not individual “life, liberty, and happiness,” is the foundation of traditional *Haudenosaunee* political philosophy.<sup>409</sup> Moreover, government should reflect a broad separation of powers among different constituencies that includes both men and women in a relative state of equality.

It was because of this difference in political philosophy and the powerfully acculturating effect of American political values, that efforts were taken by the State to establish elected forms of government within each of the *Haudenosaunee* nations during the nineteenth century. As viewed by the religious social reformers and their allies in State government, “civilized” tribal government could only occur if the people had the ability to elect their leaders, if there was a clear hierarchy of power, and if men were in charge.<sup>410</sup> Fundamentally ignorant of the sophisticated scheme by which the *Gayanashagowa* provided for the selection and recall of leaders, a wide distribution of power,

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409. See also *Haudenosaunee Homepage*, What are the underlying values of *Haudenosaunee* culture?, Nov. 23, 1998 <[http://sixnations.buffnet.net/Culture/Welcome.html?article=underlying\\_values](http://sixnations.buffnet.net/Culture/Welcome.html?article=underlying_values) (on file with author and the *Buffalo Law Review*).

410. See Goodman-Draper, *supra* note 393, at 49 (“Just as the Jesuits attempted to transform Native political organization to match French tradition in the 17th century, Euro-Americans of the 19th century wanted Native leaders, hierarchical organization, and men, not women, to make the decisions.”).

and the role of women, non-Indians could only perceive the *royanier* as some kind of monarchy that would eventually lead to dictatorship or oligarchy if not overthrown in favor of direct rule by the people. Indeed, much of this suspicion might have been affirmed by the misconduct of the *Haudenosaunee royanier* who had accepted bribes in exchange for signing away land after the Revolutionary War. The request by many *Haudenosaunee* people for the State to provide laws and protection against weak and corrupt tribal leadership fell upon a receptive audience and it took little to convince the reformers that the traditional methods of government should be abandoned.

As a result of these changes, the Mohawk and Seneca Nations were the first to abandon the *Gayanashagowa* and develop American-style constitutional forms of government. Beginning almost two hundred years ago, the Mohawks were the first to experience a State effort to transform their traditional form of government and political philosophy. Although the State was successful in establishing the Saint Regis Mohawk Tribal Council under its law and having this government officially recognized by the United States, it has not succeeded, however, in effectuating a clear transformation away from the traditional Mohawk governing philosophy. There have been times during Mohawk colonial history when the relative capacity of the traditional leadership was weak, but there always have been adherents of the *Gayanashagowa* at *Akwesasne*. Indeed, this is the only reason why there now exists the Mohawk Nation Council of Chiefs continuing to claim legitimate governing authority. Nonetheless, the recent adoption of a new constitution to support the Tribal Council is strong indication that a considerable number of the Mohawk people fundamentally reject the notion of vesting official political authority over the Mohawk people in a handful of the chiefs installed in accordance with the *Gayanashagowa*. The fact that this new constitution explicitly reserves a role for the *Gayanashagowa* evidences, however, that even those who fundamentally reject it as a form of government believe that it should play some role in Mohawk governance.

In a more decisive way, the Seneca Revolution in 1848 was the point at which most at Allegany and Cattaraugus Senecas turned away from the *Gayanashagowa*. Despite the few years of turmoil immediately following the Revolution

in which the Seneca chiefs sought to obtain political power under the constitutional system and overthrow the government, the whole of the Seneca people have long accepted the establishment of the Seneca constitutional system. While there remain members of the Seneca Nation who reject the legitimacy of the Nation constitution and remain attached to the traditional government under the *Gayanashagowa*, the traditional Longhouse leadership within the Seneca Nation do not appear to manifest any desire to reassume political authority. In this sense, and in combination with the long passage of time, the rejection of the *Gayanashagowa* as a form of government within the Seneca Nation has been largely complete. The only open question is to what extent the underlying political values reflected by the *Gayanashagowa*—such as, for example, a commitment to peace and consensus politics—are still held by Seneca people.

In contrast to the Mohawks and Senecas, the Onondaga, Tonawanda and Tuscarora Nations have always had traditional governments and, despite temporary periods of disorganization, the people within those nations fundamentally have remained faithful adherents to the *Gayanashagowa* since the message was first brought by the Peacemaker.

This has occurred notwithstanding the State's efforts to transform *Haudenosaunee* governance, a fact not lost on the Confederacy:

New York State has a long history of attempting to remove the *Haudenosaunee* and to cast aside the Council of Chiefs in each of our territories. In many ways they have been successful in this divide and conquer policy. They now have *Iroquoian* collaborators—the elective governments—who were formed to abide by New York State Law. To this very day, New York State refuses to recognize the traditional leadership in those territories where the elective councils traditional leadership in those territories where the elective councils and other administrative mechanisms are installed. They have succeeded in getting our own people to turn their backs on the laws of the *Haudenosaunee*.<sup>411</sup>

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411. See generally A SPECIAL REPORT BY THE HAUDENOSAUNEE ON LAW, SOVEREIGNTY AND GOVERNANCE 4 (March 1998). As a clarifying note, the elective governments referred to above—the SRMT Council and the Seneca Nation of Indians—no longer are explicitly linked to the State and its laws. In the case of the SRMT, the Council's entire existence for nearly 200 years was dependent

Very recent events, however, indicate that the traditional political philosophy long held by the people in those nations is being abandoned. The evidence is not the criticism that has been leveled at the chiefs in those nations for alleged misconduct in office. Rather, it is the revolutionary activity now taking place that seeks to overthrow the chiefs and establish a new form of government within those nations. This phenomenon is far beyond the scope of a mere political dispute; it is the manifestation of a new political philosophy that has little tolerance for the role currently being played by the traditional leadership.

To be sure, the individuals generally supporting this revolutionary activity appear to have an ulterior motive. They are Entrepreneurs with the single-minded objective of promoting economic development for themselves within their nations. The efforts by the traditional governments to regulate and tax this economic activity is perceived as a direct threat to the Entrepreneurs and to the way of life that they seek to effectuate.

As a result, the conflict that has arisen between the Entrepreneurs and the chiefs is one between two diametrically opposed forces and thus, of revolutionary proportions. The chiefs' response to banish the instigators of this revolutionary activity appears, in the abstract, to be an appropriately just resolution for dealing with direct assaults on the existence of the governing regime. But it is shortsighted to believe that mere banishment will resolve this problem primarily because it is not simply the matter of a few disgruntled individuals. Moreover, those who would seek the overthrow of the traditional governments have long passed the point where their political philosophy is connected to the *Gayanashagowa*. As a result of the long process of change only recently enhanced with the lure of great wealth, these individuals have had their conceptions of acceptable government radically transformed from their traditional foundations. Even acknowledging that the actions taken by the chiefs to banish and destroy property may not have been entirely appropriate, the desire of the

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upon State law, but has since become autonomous with the adoption of the SRMT Constitution in 1995. Similarly, for over 140 years, the Seneca Nation Constitution required that Nation laws could not be inconsistent with State laws, but this provision was eliminated by referendum in 1992.

Entrepreneurs for an Anglo-American style constitutional system—as is occurring at Onondaga, Tonawanda, and Tuscarora—is direct evidence that the political philosophy amongst the people in these nations has been altered.

This process can be seen even more clearly when viewed against the historical backdrop of the only *Haudenosaunee* nation that formally and fully rejected the *Gayanashagowa* and government by life chiefs. The Seneca Revolution of 1848 was spawned under circumstances hauntingly similar to what is now occurring within the other *Haudenosaunee* nations. The two most provocative issues leading up to the Revolution were both related to money and to the question of whether the chiefs were serving the best interests of the Seneca people. The first issue was the matter of the chiefs signing away all Seneca lands under the Treaty of Buffalo Creek in 1838. The second issue was over the distribution of treaty annuities directly to the chiefs, rather than to the heads of families. Thus, the process of revolutionary change within the Seneca Nation 150 years ago was driven by the Peoples' concern over economic issues and the trustworthiness of the leadership.

These appear to be the same issues raised by the proponents of revolutionary change in the Onondaga, Tonawanda, and Tuscarora Nations. While the rhetoric is obviously tinged with the possibility that the proponents stand to make millions if they can effectuate their political agenda, the fact that they are utilizing the same arguments against the traditional leadership that were used during the Seneca Revolution suggests that this revolutionary fervor is more than simply a ruse for greater profit making. In essence, the Entrepreneurs in these nations, are genuine agents of cultural change seeking to implant the political and economic philosophy of the dominant society within their nations. The 150 year difference in timing can be explained by the relatively unique circumstances facing the Seneca Nation at the time of its Revolution. Given the backdrop of the Seneca warrior spirit, the rapid assimilation of the Senecas through the work of the missionaries and the obviousness of the chiefs' misconduct by taking bribes to sign the treaty and pocketing the treaty annuities, revolutionary fervor developed quickly and completely. Given the relative lack of such factors within the Onondaga, Tonawanda Seneca, and Tuscarora nations and the recent intensity of the entrepreneurial spirit that

has bloomed, the fact that these nations are now experiencing revolutionary activity is more a symptom of inevitability rather than happenstance.

#### D. *The Corrosive Influence of Modern American Society*

The explanation given thus far for the current state of *Haudenosaunee* governmental dysfunction has focused primarily on the historical and contemporary events affecting the *Haudenosaunee*. The problems within the *Haudenosaunee* nations, however, are not unique. Many other Indian nations in the United States are suffering through periods of often deadly infighting and significant governmental dysfunction. Unfortunately, the Indian nations are surrounded, infused, and overwhelmed by American society and culture. This would not be problematic were it not for the fact that American society and culture has a caustic effect on non-American societies and cultures. As observed by Anthony T. Kronman, Dean of the Yale Law School:

We live today in a sprawling, heterogeneous society, the most complex society the world has ever known. The great nineteenth century European sociologists who observed the development and growth of this novel social order were struck by the power of the disintegrative forces within it, and by the need to find a counterweight that would resist them the forces of disintegration they identified were four. The first was *privatization*, the tendency in a large free enterprise economy like ours for individuals to concern themselves exclusively with their own private welfare, and to neglect or forget entirely the claims of public life, which the Greeks and Romans had pursued with such memorable passion. The second was *specialization*, whose inexorable tendency is to separate those in different lines of work and to reduce their fund of shared experience, the common world of similar endeavors. The third was *alienation*, the sense of detachment from one's work, and secondarily from other human beings, the experience of being only partially engaged by—and hence only partially revealed through—activities that constitute one's living, in a narrow but also in a broader sense. And the fourth disintegrative force that Tocqueville and Marx and Durkheim and Weber identified as a threat to the far-flung interdependencies of modern social life was *forgetfulness*, the loss of a sense of historical depth, and the consequent disconnection of the present moment—characterized by the idiocy of material comfort—from all that went before or is to follow, from the pain of the past and the calling of the future. We are witnessing, these

thinkers said, the evolution of a form of life more complex and interconnected than any ever seen, but in the heart of this new order lurk forces of disintegration powerful enough to nullify its achievements: the forces of privatization, specialization, alienation, and forgetfulness, and the loss of one's sense of location in time.<sup>412</sup>

As America's influence within Indian country has expanded during the modern era, there thus has been a similar distinctive effect on Indigenous peoples. In an obvious way, then, these influences from the dominant society compound the influence of the problems now emerging within *Haudenosaunee* nations. The following is an overview of these phenomena which have affect all Indigenous peoples in the United States and which fueled the internal process of change occurring within the *Haudenosaunee* nations.<sup>413</sup>

1. *Competition for Economic Opportunity.* During the last ten years, Indian nations have had the opportunity to experience the most powerful economic force that they have ever come in contact with—high stakes casino gaming. For the first time, Indian nations have had the chance, albeit a slim one, of generating enough money to safeguard the economic security of not just present, but future generations. Although the reality of this promise is seriously overblown and available to only a handful of the hundreds of recognized Indian nations that exist,<sup>414</sup> the lure of that promise has been an overwhelming influence on the Indian nations and their members. As a result, the competition for economic opportunity has reached a fever pitch. In any given Indigenous community, some individuals, if not most of the tribe, have decided that pursuing casino gambling and related forms of grand scale

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412. Anthony T. Kronman, *Foreword*, 1 CHAPMAN L. REV. 1, 7-8 (1998).

413. See generally Porter, *supra* note 390, at 78-80.

414. See Matt Kelley, *For Some Indian Tribes, Casinos a Bad Bargain*, COLUMBIAN (Clark County), Oct. 8, 1998, at B7 (discussing the closing of the Hualapai Inaian casino and quoting BIA spokesman Rex Hegler that "[t]here's about five tribes that have done very well, but there's 554 tribes in the country. People that think there's nothing the tribes need now are confused."); Merrill Goozner, *Tribe's Casino Riches Lead U.S. to Study Tying Aid to Sovereignty, Wealth*, CHI. TRIB., Oct. 5, 1997, at 16A (indicating that only eight out of 184 gaming tribes take in 40% of an estimated \$1.9 billion combined casino net income).

economic development is the most important priority of tribal government.<sup>415</sup> For these reasons, fighting over money—how to make it and how to spend it—appears to have become the greatest direct source of tribal infighting.<sup>416</sup>

2. *Competition for Political Power.* As a result of the increased desire of some for capitalism and economic development, there has been a related increase in the intensity of competition for political power. On most reservations, those having the political power are in the best position to facilitate legitimate and illegitimate economic success. For example, under the federal law that regulates Indian gaming, only the officially recognized tribal government is authorized to carry on a so-called Class III casino-style gaming operation.<sup>417</sup> Thus, he who controls the tribal government, controls the opportunity for a casino. Whereas in the past the tribal political process may have been played out in an aggressive and spirited manner, adding the incentive of great wealth to the victors of the political spoils game has only increased the pressure on the participants for success.

This pressure can have a damaging effect on both Indian tribes and individual tribal members. While the National Indian Gaming Commission and the Federal Bureau of Investigation have concluded that organized crime has not infiltrated Indian gaming,<sup>418</sup> it is not necessary for organized crime to have a foothold within

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415. See, e.g., Halbritter & McSloy, *supra* note 265, at 564-65.

416. See, e.g., Paul Salopek, *Casino Builds A Wall In Tribe: The Ojibwas of Michigan's Upper Peninsula Are Reaping Riches From For Control of the Cash Has Stirred A Civil War*, CHI. TRI., July 7, 1996, at 1; Ted Roelofs, *Tribal War: Identity Issue Splits Chippewa*, GRAND RAPIDS PRESS, June 23, 1996, at A1; *Senecas, Struck By Violence, Must Work For Compromise: Big Money Lies Behind Big Trouble For Nation*, BUFF. NEWS, Mar. 28, 1995, at B2.

417. See 25 U.S.C. § 2710 (1994).

418. See Tony Batt, *Indian Gaming Director Sees Ominous Signs*, LAS VEGAS REV. J., May 12, 1997, at 1D (reporting that the acting chair of the National Indian gaming Commission, Ada Deer, acknowledges that while there is no evidence of organized crime infiltration, indictments were recently filed against a crime syndicate trying to control a casino on the Rincon Reservation in California and that half of the Indian casino's failed to meet a standards deadline designed to ensure that casinos are crime-free). It is generally acknowledged that Indian gaming is under regulated and ripe for major scandal. See *Indian Gambling's Nonregulators*, SACRAMENTO BEE, July 29, 1996 at B6; but see Paula Lorenzo, *Layers of Regulators Are A Fact Of Business In Indian Gambling*, SACRAMENTO BEE, Aug. 5, 1996, at B5.



Indian communities for there to be a corrupting influence on a tribe's political process. The mere opportunity for distributing the "pot of gold" at the end of the proverbial rainbow can turn the tribal political process into a deadly game. Add in the myriad of contracting opportunities for such things as construction, equipment, dining, hotels, labor and other services, and the pressure to succeed to tribal political office can be overwhelming. The lure of great riches has created a powerful incentive to succeed to tribal political power and has increased significantly the competition for tribal political office.

3. *Immigration.* Also because of gaming, there has been an increase in immigration by tribal members who may have long left the reservation community or who may have never even lived there before.<sup>419</sup> Combined with what may be a legitimate interest in returning to their home communities, these individuals have returned home bringing with them a lifetime of experiences in the non-Indian communities from whence they came. Upon their reintroduction into tribal society, they know little of the traditional customs and behaviors of the long-time residents. Because the unwritten laws of making a living are unknown to them, they generate conflict when they seek to carry out their aggressive business development plans. Moreover, as they seek to participate in tribal politics, they do so with considerable ignorance of the long-standing political customs and unwritten laws governing the pursuit and exercise of political power on the reservation. Together, the effects of immigration by long-lost tribal members has had a considerable disruptive effect within established tribal communities.<sup>420</sup>

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419. See *Nebraska Indian Tribes Report Increases In Membership*, THE OJIBWE NEWS, Jan. 31, 1997, at 2 ("Many tribes around the United States are easing membership requirements just to survive. A renaissance of Indian pride also is partly responsible for increased membership, and so is an upturn in the fortunes of the tribes notably those involved in gambling."); *As Tribes Increase Wealth, Debate Grows Over Who Is "American Indian"*, THE OJIBWE NEWS, Sept. 27, 1996, at 2 ("Suddenly, the [Iowa tribe] has seen a jump in the number of requests for membership. 'Now everybody wants to be an Indian because of the casinos,' said Louis DeRoin, enrollment officer for the tribe.")

420. In some cases, the immigration has been so extensive that an entire tribe has been established where none previously existed. In cases where an Indian nation has been recently recognized, many of the immigration problems suggested here may not be as critical.

4. *Loss of Traditional Language and Culture.* Another source of tribal infighting is the continued breakdown and loss of traditional language and culture. Some Indian nations have experienced a resurgence in attention to their language, but most have continued to see a decline in the number of fluent speakers in their communities.<sup>421</sup> And, because they are necessarily linked, the number of individuals knowledgeable of the traditional religious and spiritual practices has also declined. What this means is that not only has the “cultural gap” increased between traditional and non-traditional people, but also that has intensified on-going cultural conflict. As traditional people become more and more distinct from the assimilated members of the tribal community, the potential disagreement and infighting has increased significantly.

5. *Development of an Individual Rights Mentality.* Commensurate with the breakdown in traditional language and culture has been the development of an individual rights mentality. This mentality focuses on the betterment of communities through the strengthening of individuals, rather than on the traditional understanding of individual betterment through the strengthening of the community.<sup>422</sup> This change has occurred through the gradual adoption of the central tenets American political philosophy and the cloning of its political and legal institutions.<sup>423</sup> As these differences in cultural identity and political philosophy have increased, so too has the potential for intertribal conflict.

6. *Reemergence of democracy.* As Indigenous people have begun to assume more authority over their own affairs, there has been a reemergence of the democratic

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421. See Ives Goddard, *Introduction to Languages*, in HANDBOOK OF AMERICAN INDIANS XVII, at 3 (1996) (reporting that only 50% of American Indian nations have retain their own language and nearly 80% do not teach their language to their children).

422. See, e.g., *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 876 (2d Cir. 1996), cert. denied, 117 S. Ct. 610 (1996).

423. See generally Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 260-96 (1997) (explaining how Indians came to decide disputes like Americans and what happens to tribal members and tribal sovereignty as a result).

belief amongst the tribal citizenry that every member should have the ability to participate in tribal government. Much of this may be attributed to the willingness of some to attack the old political regimes and the ineffective government they represent. Unfortunately, democracy, although traditionally the predominant form of government in Indian country, is relative "messy" as compared to autocracy or strong man rule. Although change of this sort is surely good in the long run, it does, of course, have a downside. In short, democratic resurgence means that many people become involved in tribal government who have no idea how to govern. Clearly there is a significant difference between being skillful at politics and skillful at governing, and prowess at the former is no qualification for being good at the latter. But, having a large number of inexperienced people in government at one time can be disastrous. The time honored ways of governing—through consensus building and quiet diplomacy—are too frequently lost on the inexperienced politicians whose conceptions of governing might have been learned from the two-dimensional depictions of power politics portrayed in the media. Governing inexperience, especially by when magnified by huge egos associated with politicians of all stripes, can generate considerable conflict in tribal communities.

#### E. *The General Problem of Americanization*

The reasons that the *Haudenosaunee* nations are currently in such a state of division and dysfunction, have one thing in common—each nation is suffering from the affects of American colonization. Professor Russel Barsh has observed that colonization operates at the "personal, psychological, and cultural levels, as well as in the realms of political and economic structures."<sup>424</sup> The result is the creation of "a culture of mistrust, defensiveness, and 'self-rejection'" and "a politics of resignation, reactivity, and continuing dependence on outsiders for leadership."<sup>425</sup> By the early nineteenth century, all of the important tools that have been used by conquerors throughout history to destroy

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424. Russel L. Barsh, *The Challenge of Indigenous Self-Determination*, U. MICH. J.L. REFORM 277, 285 (1993).

425. *Id.*

and assimilate the conquered—religious conversion, introduction of disease, denial of language and culture, compulsive education, change in the political and economic system—had been introduced into the *Haudenosaunee* nations. Like a slow-moving, but deadly virus that has been injected into one's body, each of these influences has had the effect of transforming the very conception of what it means to be a *Haudenosaunee* person.

Today, there are *Haudenosaunee* people who must communicate in English because they do not speak a *Haudenosaunee* language. There are *Haudenosaunee* people who believe in Christianity and who do not participate in the Longhouse ceremonies. There are *Haudenosaunee* people who have succeeded so well at the White Man's educational system that there are now *Haudenosaunee* university professors. There are *Haudenosaunee* people who have abandoned traditional *Haudenosaunee* political values and adopted the White Man's form of government. And there are *Haudenosaunee* who can only conceive of economic survival and self-worth in terms of how many millions of dollars they have accumulated.

It is true that not all *Haudenosaunee* people have been totally infected by the virus of American colonization. Indeed, there are many people who have found ways to bridge the cultural chasm that has been imposed upon us. As a result, some *Haudenosaunee* people both go to church and to the Longhouse; others can speak both English and their own language; many think of themselves as Americans and hold extremely strong views about their tribal citizenship; and still others have found a way to participate in a capitalistic economy without sacrificing their traditional community values of giving and sharing. Students of human cultural change would not be surprised at these responses to the virus. Rather than killing its host in one fell swoop, the virus of Americanization has been a slow process that has generated many degrees of completeness over a long period of time.

It is this incompleteness of the transition to the American way of life that I believe is the foundation of the current *Haudenosaunee* societal and governmental dysfunction. The primary institutions that were put in place long ago to order our affairs and allow us to deal with the threats to our existence no longer work because the people for whom they were designed no longer exist. In

almost every conceivable way, *Haudenosaunee* people have been changed as the result of American colonization. No person—even the most “traditional” amongst us—is cut from the same primordial cloth as our ancestors were hundreds of years ago. As a result, our most powerful and longstanding governing institution—the *Gayanashagowa*—no longer has the same effect at orchestrating our lives and managing our affairs because for most of us, the values upon which it stands are not *universally* known, understood, or even if so, accepted and embraced.

The inescapable truth is that the dysfunction that now exists within our nations is the direct result of our governing institutions not keeping pace with the transforming changes that have been inflicted upon the *Haudenosaunee* people during the last five hundred years.

### III. WHAT ARE THE PRIMARY EFFECTS OF HAUDENOSAUNEE GOVERNMENTAL DYSFUNCTION?

It may very well be that the source of every problem currently afflicting *Haudenosaunee* society can be traced back to America's colonizing actions. Although we know that pre-colonial *Haudenosaunee* society had its own share of problems that makes any comparative historical analysis fraught with difficulty, the foregoing facts and analysis sufficiently highlights that American colonization has had a more than an incidental effect on *Haudenosaunee* society. Destructive policies aimed at the social, economic, spiritual, and political fabric of any society over the course of several hundred years will have a deep and long term impact on that society.<sup>426</sup> Of the multitude of deep-rooted effects associated with the colonization of the *Haudenosaunee* people, there are three that I believe deserve special attention: (1) the erosion of *Haudenosaunee* law, (2) the erosion of *Haudenosaunee* government, and (3) the erosion

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426. In *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), Chief Justice conceded that the ordinary process for colonizing conquered peoples—"by force"—would not apply to the Indians. Ordinarily, he said, "[t]he 'new' and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people." But he acknowledged that "the tribes of Indians inhabiting this county were fierce savages, whose occupation was war . . . to govern them as a distinct people, was impossible." Thus, he developed the notion of "Indian title," which divested the Indian nations of legal title but preserved a permanent right of occupancy. *Id.* at 589.

of *Haudenosaunee* sovereignty.

### A. *The Erosion of Haudenosaunee Law*

There have been developed objective criteria to determine whether law exists in any society. One of the leading theorists on the anthropology of law, Leopold Pospisil, has defined "law" as follows:

- (1) law is manifested in a decision made by a political authority;
- (2) it contains a definition of the relation between the two parties to the dispute (i.e., *obligatio*); (3) it has a regularity of application (i.e., intention of universal application); and (4) it is provided with a sanction.<sup>427</sup>

It has been argued that the best way to identify whether these criteria exist within a society is to look for principles upheld by legal decisions, that is, cases of conflict.<sup>428</sup> As opposed to looking at simply the society's self-identified abstract rules<sup>429</sup> or the way in which members of the society actually behave,<sup>430</sup> conflict cases are thought to be the most revealing of a society's law.

If we apply this definition of law to each of the *Haudenosaunee* nations and the Confederacy itself, it is difficult to conclude that law predominates throughout the entirety of *Haudenosaunee* societies. Looking to the various conflict cases, the events of the last thirty years, especially the last ten, reveal a multitude of conflicts from which conclusions about the existence of law might be developed.<sup>431</sup> Unfortunately, these conflicts reveal that there are major deficiencies in the elements necessary to establish law within any particular nation. Foremost, there appear to be no major decisions made by a legitimate political authority nor is there sanction.

Certainly throughout the *Haudenosaunee* nations there are decisions made by those purporting to be in political

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427. See LEOPALD POSPISIL, *ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY* 8 (1971)

428. See *id.* at 31-37. The conclusion that cases of conflict most reveal a society's law is derived from the work of Karl Llewellyn and E. Adamson Hoebel in *THE CHEYENNE WAY* (1941) and Oliver Wendell Holmes in *THE PATH OF THE LAW* (1897). See POSPISIL, *supra* note 427, at 31.

429. See *id.* at 20-28.

430. See *id.* at 28-31.

431. See *supra* Part II.C.

authority. But as a practical matter, these political "leaders" are usually not leaders at the societal level. Within every nation and for the Confederacy itself, the traditional or elected officials do not carry universal recognition and support as the legitimate political authority by all of those people who would self-identify as members of that society. This, of course, erodes the viability of any decision that they might be rendered and makes it impossible to conceive of law existing at a societal level.

Similarly, law breaks down because there are no sanctions associated with the administration of what is purported to be the law. It is usually the case within the *Haudenosaunee* nations that "laws" are developed by the "leaders" and ignored by a significant percentage of the population, with no sanction associated with the violation of that law. For example, this is almost always the case within the Seneca Nation, where "law" is generally complied with only by those in power because the Nation has no effective means for enforcing compliance. So too in the other nations where people generally do whatever they want regardless of what the government instructs, or suggests, that they do.

The closest that any nation has come in recent years to developing true law has been the Onondagas with their tax laws and subsequent enforcement action of banishing certain Entrepreneurs and destroying the business enterprises not in compliance with the law. This falls short of a true definition of law, however, because the legal resolution does not define any relationship between the parties to the dispute—the Entrepreneurs are perceived as being aliens outside the society and thus not subject to being considered in a mutually reinforcing relationship—and thus have no role within the legal system.

Despite these shortcomings, there is a level within *Haudenosaunee* society where it could be said that "law" exists, and that is generally at the factional level. All societies have different levels at which law operates.<sup>432</sup> If it were possible to look closely within the inner workings of the various factions in *Haudenosaunee* society, that is, the Council of Chiefs, the Entrepreneur community, the Warrior Society, the Seneca Nation and SRMT Councils, or the Oneida Nation Men's Council and Clan Mothers, one might observe that all four elements necessary to define the

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432. See POSPISIL, *supra* note 427.

existence of law do, in fact, exist. Add in the number of supporters of those factions who would comply with the laws generated by the political authorities within those factions, and it might be very possible to see a kind of legal system existing at the factional level that exists within other societies at a societal level.

Unfortunately, the conflicts that have been occurring within the *Haudenosaunee* nations during the last few years reveal far more about the existence of a non-legal concept, feud, than they do about law. A feud state is defined as "relations of mutual animosity among intimate groups in which a resort to violence is anticipated on both sides."<sup>433</sup> If a people are feuding, the violence:

may range from beating, which leaves only slight injuries, to killing several members of the opposite group. A feud involves prolonged and intermittent hostilities. As a logical consequence, a single fight or single killing cannot be defined as a feud. Long intervals of relative peace sometimes elapse between the fights and slayings.<sup>434</sup>

As opposed to a society founded upon law this definition more accurately describes *Haudenosaunee* society during the last few years. Each nation has abandoned the notion that law and legal process will resolve their problems and have resorted to violence during times of maximum conflict.

During high points of crisis within every *Haudenosaunee* nation, the response has increasingly been the same. There is an introductory period of discussion, but if that fails to resolve the dispute, the parties become firmly entrenched in their positions. Once this occurs—and this has been the case perpetually for many years—the next step is violence. There is no mutually agreed upon legal or political dispute resolution process that is utilized. Thus, if one were to argue that feud can be a form of law, then the *Haudenosaunee* law is a law of blood. But it is generally accepted that feud is not just some primitive form of law; feud exists outside of law.<sup>435</sup>

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433. See *id.* at 3.

434. See *id.*

435. See *id.* at 7-8. Feud is not law because "the counterkillings do not stop and that there is nothing one may regard as a mutually recognized coercive sanction against the killer and his group." *Id.* It is "a faulty jural mechanism" because it does not lead to a final settlement—to peace and rectitude." *Id.* And perhaps foremost, feud is not law because it lacks "the exercise of recognized



To be totally accurate, then, it may be premature to say that *Haudenosaunee* society has deteriorated to a feud state. There have in fact been coercive forces that have inhibited additional killings and violence from occurring. An outsider might conclude that the fear of criminal prosecution by the federal or State government is the reason why killings have not continued. But having observed the Seneca Civil War firsthand, my conclusion is that there remains a fabric of interconnectedness amongst the Seneca People that precludes as irrational the taking of another Seneca's life. If one were to do so, at a fundamental level, this would certainly ensure swift and immediate retribution from the victim's family. More so, at perhaps an instinctive level, murder may still even be perceived as the ultimate wrong or act of immorality. This same restraining force also appears to have been in play during the Mohawk civil war, where despite beatings, firebombings and endless shooting, only two people managed to be killed.<sup>436</sup> Given the fact that the three deaths at Seneca and at least one of the deaths at Mohawk were alcohol related or accidental, despite there being numerous occasions when death could have occurred, there may still exist a *Haudenosaunee* fundamental law that *Haudenosaunee* people should not kill *Haudenosaunee* people.

From where things now stand, it can be concluded with some assurance that the condition of law in every *Haudenosaunee* society lies somewhere between a feud state and a state where law exists. Unfortunately, evidence to date suggests that the direction of the law's development is moving increasingly towards a feud state. While it may certainly be the case that there are instances where law as defined above does in fact exist, it is surely the case that colonization has had the noticeable effect of eroding the state of the law within every *Haudenosaunee* nation.

### B. *The Weakening of Government*

The conflict that has emerged within *Haudenosaunee* has not only had a detrimental effect on the state of *Haudenosaunee* law, it has also had a detrimental effect on the condition of *Haudenosaunee* governance. Government,

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authority in settling disputes." *Id.*

436. See *supra* Part II.C.1. (discussing Mohawk killings).

after all, is a society's fundamental law. To the extent either the legal system or the government is dysfunctional, it naturally follows that the other would also be dysfunctional.<sup>437</sup> As recent events indicate, the erosion of law within each of the *Haudenosaunee* nations has had a direct effect on the growing weakness in *Haudenosaunee* government.

The best and most obvious evidence of this weakness has been those occasions when civil wars have broken out, when revolutionary activity has taken place, or when political opponents have been banished. These are extraordinary events in the history of any society, especially societies that have long had stable governments. To the extent that these events have occurred, they represent the predicate events leading up to an emerging state of complete anarchy.

Both the Mohawk and Seneca Nations have been ravaged by civil war during the last ten years. Perhaps no where has government been so dysfunctional and weak than at *Akwesasne*. The proliferation of factions all claiming governmental authority is direct evidence of how little government there actually is within the Mohawk Nation. By definition, a government exercises authority within a territory with the consent of the governed. At *Akwesasne*, there is no consent by the People for any one of the governmental factions to govern. Thus, regardless of how much the supporters of each of the factions believes that they are the rightful, lawful government, or who the United States might recognize as the official government, the fact that the Mohawk People living at *Akwesasne* do not universally agree upon what constitutes the legitimate government within their territory signifies, by definition that no central government exists. The Mohawk Civil War, while heavily fueled by the tension over gambling and economic development, was spawned out of conditions where no strong tribal government existed. In the absence of a governing structure to contain competitive political passions, civil war was a natural result.

For similar reasons, the Seneca Nation has also experienced civil war. Throughout the course of the legal and political maneuvering that occurred prior to the outbreak of actual violence in 1994, the Seneca Nation

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437. See ROBERT ELLICKSON, ORDER WITHOUT LAW 126-30 (1991).

constitution was heavily relied upon by both sides to the dispute as providing the support for their respective political positions. The problem, however, was that the Nation's Constitution was vague on the most controversial issues that arose.<sup>438</sup> Thus, while one side of an issue may have been technically correct on the law, it may very well have been wrong in the face of long-standing practice and public sentiment. This tension proved overwhelming for the governing structure established under the Seneca Constitution. From what originated as a political dispute, lives were lost, property was destroyed, and the Nation's self-government was temporarily eliminated. Indeed, the most dramatic evidence of the end of Seneca government was the fact that over half the Nation's Council had more faith in the ability of a State court to conduct the affairs of the Seneca Nation than they did in their own people and institutions. This act, had it not been enjoined by the federal court, would have permanently ended Seneca self-government. As the Federal district court judge who heard the case accurately comprehended:

State court jurisdiction over the type of internal political dispute present here would set a dangerous precedent that could severely undermine the [Seneca] Nation's sovereignty, usurp the authority of the Nation's courts, and erode the power of the Nation's leaders to govern for generations to come.<sup>439</sup>

As a close observer of this conflict, the Nation government was a casualty in the Seneca civil war because each faction (and almost every person it seemed) had their own interpretation of what the Nation constitution meant and thus, deprived it of any meaning at all. The evolution of personal constitutional interpretations and the lack of any institution universally accepted to render "legitimate" constitutional interpretations is additional evidence that the Seneca Constitution has little meaning. While the Nation did resume a peaceful electoral process in November 1996, the degree to which the Nation's constitution was

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438. These issues included whether two Council member appointments made by the previous administration were valid, whether the President could declare Council vacancies and remove Councilors, whether Councilors could be appointed for the day, and whether the President could fire employees at will. See *Bowen v. Doyle*, 880 F. Supp. 99, 115, 135 (W.D.N.Y. 1995).

439. *Id.* at 137.

effectively ignored and manipulated when it was needed most demonstrates the weakness of the fundamental Seneca law—the Seneca constitution.

In addition to civil war, the emergence of revolutionary activity and banishment is also evidence of the weakening of government. Revolutionary activity has been taking place within the Onondaga, Tonawanda, and Tuscarora nations for many years. Bitter political spawned the modern Oneida Nation and it has continued for many years. The response to this activity by government officials,—banishment and depriving people of their “voice”—demonstrates the most extreme measures that a government can take to protect itself from political dissent. Similarly, seeking the overthrow of the governing regime in response to a perceived inability or unwillingness to respond to one’s concerns is also the most extreme expression of political dissent. Given the numbers of people involved in this extreme conduct, together these two phenomena reflect considerable weakness in the governing capacity of these nations.

To the extent that partisans on both sides of this dispute are willing to engage in extreme behavior, that is, to literally destroy the opposition rather than to find some way to work with it, there is strong evidence that the governing process in that community has broken down. In a functioning democratic system, there is, of course, a great deal of controversy and disagreement. But the disputes focus on what the possible outcome of the issue might be, not upon whether certain people have a legitimate voice to speak on the issue or who is the legitimate political leadership. When these issues become the focus of the political dispute, the politics of revolution, totalitarianism, and excommunication have prevailed. In the absence of corrective change, societies undergoing this type of conflict run the risk of decaying into a state of total anarchy.

Indeed, this is what actually happened to the Confederacy following the Revolutionary War. Arguably, the Confederacy came to end shortly after the Revolutionary War when the Oneidas and the Tuscaroras chose to support the Americans over the longstanding allies of the *Haudenosaunee*, the British. But all governments can and do change, and it would be more accurate to say that the Confederacy evolved as the time moved forward. The loss of most *Haudenosaunee* lands greatly undermined the

ability of the Confederacy to exercise governmental authority. Commensurately, this enhanced the ability of the United States to deal directly with each of the component nations and to deny official recognition of the Confederacy as a distinct legal and governmental institution. Nonetheless, over the years, the Confederacy has maintained its existence and periodically sought to exercise governmental authority.

In recent years, however, the Confederacy—led by the Onondagas—has fixated on resisting the influence of the Entrepreneurs throughout each of the *Haudenosaunee* nations.<sup>440</sup> The most recent and likely self-destructive act taken by the Confederacy was its involvement in the purported tax agreement with New York State in 1997. This saga alone symbolizes the dysfunction occurring with the Confederacy and its weakness in dealing with contemporary problems. In failing to consult with all of the people in the *Haudenosaunee* territories about the purported agreement, the Confederacy's leaders demonstrated their view that the Entrepreneurs (and others not in their immediate circle of supporters) are "outsiders" who have no legitimate role in the Confederacy's decision making process (a conclusion made easily in light of the recent banishments).<sup>441</sup> Many of the Entrepreneurs are, in fact, so culturally, socially and economically assimilated that they could very well be considered as "aliens" within these communities. But the reality, of course, is that the Entrepreneurs, their families and their supporters remain a part of their nations both physically and in their personal relationships with others. The attempt to enter into a major intergovernmental agreement over the objection of many of one's own people—regardless of their political view—is, in the least, an attempt to govern with blinders on and, at

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440. The Chiefs have taken positions against the Warrior Society and smugglers at *Akwesasne* and opposed the leadership of Ray Halbritter at *Oneida*.

441. The official position of the Confederacy is consistent with this conclusion:

We hold that the native people who consistently defy the laws of their own traditional governments and who run to the state and federal courts. for protection form the lawful governmental processes of their own. traditional governments have removed themselves from the circle of the *Haudenosaunee*.

A SPECIAL REPORT BY THE HAUDENOSAUNEE ON SOME OF THE PRIMARY ASPECTS OF LAW, SOVEREIGNTY AND GOVERNANCE 1 (Mar. 1998) (emphasis added).

worst, evidence of the complete failure of the Confederate government to formulate policy in a manner that is acceptable to the people over whom it purports to govern. It is actions of this sort that only perpetuate the erosion of an already weak form of government.

### C. *The Loss of Sovereignty*

The erosion and weakening of law and government in *Haudenosaunee* society is not simply a matter of identifying that dramatic changes have occurred. To the contrary, these changes have generated very real consequences associated with the ability of the *Haudenosaunee* people to exercise control into the future. In short, the erosion and weakening of *Haudenosaunee* law and sovereignty translates directly into a loss of *Haudenosaunee* sovereignty.

*Haudenosaunee* sovereignty can be defined as a reflection of three interrelated phenomena: (1) the degree to which *Haudenosaunee* people *believe* in the right to define their own future, (2) the degree to which *Haudenosaunee* people have the *ability* to carry out those beliefs, and (3) the degree to which the sovereign actions of the *Haudenosaunee* nations are *recognized* both within the nation and by the outside world.<sup>442</sup>

In evaluating the degree to which governance issues affect *Haudenosaunee* sovereignty, it is necessary to identify the degree of governmental dysfunction. There are at least five factors to consider. Two have already been discussed: (1) the viability of the nation's laws and legal system and (2) the capacity of its governing process. The discussion above highlights that each of the *Haudenosaunee* nations, to varying degrees, has serious problems associated with these two factors. The other three factors to consider in evaluating governmental dysfunction are: (3) poor administration,<sup>443</sup> (4) dependence upon foreign govern-

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442. See Porter, *Strengthening Tribal Sovereignty Through Government Reform: What Are The Issues?*, *supra* note 390, at 90.

443. See *id.*

*Administrative problems* undermine tribal sovereignty in many ways. Human resource mismanagement weakens a tribe because it mistreats the very people that the government is designed to serve and causes them to lose faith in the mission of tribal government. Despite the political instinct to do it, hiring people to perform jobs that they are not

ments,<sup>444</sup> and (5) feuding. Conceptually, then, each of these five factors has a direct impact on the second prong of the sovereignty "test" set forth above—each one affects the *ability* to carry out the belief in being a sovereign nation. Accordingly, failure to have this ability further undermines the first and third prongs of the sovereignty "test"—the *belief in* and *recognition of* that nation's sovereignty.

1. *Poor Administration.* The degree to which each of the *Haudenosaunee* nations are afflicted with problems of poor administration is fundamentally an internal matter beyond

qualified to do does not help them or the tribe in the long run. Fiscal mismanagement undermines sovereignty because it deprives the Indian nation of the financial resources necessary to finance legitimate public activities, such as building health centers and schools. Inadequately accounting for the Peoples' money will only deny them the opportunity to take action on important tribal priorities. Corruption undermines sovereignty because it too wastes scarce financial resources and undermines the government's credibility.

Administrative dysfunction in tribal government has a corrosive effect on tribal sovereignty in other intangible ways. Notwithstanding the immediate effects of the many faces of mismanagement, if the people have no faith in the manner in which government functions, they will be unlikely to get involved in government affairs. This is a disaster for self-determining capacity. If the most capable and generous people in the community feel that getting involved in government affairs is a waste of time, then the only people who will get involved will be either the least capable or the most selfish. When that happens, tribal government has been reduced to simply a game for a few self-interested players and its role as the defender of the peoples' sovereignty is lost.

*See id.* (emphasis added).

444. *See id.* at 91-92.

*Dependence* undermines tribal sovereignty by definition. If you are dependent upon others for your well-being, then you are not achieving your own destiny. This is what happens when tribal government relies too heavily on non-members to carry out its responsibilities, when tribal leaders are too dependent upon their lawyers, and when tribes become too dependent upon the services, money and institutions made available to them by foreign governments. . . . Unfortunately, the worst effect of dependence, however, is the most insidious and difficult to remedy. Over time, people who are told they are dependent actually come to believe it. From the law, to the schools, to the churches, and to the media, all of the messages sent by American society to the Indian nations have revolved around American superiority and native dependence. Dependence undermines tribal sovereignty because it drains from the People any meaning of what it means to be independent.

*See id.* (emphasis added).

the scope of this Article. Surely, administrative problems would be issues of most concern for those nations that developed significant administrative operations, that is, the Saint Regis Mohawk Tribal Council, the Oneida Indian Nation and the Seneca Nation of Indians. The other nations, simply by virtue of their relatively undeveloped administrative operations, most likely would not be presented with the same degree of potential deficiencies.

2. *Dependence.* While the manner and extent of the dependence varies, each of the *Haudenosaunee* nations is dependent upon the aid and assistance of foreign governments, such as the United States or the State of New York and its subdivisions, for support. Examples of this dependence are plentiful:

a. *Government Recognition.* Every *Haudenosaunee* nation government relies upon the continued recognition of its authority by the United States to maintain its governmental authority. In recent years, the Mohawks, Oneidas, Cayugas, Senecas and Tuscaroras all have had leadership controversies that the parties could not resolve internally. This has spawned an amazing degree of reliance upon foreign governments, usually the United States, to determine who are to be the recognized leaders. Putting aside the lofty rhetoric of being leaders of sovereign nations, the combatants in these leadership disputes hypocritically have allowed foreign governments to determine who are to be the recognized leaders within these nations. During these conflicts, advocacy efforts have been taken to the BIA for recognition decisions, to the federal courts and to federal administrative agencies to challenge the BIA decisions and, in the worst case of all, to the State courts to obtain control over the tribal government. As a result, foreign governments have been given de facto control over these nations by the very people purporting to be the leaders and defenders of their nation's sovereignty.

b. *Law Enforcement.* Every nation is dependent upon the State and county sheriffs for criminal law enforcement within their territories. While the Mohawks and the Oneidas have their own police forces, each is deputized to enforce the State criminal law and thus remains dependent upon the State criminal justice process.



c. *Dispute Resolution.* Every nation is dependent upon the State and federal court system for the resolution of internal and all external disputes. The Mohawks, Senecas and many Oneidas have their own court systems while the Onondagas, Tonawandas and Tuscaroras do not. While the Seneca courts have long existed, support for them is weak. So too with the Mohawk and Oneida courts, but more for reasons associated with their recent development than their inherent weaknesses. Nonetheless, tribal members, and often the tribal governments themselves, enter the State court systems for redress of internal, as well as external problems

d. *Financial Support.* Every nation receives financial support to conduct government operations from the United States and/or the State of New York. The Saint Regis Mohawk Tribal Council, the Seneca Nation of Indians and the Oneida Indian Nation all receive funding for governmental programs and services from the United States. In addition, these nations, plus the Onondaga, Tonawanda Seneca and Tuscarora nations, also receive funding from the State of New York.

e. *Education.* Every nation relies upon the State to educate its children. The Onondagas and the Mohawks, however, each have their own school within their territory that allows them greater control over the education of their children.

f. *Social Services.* Every nation is dependent upon the wide variety of social services provided to their members by the State (such as unemployment compensation or welfare payments) and the federal government (such as social security, medicare or medicaid).

g. *Enterprise Support.* The Oneida Nation generates governmental revenue from its dependence upon the gaming compact entered into with New York State in further reliance upon the federal government and its Indian gaming regulatory laws. All nations (except the Cayugas) rely upon de facto exemptions from State sales taxes to conduct gasoline and cigarette businesses.

Reliance upon foreign governments is justified by supporters (if at all) in two fundamental ways. First, it is argued that any funds or services provided by foreign governments are an entitlement provided in accordance with federal and State treaties. Second, it is argued that it is the prerogative of sovereign nations to enter into relationships with other nations for mutual benefit. Regardless of the rationale one adopts to justify this dependence, the fact that there is any dependence at all on foreign governments—especially ones like the State that have long been hostile to *Haudenosaunee* concerns—means that there is a commensurate loss of the nation's autonomy to carry out its affairs as it sees fit.

There may be some beneficial effects of entering into dependent relationships—especially in an increasingly interdependent world—but the *Haudenosaunee* nations nonetheless are dependent upon foreign governments for providing basic services that they themselves should be providing. Education, dispute resolution and law enforcement are governmental functions too important and culturally sensitive to leave to the hands of strangers and historically hostile governments. Indeed, because of the interconnectedness between the *Haudenosaunee* nations and the State, conflict on one issue routinely affects the resolution other issues both formally and informally.<sup>445</sup> The failure to assume as much responsibility over these important areas of traditional governmental activity has a long term detrimental effect on that nation's sovereignty.

3. *Feuding*. The last major source of *Haudenosaunee* governmental dysfunction, feuding, has particular impact on *Haudenosaunee* sovereignty because it is the only problem that is capable of producing immediate political self-destruction. In an era increasingly hostile to assertions of tribal sovereign authority, the *Haudenosaunee* do not have the luxury of engaging in self-destructive infighting. The federal government is fully empowered and has a long history of taking actions that from time to time have a

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445. Recently, the Governor of New York, George Pataki, suggested that land claims issues with the *Oneida* Indian Nation could only be resolved if linked to the resolution of the conflict over collecting State sales taxes on reservation transactions with non-Indians. See Erik Kriss, *Land Talks Strategy Criticized: The State Has Attempted to Link the Oneida Indian Land Claim Talks with Other Issues*, POST-STANDARD (Syracuse), Mar. 1, 1997, at A7.

genocidal effect on the *Haudenosaunee* people.<sup>446</sup> In addition to the federal government, the usual suspects in the fight against tribal survival—the State and its private business interests—all continue to pose threats to the existence of Indigenous nations.<sup>447</sup> Indeed, the very worst threat to our sovereignty may be our own members, who seem to have no qualms drawing upon the legal machinery of the colonizing nation to effectuate their own personal political agendas.<sup>448</sup> In an age when *Haudenosaunee* economic and political competition with the dominant society and its agents has become a life or death struggle, the specter of the Termination Era occurring only thirty years ago is a haunting prospect for the future.

Against this backdrop, feuding amongst the *Haudenosaunee* people is a matter of life or death for both our members and our sovereignty. During the last ten years, five *Haudenosaunee* people have lost their lives as the result of economic and political disputes escalating into civil war. On top of that, during these times of crisis, our nations have been wholly subordinated—indeed, often at our own choosing—to the authority of the State and federal governments.

This is not simply a short-term problem. If the *Haudenosaunee* people are overwhelmed with acrimony, infighting and civil war, we cannot possibly muster enough strength to repel the forces that would seek the destruction

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446. See H.R. Con. Res. 108, 83d Cong. (1953) (calling for Indian tribes to be “freed from Federal supervision and control and from all disabilities and limitations specifically applicable to Indians” and thus marked the official beginning of the federal government’s Termination Policy); Jeff Barker, *Plan Would End Tribal Immunity Law Shield Tied to U.S. Funds*, ARIZ. REP., Aug. 28, 1997, at A1. (reporting on Senator Slade Gorton’s proposal to tie federal funding of tribes to waivers of tribal sovereign immunity).

447. See generally *New York State Tax & Fin. Dep’t v. Attea*, 512 U.S. 61 (1994).

448. See, e.g., *Fletcher v. United States*, 116 F.3d 1315, 1318-19 (10th Cir. 1997) (sacrificing sovereignty to federal government by tribal officials successfully having democratically elected Osage government invalidated); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996), cert. denied, 117 S. Ct. 610 (1996) (discussing sacrifice of tribal sovereignty to federal government by tribal members successfully utilizing Indian Civil Rights Act to obtain federal court review of their banishment by traditional tribal government); *Bowen v. Doyle*, 880 F. Supp. 99, 115, 135 (W.D.N.Y. 1995). (indicating sacrifice of tribal sovereignty to state government by tribal officials successfully having state court exercising jurisdiction over internal political dispute with tribal president).

of our nations. Even in those instances where there might be an enemy obvious enough to unify opposing factions—such as has occurred recently with the State—the days, months and years of prior conflict will have produced a long-term corrosive effect that will make those moments when unity is necessary terribly difficult to achieve.

As each of the *Haudenosaunee* societies continues to deteriorate, the division that grows within the people will only continue. Friendships will be lost, kinship will fall away and the connectedness that exists between all things within the *Haudenosaunee* world will eventually be non-existent. As this happens, distrust, conflict, violence and death are likely to continue. The end result will be the continued fragmenting of our political relationships. Division will occur that will fuel the revolutionary activity occurring at Onondaga, Cayuga, Tonawanda and Tuscarora. Inevitably, the traditional governments will be unable to satisfy the needs of the people who have been spawned by colonization and new governments will rise to claim authority. The end of *Haudenosaunee* government will look a lot like things have been during the Mohawk and Seneca civil wars, except it will not be a temporary state of affairs.

Put simply, then, if the *Haudenosaunee* people are divided and *Haudenosaunee* governments are dysfunctional, then there are weak tribal governments that will be unable to protect and defend the membership from the continuing onslaught of more than five hundred years of American colonization. If the *Haudenosaunee* people are too divided to control internal affairs and determine a future course, then it simply cannot be expected that survival as sovereign nations will continue for much longer.

#### IV. WHAT IS THE CASE FOR REFORMING *HAUDENOSAUNEE* GOVERNMENT?

Although American colonization has had a disastrous effect on *Haudenosaunee* government and society, I believe that there is little benefit in simply identifying the sources of a problem without also identifying remedies to help resolve it. As I see it, current ills afflicting each of the *Haudenosaunee* nations can only be resolved if there is a mechanism in place to allow all *Haudenosaunee* people to participate in a decision-making process that is perceived

as legitimate. Fundamentally, this means to me that the governing process within each of the *Haudenosaunee* nations must be reformed to some degree. This section will lay out the reasons why I believe that all of the *Haudenosaunee* nations must immediately initiate government reform efforts.

A. *Disorganization and Inaction are Destroying the Haudenosaunee Way of Life*

Colonization and its close relative, assimilation, are processes that have as their end result the destruction of the people being colonized and assimilated. Were it not for this reality, these tools would not have been utilized by conquering peoples throughout human history to subjugate other peoples who stood in the way of "progress" or who were simply perceived as inferior or different. Thus, it is with some irony that the *Haudenosaunee* peoples—one of the most effective colonizing peoples of the North American continent—are now suffering from the very same fate than other Indigenous peoples had inflicted upon them by the *Haudenosaunee* people of long ago.

One cannot look at the *Haudenosaunee* nations today and not have a fear that the distinct way of life that has existed for hundreds of years is in danger of being eliminated. The traits common to all dying societies are readily apparent. Lawlessness and anarchy, factionalism, excessive greed, loss of culture and language, obsessive self-indulgence, homicide and banishment are all phenomena occurring within each of the *Haudenosaunee* nations. I know that the "good old days"—before the colonists showed up—were hardly some kind of romantic Garden of Eden, but there was hardly the same degree of self-destructive activity taking place, at least after the Peacemaker brought his message of peace. To the contrary, the high point of *Haudenosaunee* existence was characterized precisely by the existence of opposite values and philosophy—respect for the law and responsibility to the community.

The emergence of the dark days that now befall the *Haudenosaunee* people is not to say that action is not being taken by some *Haudenosaunee* people right now to address caustic aftereffects of the colonization process. At one level, there is somewhat of a renaissance recurring within the traditional segments of *Haudenosaunee* society. Faith-

keepers will tell you that the Longhouses at various ceremonial times are as full as they have ever been. This is not surprising, since a response of any people in the face of cultural and societal crisis is for some to turn inward towards things spiritual. The question is whether any of this newly-reawakened flock will translate what they may learn in the Longhouse into practice—that is, to real life—where the troubles and temptations of American society await to consume the culturally and spiritually weak. Given that many of the most destructive and self-interested elements in *Haudenosaunee* society are often the most vocal proponents of *Haudenosaunee* culture and identity presents a troubling paradox that undermines any confidence that cultural revitalization alone will have an appreciable effect against the five hundred years of colonization and continued pressure to assimilate into American society.

At another level, some *Haudenosaunee* people—Entrepreneurs—have concluded that the problems now occurring within our societies are simply economic in nature, that is, that our problems must be due to there being too much “poverty.” Accordingly, these people believe that taking aggressive action to resolve our poverty problem requires finding new ways to further stimulate the growth of capitalism, such as economic development within the *Haudenosaunee* territories. While there is considerable debate within this group over how that is to be accomplished—either collectively through the nation or individually through the Entrepreneurs—both sides advocating this form of progress nonetheless agree that more money in the hands of our people is the catch-all solution to our modern ills.

The problem with this formulation is that the proposed solution, as well as the problem itself, are defined and resolved in terms borrowed totally from the colonizer. First, to say that the problem with *Haudenosaunee* society is that we are simply too “poor” is to impose an assessment of our collective condition that is wholly external and adopted from Anglo-European society. If one has food, shelter, clothing, family, recreation and a nation to protect oneself, could not one be living a good life without being a millionaire? Given how much our ancestors belittled the material preoccupations of the colonists’ way of life, I am sure that they thought they were living a better life and would have answered this question affirmatively. And given

how prone the colonists were to thinking of us as savages, pagans and uncivilized beasts, it is not a far stretch to accept that they also thought of us as "poor" as well. Adopting one of their preferred terms of debasement—that we are "poor"—concedes too much and could alone be seen as evidence that their colonization of us has substantially succeeded.

Secondly, resolving the so-called poverty problem through a process of economic development only compounds the assimilative effect of the original colonization process. Promoting the development of excess wealth—capitalism—is as much a whole cloth adoption of American values and beliefs as is accepting that our problem results wholly from our "impoverished condition." Economic development, however, rather than promoting *Haudenosaunee* values and a distinct *Haudenosaunee* way of life, only furthers the forces of assimilation that push us into American society.

Strong evidence of this effect are the Entrepreneurs who have fully accepted the American businessman's creed that they must always fight their own tribal governments for having to pay taxes for the exercise of tribally-based rights. But maybe an even greater exercise of this philosophical approach is occurring at the Oneida Nation. Unlike the other nations, where capitalism is but one philosophy among many, the Oneidas have officially established economic development as the primary means for defending their sovereignty. It is a grand experiment in social engineering to consciously adopt the colonizing society's economic system and expect that it will help you maintain your distinctness. While it is unclear to me how more money translates into the preservation of distinctness, the Oneidas (and many other Indian nations in the United States following the same path) will be the first to find out whether it can be done or not.<sup>449</sup>

Nonetheless, aside from the apparent conspiracy of efforts to promote economic development for individual benefit, there is no *Haudenosaunee* nation (other than the Oneidas and maybe the Onondagas) that has both identified a plan of collective action to address the aftereffects of colonization and has the desire and ability to

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449. See generally Naomi Mezey, *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*, 98 STAN. L. REV. 711 (1996).

carry out that plan.<sup>450</sup> The problem with this inaction is that the illness of colonization affects us like a virus. Once you are infected, it continues to grow, and grow, and grow, until one day you realize that you're ill. Maybe by then its too late to find a cure and you are no longer the person you once were because the old you is dead. Some people are infected in greater degrees than others. Some people have stronger immunities than others. But in any event, the failure to identify the virus, admit that action must be taken and do something to find a cure or, at least, a method of containment, means that the likelihood of death will only increase. As *Haudenosaunee* people continue to become infected with the virus of Americanization without taking corrective action, it is much more likely that the *Haudenosaunee* people eventually will cease to exist.<sup>451</sup>

This may seem dramatic, but it is undeniably true if one believes that there are certain immutable characteristics that make up the *Haudenosaunee* people. Language, culture, government, physical appearance and religion are all but a few of the factors which contribute to our distinct way of life. If those things are gone, by definition there is little to support our existence as a distinct people. *Haudenosaunee* people who seek to recreate within our society the American way of life run the risk that they will be seen, if not by themselves then by outsiders, as indistinct from the outsiders and thus not entitled to one of the paradigm barometers of sovereignty status—recognition as such.

There is no better example of what I refer to here than the actions taken by some *Haudenosaunee* people to kill, banish and silence other *Haudenosaunee* people to accomplish their objectives, behaviors that presume that the

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450. The Onondagas might argue that they have a plan for the future, but it revolves primarily upon simply perpetuating the past.

451. Our end will come when we no longer have or desire kinship relationships with one another. See Barsh, *supra* note 424, at 297 ("What makes a political system 'tribal?' By definition, it is one that is based on kinship."). The evidence of this is beginning to show. See, e.g., Sean Kirst, *An Onondaga Family Deals with Rift: "We'll Get Past This"*, POST-STANDARD (SYRACUSE), Mar. 11, 1998, at B1 (explaining the division that exists between the Confederacy *Tadadaho*, Sidney Hill and his brother Oliver Hill, who was one of the entrepreneurs banished by the Onondaga Nation); Tobin, *Making Dollars and Dissent*, *supra* note 248, at A4 (discussing the difficulties within Oneida leader Ray Halbritter's family).



“enemy” is an outsider or stranger.<sup>452</sup> Killing for political reasons is obviously a reflection of deep societal decay in a small community. To kill a person because they do not subscribe to your political views is direct evidence that *Haudenosaunee* people may have fully assimilated the destructive behavior of the White Man.<sup>453</sup> Silencing, while less severe than killing, has the same practical effect of eliminating that person as a voice of political opposition and is also direct evidence of how some *Haudenosaunee* people may have come to accept the stranger-oriented focus of American political values.

In a significant way, however, banishment may be even more reflective of societal breakdown than Oneidas silencing each other or Mohawks and Senecas killing each other. While both banishment and killing clearly evince an intent to end the life of another person as an Indian, killing occurs quickly. Banishment, on the other hand, and to a lesser extent silencing, are equivalent to slow torture. For an Indian community to take a conscious, deliberate action to formally deny one of its members recognition as an Indian may be the worst thing that can be done to punish an Indian. Even though stripping Indians of identity has been one of the most heinous colonizing actions taken by the United States, banishment is far worse because it comes from one's own people. Clearly those who seek to overthrow the traditional governments are perceived by those in power as being the equivalent of White people—so foreign and outside the community that banishment must occur in order to defend the community. But these people, regardless of their actions, surely believe themselves to be Indian. Given the wide variety of terrible things that

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452. Political opponents frequently engage in rhetoric designed to devalue the humanity and worth of each other. *See, e.g.*, Grazma, *supra* note 196, at 3. (“Halbritter says he only punishes Oneidas who he says threaten the nation. He and his Men's Council call them ‘traitors’.”). “The traditional chiefs [at Onondaga] see Halbritter as ‘a collaborator’ in a conspiracy with the dominant culture to divide and conquer the Iroquois people by getting them addicted to gambling profits.” *Id.*

453. Indeed, while not acknowledged under American tort law, Americans often take lives to defend economic and property interests. The Persian Gulf War is a good example. Some *Haudenosaunee* have also absorbed this philosophy. *See, e.g.*, Mary M. Earl & John Grau, *supra* note 292, at A1. (reporting that an Entrepreneur, Duane Beckman, co-owner of a business destroyed by the Onondaga chiefs, said that “[t]hey'll tell you I had a rifle, and you're damned right I had a rifle. I was there to protect my rights.”)

*Haudenosaunee* people do to each other that does not result in banishment, it is difficult to fathom the degree of societal breakdown that must exist at Onondaga, Tonawanda and Tuscarora that would push a tribal member to tempt banishment, or induce a tribal leader—especially those who profess adherence to peace—to resort to such an extraordinary remedy. The days of running off and setting up new communities over political disputes are no more. We are stuck with each other, warts and all, and crude attempts to hack off the ugliness that the White Man has bestowed upon us is futile. Denial of this reality means that the virus of American colonization will continue to precipitate cannibalism amongst the *Haudenosaunee* people and bring an the end to *Haudenosaunee* society.<sup>454</sup>

### B. *Decolonization Through Collective Action is the Only Viable Remedy*

It hardly seems rational to expect that five hundred years of colonization could somehow be undone in anything less than another five hundred years, if at all. The monstrosities inflicted upon our people over the generations were forceful, violent and continuous. Perhaps even more insidious, however, were the less direct actions to destroy our unique way of life, such as religious conversion, boarding school education and the imposition of American citizenship and State jurisdiction. When one looks at the magnitude of the challenge of redressing colonization, it seems almost impossible. Even so, without faith that these actions can be resisted and overcome, we can be assured that our complete colonization is inevitable and simply a matter of time.

Decolonization—the process of undoing colonization—

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454. Some *Haudenosaunee* believe that the chaos of the modern era was foretold in ancient prophecies. The late Cayuga *Royanier* Jake Thomas has said, “we have prophecies that speak of this time. The coming of destruction of Mother Earth.” See Dawn Hill & Rick Monure, *Cry of the Eagle: Prophecies and Preparation*, AKWESASNE NOTES, Oct.-Dec. 1995, at 100, 107 (“As for the *Haudenosaunee*, the prophecies speak of a time when ashes will be thrown across the fire and heads will roll, blood will be spilt. We know this to be happening today. Fear, gossip, and bad thoughts rule as it did when the Peacemakers brought the Great Law.”). See also Grazma, *supra* note 196, at 3. (““The elders will tell you that the things they heard when they were kids are today making themselves known,” [Richard] Kettle said. ‘It is said that husband and wife will fight, sisters and brothers will fight, fathers and sons will fight.’”).

must occur if we *Haudenosaunee* people are to remain distinct members of humankind. Decolonization is not simply the process of attempting to reverse the colonization process; that would be impossible and even if possible, overly idealistic and probably impractical. Instead, decolonization is the process by which an Indigenous people preserve their distinct way of life by continually evaluating and reassessing the past and present appropriation of externally derived institutions and behaviors. The intent is not simply to reject all things that are of foreign origin, but to reassume control over the future and to preserve the unique attributes of one's own society and identity while adapting to and appropriating those new things that have been absorbed and confronted. In short, a decolonization process seeks to revitalize an Indigenous society by consciously rejecting the course of development imposed by the colonizing society and to otherwise restore the natural and independent development process of that particular Indigenous people. As victims of colonization, *Haudenosaunee* people must decolonize if we are to avoid being fully absorbed into American society.

Decolonization is a societal process for a people and cannot occur if only a handful of individuals participate. While it is true that individuals can make a personal commitment to engaging in a decolonization process—what might be called “personal decolonization”—unless a significant number of individuals in the society are willing to participate in such a process there will not be the critical mass necessary to revitalize it.

This requirement raises a tremendous problem of what may be the single biggest obstacle to *Haudenosaunee* revitalization. How is it possible to organize such a wildly diverse population of people to take the collective action necessary for decolonization? The *Haudenosaunee* have always been a very independent people forged from a multitude of different Indigenous cultures. Each of the Six Nations has its their own distinctive personality, and adding in the additional cultural diversity associated with being a people colonized by Americans makes the task almost insurmountable. Because one of the paradigm modern values of the American way of life is to know one's rights but not one's responsibilities, the incorporation of these values by many *Haudenosaunee* people makes collective action even more problematic. And given the fact

that many *Haudenosaunee* people are already so assimilated that they are able to live a life wholly disconnected from their Indigenous nation almost guarantees that moving all *Haudenosaunee* people in the direction of decolonization is probably a theoretical as well as practical impossibility.

This would be a tragedy of the highest order because I believe that all of the raw material that is necessary for the decolonization and revitalization of the *Haudenosaunee* people still exists. We still have considerable territory. We still have individuals who know our language and culture. We still have individuals with strong beliefs about our own political independence. We still have a wide variety of very skilled and committed people. And, because of the success of colonization thus far, we now even have some money to assist us in our efforts. In short, we have almost everything that every other Indigenous society trying to survive in this world wishes they had—except for one thing.

We have no organization. Instead of an organized, collective movement toward the revitalization of our nations, or any direction for that matter, we have almost total anarchy (except for the Oneidas). The largest focus of collective action in our societies is the faction, and maybe the social organization. No *Haudenosaunee* government has the universal support of its people, nor does any entrepreneur, minister or faithkeeper. If at all, people are organized along lines that further their personal interests. Rarely do large numbers of community members support efforts that might have broader societal impact. Only when there is an obvious threat—such as when the State has attempted to impose its taxes within *Haudenosaunee* territories—has there been a unification of people beyond their ordinary line of demarcation.

One of the symptoms of colonization is that people withdraw further and further into their own personal cells at the cost of an increasingly more disconnected sense of community. Unfortunately, this is happening within *Haudenosaunee* society. The emerging trend within our nations is to fragment and separate. Banishment is a response by a community to exorcise individuals it perceives as a threat to its existence. It is equivalent to chopping off a finger or a toe. You can survive without the harmful appendage, but if you don't heal the wound, you'll probably die from either the hemorrhage or the gangrene.

*Haudenosaunee* governments that banish their members ignore the underlying disease and run the same risk of long-term destruction. Similarly, tribal members who actually believe that they can start their own small communities in this modern, hostile world—such as has occurred at Onondaga and at *Kanatsiohareke*—ignore the reality that being Indian means being part of an Indian community. By definition, it is not possible for there to be only one Indian. Barring any correction action, this process of fragmentation and separation is likely to continue.

Thus, the only chance that the *Haudenosaunee* might take collective action to decolonize and take a chance at ensuring a distinct future would be if there is sufficient organization within our communities to move us to action. With organization, we could resist the colonizing influences that continue to have our destructive effect and channel their energies towards common objectives.

### C. *Collective Action Can Only Occur if Government is Once Again Made Legitimate*

There are at least five different directions that the *Haudenosaunee* people might take to reorganize for decolonizing purposes: (1) reversion to the traditional form of government, (2) abandonment of the traditional form of government, (3) adaptation to a business organizational structure, (4) adaptation to a theocracy, and (5) adaptation of a new or amended form of government.

#### 1. *Reversion to the Traditional Form of Government.*

One way to effectuate change in government would be to revitalize the *Gayanashagowa* in those communities that have abandoned it as the governing law.<sup>455</sup> Such a process might entail recognizing once again those in the Longhouse as the political, as well as the spiritual, leaders. If successful, this approach could dramatically lead to the revitalization of the *Haudenosaunee* people, primarily because knowing the language and the traditional ways would be critical for understanding and participating in the governing process.

The major problem with revitalizing the *Gaya-*

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455. Within the Seneca Nation, this is frequently referred to as "going back to the chiefs."

*nashagowa* is that this form of government no longer works for many *Haudenosaunee* people who *already* have it as their official form of government. There is ample evidence within the nations that currently retain the traditional form of government—at Onondaga, Tonawanda and Tuscarora—that this form of government is not supported by all of the people who are members of those nations and may not even work throughout the nation as a practical matter. This is not surprising since, as discussed above, colonization has transformed the very identity of many of the people in those nations and has made the traditional ways seem totally foreign to them. For example, the fact that many *Haudenosaunee* people are Christians may inhibit their acceptance of a system in which “pagan” chiefs hold both the political and spiritual power. Moreover, as a practical matter the fact that most *Haudenosaunee* people do not speak their own tribal language makes adaptation to the *Gayanashagowa* especially problematic. While there is a simple beauty associated with seeking to just “unwind” the colonization process and revert back to the old form of government, many of the changes that have occurred to the present day simply cannot be undone, making this type of change impossible.

2. *Abandonment of the Traditional Form of Government.* Another option to transform *Haudenosaunee* government would be to follow the path set by the Saint Regis Mohawk Tribal Council and the Seneca Nation of Indians in abandoning the *Gayanashagowa* as the official form of government and replacing it with some kind of elected, constitutional republic. The reasons for doing so would be to address the problems described above and to ensure a stronger role in the government for those tribal members unable or unwilling to participate in the traditional governing process.

The major problem in doing so is that there are many *Haudensaunee* people for whom this form of government still works. Given the reverence for the *Gayanashagowa*, it is highly unlikely that it would easily be abandoned. Those in such a position would be extremely conservative towards change, especially any change that would result in the adoption of something that looks like the White Man’s form of government.

### 3. *Adaptation to a Business Organizational Structure.*

Another model that *Haudenosaunee* people might consider pursuing would be the business organization model. Under this approach, an Indian nation could organize itself as a corporation much like under the provisions of the Indian Reorganization Act of 1934 or the Alaska Native Claims Settlement Act of 1971.<sup>456</sup> The tribal members could deem themselves shareholders in the corporation and have all tribal assets transferred to the ownership of the corporation under the management of a board of directors and officers. Fundamentally, the reason for doing so would be to promote economic development for tribal purposes and thereby seek to redress other tribal problems.

It is highly unlikely that any of the *Haudenosaunee* nations would pursue this course. While there might be a few supporters, the most traditional people would reject the option out of hand as too much a concession to the forces of colonization. The purpose for incorporating—maximizing profit—is not a value that is universally shared. Moreover, even the less traditional nations—the Mohawks and Senecas—each have their own distinct form of governing (or, rather, non-governing) traditions that would make the transformation to the corporate form also unlikely.

Interestingly enough, one *Haudenosaunee* nation—the Oneida Nation—appears to have adopted such a form as a practical matter. While the nation has not formally incorporated itself under either its own, federal or State law and officially maintains its status as a “traditional government,” it appears to operate in much the way a corporation would. Through the Men’s Council and Clan Mother system, there is a kind of board of directors which establishes working policy. The Nation Representative also serves as the Chief Executive Officer and operates the Nation’s casino and other businesses as well as carrying out the Nation’s laws and policies. This is to help carry out the fundamental purpose of the Nation government—to promote its sovereignty through economic development. Because all major business activity is nationalized, the Oneidas appear to have harmonized government and business in their own distinctive form of organization. Because of their unique history and many years in near

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456. See 25 U.S.C. § 477 (1994); Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§ 1606(a), 1607(a) (1993).

extinction, the Oneidas may be the only Nation willing and able to maintain such an organizational structure.

4. *Adaptation to a Theocracy.* Aside from revitalizing the traditional form of government and transforming to a corporate form of government, a pure theocracy under the *Gaiwiiio* might be considered. This is likely to have little support for much of the same reason that revitalizing the traditional form of government would not succeed. A theocracy would put too much power in the hands of a few people who do not reflect a common religion amongst the people and would most likely conduct their affairs in a language that few would understand. Thus, establishing a theocracy would not be a viable alternative.

5. *Adaptation to a New or Amended Form of Government.* Mainly as the result of a process of elimination, the only possible option left for restoring a legitimate form of *Haudenosaunee* government is to totally or partially restructure the existing forms of government. For the traditional nations, this might mean finding ways to amend the *Gayanashagowa* to better incorporate the views of people who do not have faith in the existing governmental process. For the Mohawks and Senecas, it might mean abandoning the old quasi-colonized structures and adopting new forms of government that would better reflect the purpose and values of the *Gayanashagowa* and thus engender broader community support.

The potential paths of governmental redevelopment could go in a number of different directions. Moving backward or laterally must be rejected as inadequate. Success will be defined by developing new forms of government that have the broad support of all of the people in a particular nation. Going back to the old ways, or simply jumping onto some new path, are radical changes that most likely would engender limited support. Choosing to move forward consciously while giving proper respect to our governing traditions is a much more natural process of change that presents the only real possibility that the *Haudenosaunee* people can organize in a way that will allow for the revitalization of our societies.



## V. WHAT SHOULD BE THE FUNDAMENTAL OBJECTIVE OF *HAUDENOSAUNEE* GOVERNMENTAL REFORM?

### A. *The Restoration of Peace*

It is relatively easy to identify organization as the key to the revitalization of *Haudenosaunee* society. The difficulty lies in determining what will move people to action. Whatever the answer may be, it will be directly related to whatever is defined as the fundamental purpose, or essence, of *Haudenosaunee* society. The basis of any governmental reform effort will be dependent upon finding the singular concept or idea that will, of its own inherent force, move people to put aside their grievances and take collective action.

I propose that the singular unifying concept that will serve as the basis for revitalizing *Haudenosaunee* society is the same singular unifying concept that has sustained *Haudenosaunee* society for hundreds of years—the affirmative, active and aggressive pursuit of peace. The *Gayanashagowa* is founded upon the pursuit of peace. Indeed, the very organization of the Confederacy—so dependent it is upon achieving unanimity—is designed to promote peace. The strength the *Haudenosaunee* people once had was directly related to the acceptance by the people of the concept of peace. I believe that the failure to hold true to this simple but time-honored conception of our most important societal purpose may be the singular reason why *Haudenosaunee* society has been on the demise for the last two hundred years.

### B. *The Case for Restoring Peace*

Accepting the notion that peace could be the basis for revitalizing *Haudenosaunee* society sounds extraordinarily idealistic and abstract. I believe, however, that there are practical and tangible reasons why peace should again become the unifying force within *Haudenosaunee* society.

If peace once again is restored among us and within our nations, there will be a number of demonstrable effects:

1. *Peace will Restore the Good Mind.* If the people can accept that peace is the most important objective, then the

mind and reasoning will become elevated above all other means that we might rely upon to effectuate our goals and objectives. Violence and fratricide are not rewarded in a world where peace reigns, so those who are skilled in such ways must either stand by while others carry on the business of promoting society's welfare, or transform the means by which they choose to interact with others. Similarly, hate, jealousy and greed will be minimized in their importance because reason does not allow such emotions and behaviors to have significant effect.

*2. Peace will Promote Stability.* If peace is restored, the instability associated with violence and intertribal conflict will disappear. Living in a state of violence and hatred is extremely distressing in both physical and emotional ways. With tempers flaring, it is difficult to be patient and exercise compassion and sympathy for other people. When anger rules, violence is spawned, and it is impossible for people to work together to achieve common goals. Accordingly, the stability associated with living in peace will allow for a multitude of common objectives to be achieved.

First, to the extent that peace has succeeded in allowing for the reestablishment of legitimate government, government can again function effectively. The primary effect of restoring legitimate government is that decisions affecting the well-being of the nation can be made and thus, laws can be legitimately developed and enforced. The reestablishment of the lawmaking process will allow for government to take on responsibilities that previously have been either neglected or carried out only by a handful of committed individuals. For example, an effective government could develop a plan for building a tribal school that would allow for the children to better learn the language, culture and history of the people. An effective government could find ways to generate jobs and opportunity for the community and its members. An effective government could find ways to provide health care and housing for the elders. And so on.

Second, stability will allow for business to develop responsibly in a manner that benefits the entire nation. Associated with having an effective government will be the ability to make decisions as to how the nation's economy will be structured. Will all of the businesses be owned by

the nation? If not, to what extent will private businesses control the territorial economy? And to that extent, how will the businesses contribute to the nation for the opportunity of being in business? If peace exists, these and other questions can then be resolved in a fair and legitimate manner. Once these decisions are made, stability will allow for the tribal and/or privately owned businesses to enhance their profit making potential. There is nothing more damaging to conducting business operations than instability. New businesses cannot be started because banks are too worried about the risks of the investment. Existing businesses cannot expand for similar reasons. Consumers will not purchase goods because of concerns about the reliability of the products being sold, or worse yet, their safety. The best thing that can happen for business development within *Haudenosaunee* society is for the establishment of a strong tribal government that will protect tribal businesses from unfair economic competition and ensure that the rules that are applied to all businesses are applied fairly and evenly.

Thirdly, stability will allow for learning to take place. The revitalization of each of the *Haudenosaunee* nations is critically dependent upon the establishment of an environment in which all members of the society have the desire and ability to learn. Learning the language takes time and patience. It is not possible to do this if one's life is consumed with distractions. So too with the other things that must be learned—how to run the government, how to carry on the ceremonies, how to run a business, and how to better care for our children.

Lastly, stability will allow for foreign relations to normalize. One of the oldest problems that the *Haudenosaunee* people have faced is the threat from outside governments and private interests. Whether it be for purposes of acquiring *Haudenosaunee* lands or attempting to impose sales taxes on non-Indians who do business in *Haudenosaunee* territory, there has always been a constant threat from outsiders. Since it is unlikely that this threat will ever end, it is important to maintain good diplomatic relations with the federal and State governments. The strength of these relationships is dependent upon the ability of the *Haudenosaunee* governments to remain unified internally and to make commitments that can be kept over time. The ability to do this will best ensure that

outside governments and private interests cannot exploit divisions within the people for their benefit. Having strength in intergovernmental relations will have a spillover effect in promoting business and community development.

3. *Peace will Promote Strength.* If the *Haudenosaunee* people are not living in conflict, then unity can be restored. Once unity is restored, my view is that the inherent power of the *Haudenosaunee* people will allow any objective that could be desired to be attained. Whether it be a revitalization of our languages, the establishment of an economy that allows everyone to benefit, or repelling the efforts of outsiders to undermine the *Haudenosaunee* way of life, there is unlimited strength to deal with these matters if the people are working together.

4. *Peace has been the Key to our Revitalization in the Past.* It is hard not to compare what is now happening to what was occurring at the time that the Peacemaker first brought the *Gayanashagowa* to the people long ago. Because we have been in a similar situation before, I have every reason to believe that we can find a way to redress our problems. Peace was the simple message brought to the *Haudenosaunee* people hundreds of year ago by the Peacemaker, and the people's the acceptance of that message allowed for the revitalization and strengthening of our nations for hundreds of years. Given its previous success, I am hesitant to reject it as *the* potential basis for how we might govern our affairs in the future. Indeed, because it worked before I am more than confident that it is the only concept that might improve the chances that we can move towards the future as a distinct people.

### C. *The Process of Restoring Peace*

Restoring peace within the lives of the *Haudenosaunee* people will first require good thinking and then a great deal of time and effort. Given the changes that have occurred in *Haudenosaunee* identity during the last few hundreds years, I believe that restoring peace will require that a new or amended vision of government be developed and shared with the "new" *Haudenosaunee* people. To be effective, this vision must include specific provisions defining the

mechanics of the new or amended governmental form. I believe this is a process in which others can and should participate as it relates to their own nations. At this time, my thinking on the subject of how this might actually occur is incomplete. Indeed, unless invited, it is probably only appropriate for me to focus such efforts on transforming governance within my own nation. I know that I will continue to work on what this process of change might look like and eventually share the results of this thinking with others.

### CONCLUSION

American colonization has long been a caustic force within *Haudenosaunee* society and fundamentally is the reason for the current state of dysfunction that now exists within our nations. This should be far from surprising. American society has long sought to eliminate the distinct existence of Indigenous peoples. Senator Henry Dawes, the father of the General Allotment Act, captured this national obsession almost a hundred years ago after a visit to the so-called Five Civilized Tribes:

[T]here was not a family in that whole nation that had not a home of its own. There was not a pauper in that nation, and the nation did not owe a dollar. It built its own capital, and it built its own school and its hospitals.<sup>457</sup>

His reaction to this scenario, however, was typical of those who have continued to seek our destruction:

[T]he defect of [their] system was apparent. They have not got as far as they can go because they own their own land in common, and under that [system] there is no enterprise to make your home any better than that of our neighbors. There is no selfishness, which is at the bottom of civilization.<sup>458</sup>

This national sentiment was fully absorbed by the most dominant colonizing influence on the *Haudenosaunee* people—the State of New York. While State officials today do not engage in the same rhetoric, their current policies and

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457. BOARD OF INDIAN COMMISSIONERS, ANNUAL REPORT 90-91 (1902). See also John Aloysius Farrell, *The New Indian Wars*, DENVER POST (special reprint), 20-27 Nov. 28, 1983., at 20-27

458. BOARD OF INDIAN COMMISSIONERS, ANNUAL REPORT 90-91 (1902).

actions have been shaped by their predecessors who believed that

These Indian people have been kept as “wards” or children long enough. They should now be educated to be men, not Indians, and it is the earnest belief of the committee that when the suggestions made [to break up the tribal governments, to force Indians to go to school, to allot the reservation lands, and to repeal the Indian laws], . . . and the Indians of the state are absorbed into the great mass of the American People, then, and not before, will the “Indian problem” be solved.<sup>459</sup>

Despite these efforts to destroy us, our nations have continued to exist for hundreds of years. They are founded upon respect for individual freedom and the principle that strength comes through peace and collective effort. In this way, we as *Ongwehoweh*<sup>460</sup> have a fundamentally different foundation than the people who surround us. The reality, however, is that it means little to know that America and its colonial efforts to destroy us may ultimately be responsible for the dysfunction within our communities. The day we *Haudenosaunee* people are indistinct from Americans—on political, legal, cultural and economic grounds—will be the day that we have been terminated. Knowing this, our failure to take action to prevent our termination from happening makes this our problem, not theirs.

*Da nay ho.*<sup>461</sup>

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459. See WHIPPLE REPORT, *supra* note 17, at 79.

460. Meaning “Indian” or “First” people. See SENECA LANGUAGE GUIDE, *supra* note 7, at 3.

461. “It is said.”

