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# NOTES

## INDIGENOUS NATIONS AND INTERNATIONAL TRADE

### I. INTRODUCTION

Robert Reich, in *The Work of Nations*, argues that the notion of a national economy—distinct from the global economy—is becoming outdated.<sup>1</sup> Unfortunately, in an era where economic policy must be increasingly fashioned in global terms, the economies of Indigenous Nations in present-day Canada and the United States remain isolated from international commerce.<sup>2</sup> These nations—once independent, now governed by a supervising state<sup>3</sup>—in most cases cannot be said to enjoy even

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1. ROBERT REICH, *THE WORK OF NATIONS* 3 (1992). Reich observes that, [a]s almost every factor of production—money, technology, factories and equipment—moves effortlessly across borders, the very idea of an American economy is becoming meaningless, as are notions of an American corporation, American capital, American products, and American technology. A similar transformation is affecting every other nation, some faster and more profoundly than others . . . .

*Id.* at 8.

2. The isolation of Indigenous Peoples from commerce is, of course, a global phenomenon. See, e.g., *Speakers in Commission for Social Development Highlight Specific Needs of Marginalized Groups*, U.N. Press Release SOC/4436 (Feb. 12, 1998) (reporting that Indigenous Nations are among the most economically marginalized groups in Guatemala and noting the Guatemalan government's current attempt to integrate "indigenous peoples into the country's economic growth."); *Progress Needed on Indigenous People's Draft Declaration, say Third Committee Speakers*, U.N. Press Release GA/SHC/3442 (Nov. 11, 1997) (reporting on the remarks of Marcia Muir, who described the economic marginalization of Indigenous Nations in Papua New Guinea).

3. Indigenous Nations in present-day Canada and the United States were at one time independent and self-governing entities. They are now, however, no longer recognized as being fully sovereign under either international or municipal law. Their sovereignty is rather a qualified or adumbrated sovereignty that took its shape over many years. Although indigenous national sovereignty has been qualified, it has nevertheless persisted tenaciously over centuries. Indigenous sovereignty is, then, the product of two enduring historical efforts: (1) the push of

an unhindered access to commerce within the states that surround them. Indeed, the insularity of the North American Indigenous Nations is a fundamental feature of their existence and, too, a formidable barrier to these nations' ability to establish vibrant and diversified economies.

The history of indigenous national economies was one in which trade alliances with European powers were established and then displaced by the regulation of indigenous trade under the oversight of a single state. That single-state system of regulation—to an even greater extent than the arrangement that preceded it—was accompanied by exorbitant and disastrous overreaching.<sup>4</sup>

Given their history of economic isolation, is it feasible for North America's Indigenous Nations to participate directly and substantially in international trade? If these Indigenous Na-

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state-administered programs to diminish the political independence of Indigenous Nations and (2) resistance by means of indigenous efforts to maintain a political independence in spite of efforts to force the assimilation of Indigenous Peoples. See discussion *infra* Part III.A.

4. States legitimized the overreaching that characterized their dealings with Indigenous Nations by claiming a right of discovery. Francis Prucha explains that "as European exploration and colonization increased, a theory in regard to the territory in America gained general acceptance" among European nations:

According to this theory, the European discoverer acquired the right of preemption, the right to acquire title to the soil from the natives in the area . . . . In practice . . . and eventually in theory, absolute dominion or sovereignty over the land rested in the European nations or their successors, leaving to the aborigines the possessory and usufructuary rights to the land they occupied and used.

FRANCIS PAUL PRUCHA, 1 *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 15-16 (1984). The Cherokee Nation questioned the legitimacy of rights grounded in discovery in 1831 when that nation asked the United States Supreme Court to enjoin Georgia from enforcing its laws within Cherokee territory. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). The Cherokee Nation denied the validity of Georgia's claim that Great Britain once had dominion over Cherokee territory based upon a right of discovery, which dominion Georgia claimed for itself as the successor to Great Britain. The court reporter summarized the Cherokee position as follows:

This right, as affecting the right of the Indian nation, the bill denies; and asserts the whole length to which the right of discovery is claimed to extend among European nations is to give to the first discoverer the prior and exclusive right to purchase these lands from the Indian proprietors, against all other European sovereigns: to which principle the Indians have never assented; and which they deny to be a principle of the natural law of nations, or obligatory upon them.

*Id.* at 2. The Court determined that it did not have jurisdiction to hear the case as the Cherokee Nation was not a fully sovereign foreign nation, but rather a domestic dependent nation having a qualified sovereignty. See *infra* Part III.B.

tions embrace the goal of robust participation in international trade, what obstacles would they encounter and to what extent would they find international law to be a useful resource?

This Note examines the central role that trade played in relations between Indigenous Nations and the European powers historically, concluding that Indigenous Nations' historic loss of access to international trade contributed centrally to the impoverishment of indigenous economies and to these nations' loss of political autonomy. An obvious and reasonable policy to pursue in order to strengthen the political autonomy and to promote the economic viability of Indigenous Nations would be to re-establish a robust indigenous participation in international trade. This Note contends, moreover, that intrusive state policies—justified in terms of assimilationist ideology—were historically, and remain today, major obstacles to indigenous economic prosperity. Although international law undoubtably offers a valuable resource for protecting the economic rights of Indigenous Nations<sup>5</sup>—and although the modern trend within international law has been toward a more expansive understanding of human rights<sup>6</sup>—it must be recognized that inter-

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5. One promising international legal document is the United Nations Draft Declaration on the Rights of Indigenous Peoples, prepared by the Working Group on Indigenous Populations. That declaration indicates an intent to bring Indigenous People as individuals, and as groups, fully within the ambit of international human rights protections. United Nations Draft Declaration on the Rights of Indigenous Peoples, art. 2, U.N. ESCOR Comm. on Hum. Rts., U.N. Doc. E/CN.4/Sub.2/1993/29, Annex I, at 50 [hereinafter Draft Declaration] (declaring that "indigenous individuals and peoples . . . are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination"). Work on the Draft Declaration is an ongoing process, as is an effort within the United Nations to establish a permanent forum for Indigenous Nations. See *Commission on Human Rights to Meet at Geneva from 16 March to 24 April*, U.N. Press Release HR/CN/815 (Mar. 10, 1998).

6. The aspiration to extend the purview of international human rights law to include Indigenous Peoples reflects the modern trend in international law toward recognition of a broad universe of human rights. For instance, international human rights protections for individuals—beyond limited protections for civilians during times of war and for citizens of one state present within the boundaries of another—emerged during the aftermath of the Second World War. NEWMAN & WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS* 1 (1990) (identifying international reaction to Nazi Germany's perpetration of atrocity on a massive scale as the origin of "[m]odern international human rights law").

The trend toward protection of individuals and groups is now well established. The Economic and Social Council's technical review of the Draft Declaration observed that "[t]he principle of non-discrimination between individuals is a central norm of human rights law." *Technical Review of the United Nations Draft Declara-*

national legal recognition of indigenous national rights is currently limited insofar as it remains a wholly aspirational undertaking. It is nevertheless abundantly clear that just as international trade played a primordial role in the development of an international legal system,<sup>7</sup> international trade offers an avenue for Indigenous Nations to re-emerge as effective international actors today.

A basic starting point for any discussion of indigenous rights is the recognition that the adumbration of indigenous

*tion of the Rights of Indigenous Peoples*, U.N. ESCOR, Hum. Rts. Comm., Prov. Agenda Item 15, at 7, U.N. Doc. E/CN.4/Sub.2/1994/2 [hereinafter *Technical Review*]. As the *Technical Review* observes, the principle of non-discrimination is expressed in several important international legal documents. These are the: U.N. CHARTER art. 1; Universal Declaration of Human Rights, arts. 2, 7, G.A. Res. 217A, U.N. GAOR, 3d Sess., 67th plenary mtg., U.N. Doc. A/811 (1948); International Covenant on Civil and Political Rights, art. 2, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 3, 1976) (stating that parties are to extend to individuals respect and rights recognized in covenant); International Covenant on Economic, Social and Cultural Rights, art. 2, G.A. Res. 2200A, Dec. 16, 1966; and International Convention on the Elimination of All Forms of Racial Discrimination, art. 1, *opened for signature* Mar. 7, 1966, 600 U.N.T.S. 195. See *Technical Review*, *supra*, at 7.

Human rights provisions applying to groups or to peoples can be found in the International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); the African [Banjul] Charter on Human and Peoples' Rights, art. 19, *adopted* June 27, 1981, OAU Doc. CAB/LEG/67/3 Rev. 5 (1981), *reprinted in* 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) (agreeing that "[a]ll peoples shall be equal; they shall enjoy the same respect and shall have the same rights."); Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, ILO Convention No. 169 (entered into force Sept. 5, 1990); *Technical Review*, *supra*, at 6, 7.

See also Convention on the Prevention and Punishment of the Crime of Genocide, arts. 1, 2(a), 2(c), 2(e), *done* Dec. 9, 1948, 78 U.N.T.S. 277 (declaring genocide to be "a crime under international law" [art. 1] and enumerating several genocidal acts taken against groups, such as: "[k]illing members of the group" [art. 2 (a)]; "inflicting on the group conditions of life calculated to bring about its physical destruction" [art. 2(c)]; and "[f]orcibly transferring children of the group to another group" [art. 2(e)]).

7. As Henkin and his co-authors describe in their casebook on international law, international trade was one of the factors that preceded and necessitated international law:

The several centuries that preceded the Thirty Years' War (1618-1648) were marked in Europe by an intensification of international trade, improvements in navigation and military techniques, and the discovery of many distant lands. These events stimulated the further development of international practices and the emergence of modern conceptions of a law of nations.

LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS xxiii (3d ed. 1993).

national sovereignty<sup>8</sup> has important implications for the ability of Indigenous Nations to establish diversified, vibrant economies, including their ability to establish a substantial participation in international trade. Whereas states have an inherent right over natural resources contained within their territories,<sup>9</sup> Indigenous Nations may encounter formidable state-imposed legal barriers impeding both their access to natural resources and their ability to introduce those resources into commerce.<sup>10</sup>

To understand these barriers it is necessary to examine the laws that were set down to regulate relations between Indigenous Nations and states. Of particular relevance to an inquiry into indigenous national trade are those laws that served to insulate Indigenous Nations from international commerce. For instance, treaties regulating state/indigenous relations often pressed the Indigenous Nations to forego some measure of their independence and align themselves with the treating state. These treaties frequently gave expression to this

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8. International recognition of the sovereign rights of Indigenous Nations occurred early in the history of the relations between modern states and Indigenous Nations. This is clear from the many treaties the European powers and their colonies relied on to formalize their relations with Indigenous North Americans. See PRUCHA, *supra* note 4, at 17 (observing that "[i]t is in the treaties that one sees best the acceptance by Europeans of the nationhood of the Indian groups."); see also FRANCIS JENNINGS, *THE AMBIGUOUS IROQUOIS EMPIRE* 54-56 (1984) (discussing a treaty made between the Dutch and the Mahicans in 1618 and treaties made between the Dutch and the Mohawks in 1643 and 1645); DANIEL K. RICHTER, *THE ORDEAL OF THE LONGHOUSE: THE PEOPLES OF THE IROQUOIS LEAGUE IN THE ERA OF EUROPEAN COLONIZATION* 102 (1992) (detailing political circumstances surrounding the Treaty of Quebec made in 1665 between the "Seneca, Cayuga, Onondaga, and Oneida" nations and "the French and their Wyandot and Algonquin allies"); *Non-Indian Biographies*, in 4 *HANDBOOK OF NORTH AMERICAN INDIANS: HISTORY OF INDIAN-WHITE RELATIONS* 628 (Wilcomb E. Washburn ed., 1988) (observing that the governor of Louisiana signed the Treaty of Nogales in 1793 giving formal sanction to various agreements established between Spain and "the Creeks, Cherokees, Choctaws, Chickasaws, and Alabamas.").

Recent efforts to expand rights associated with indigenous national sovereignty are reflected in the Draft Declaration, *supra* note 5, preamble, at 50 (recognizing *inter alia*, the right of Indigenous Peoples "freely to determine their relationships with states in a spirit of coexistence, mutual benefit and full respect"). Such efforts reflect what Richard Falk referred to as "the aspiration for a special regime expressing the rights of indigenous peoples." Richard Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, in *THE RIGHTS OF PEOPLES* 31 (James Crawford ed., 1988).

9. This inherent right was, for instance, recognized in the North Sea Continental Shelf Cases, [F.R.G. v. Den.; F.G.R. v. Neth.], 1969 I.C.J. 3, 22.

10. See *infra* Part IV.A.

circumstance in provisions under which the indigenous party or parties would "accept the protection" of the state party. This was the case in a peace treaty made between the Onondaga Nation and France in 1666.<sup>11</sup>

Based on an examination of these laws, two important periods in the interrelations between North American Indigenous Nations and states can be identified: (1) the early emergence of treaty-based relations between states and Indigenous Nations in North America;<sup>12</sup> and (2) a subsequent, more general and more complete isolation of North American Indigenous Nations from trade following the consolidation of territory under the United States and England following the War of

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11. Treaty of Peace between France and the Iroquois Indians of the Nation of Onontague, Dec. 13, 1666, 9 Consol. T.S. 365, 367 (providing for peace among Indigenous Nations under protection of France). *See also* Treaty of Peace and Alliance between Spain and the Choctaw and Chickasaw, May 10, 1793, 52 Consol. T.S. 31 (extending the protection of Spain to Choctaw nation and renewing existing relations with Chickasaw nation); Treaty of Peace and Alliance between Spain and the Cherokee [and other nations], May 10, 1793, 52 Consol. T.S. 177 (the Treaty of Nogales, extending protection of Spain to the Cherokee Nation, renewing similar agreements with other Indigenous Nations and authorizing Spain to mediate the fixing of boundaries between indigenous parties and the United States). States also relied on the treaty as a basic tool for shaping their relations with Indigenous Nations in Africa during the 19th century. *See, e.g.*, Treaty of Peace and Commerce between France and the Brakna and Dimar Tribes, June 18, 1858, 119 Consol. T.S. 138-39 (re-establishing commercial relations for exporting rubber, recognizing Dimar as a new independent state and extending protection of France to Dimar); Provisional Agreement between Great Britain and the King and Chiefs of Katanu, Sept. 24, 1879, 155 Consol. T.S. 274 (extending protection of crown provisionally to territory of Katanu, providing for the collection of reasonable dues by the king and chiefs of that territory, and prohibiting said king and chiefs from entering "into negotiations with any Foreign State except under the express permission of Her Majesty's Government.").

12. A first step in the isolation of Indigenous Nations from trade was typically the insistence by states that Indigenous Nations sever any relations they may have had with competing states. Where this insistence was successful, Indigenous Nations were isolated from the global community and prevented from negotiating competitive economic arrangements. Chief Justice John Marshall described this practice of states and the impact it had on indigenous national sovereignty as follows:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves as well as on the Indians.

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

1812.<sup>13</sup>

Characteristic of the first period were treaties containing provisions that specifically restricted indigenous national trade.<sup>14</sup> A peace treaty between the Seneca Nation and England illustrates this with its requirement that the Seneca Nation "immediately stop all intercourse between any of their people and those of the Shawanese and Delawares, or other [of] his majesty's enemies, whom they are to treat as common enemies, and to assist his majesty's arms in bringing them to proper punishment . . . ."<sup>15</sup>

The historical relations between states and Indigenous Nations in North America contribute importantly to our understanding of indigenous national affairs. These relations were formed during periods of intense international competition for resources<sup>16</sup> followed by the consolidation of indigenous rela-

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13. *See infra* Part III.A.

14. A state practice that accompanied the imposition of specific restrictions on indigenous national trade—and that also served to isolate the Indigenous Nations from the international community—was the practice of compelling Indigenous Nations to make substantial and repeated land cessions. *See, e.g.,* Treaty of Peace between France and the Iroquois Indians of the Nation of Tsonnotssan, May 22, 1666, 9 Consol. T.S. 165 (peace and protection of France in return for land cessions); Treaty of Peace between France and the Iroquois Indians of the Nation of Ouneisst, July 12, 1666, 9 Consol. T.S. 211 (same). A consequence of that practice was, invariably, a precipitous decline in indigenous access to the basic resources necessary to sustain even a limited participation in trade.

15. Preliminary Articles of Peace, Friendship and Alliance between Great Britain and the Seneca, Apr. 3, 1764, 42 Consol. T.S. 499, 501. *See also* Treaty of Alliance and Commerce between Great Britain and the Cherokee North American Indians, Sept. 20(?30) [sic], 1730, 33 Consol. T.S. 279, 281 (providing that "the Cherrokees nation shall not suffer any of its people to traffic with any other white men besides the English.").

16. Stephen Cornell discusses the importance that North America had for the "European powers" in their "competition . . . for economic and political dominance in the rapidly expanding world economy of the sixteenth, seventeenth, and eighteenth centuries:"

North America, with its apparently abundant resources, became a central arena of European competition, and the new colonies the loci of extensive commercial enterprise directed at control of those resources and their export to Europe. At stake were money metals as well as whatever other minerals that might be found, timber, fish, agricultural produce, and animal hides or furs. These last are of particular interest here. For a substantial part of the colonial period, competition among the European powers in North America, and particularly between England and France, was centered on the fur trade. At the center of that trade were the Indian nations.

STEPHEN CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RE-



tions under the general supervision of a single state. This basic pattern of competition and consolidation is not unique in world history and was repeated, for instance, in Africa. For this reason, North America provides us with a comparative framework to understand state/indigenous relations throughout the world. Furthermore, influential laws were established to regulate state/indigenous relations in North America; laws which ultimately compromised the independence of Indigenous Nations and reconstructed their political status.<sup>17</sup> The reconstruction of indigenous sovereignty became an established feature of state expansion in North America and subsequently came to be embraced by the international community—particularly by the British Commonwealth countries—as a model for indigenous national sovereignty.<sup>18</sup> An understanding of the events which took place in North America is indispensable to an informed discussion of the rights of Indigenous Peoples throughout the world.<sup>19</sup>

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SURGENCE 15-16 (1988).

17. See *infra* Part III.B.

18. Getches and Wilkinson observed that "[m]uch of the legal attention" given to Indigenous Peoples, "in other nations has occurred in British Commonwealth countries." See DAVID H. GETCHES & CHARLES F. WILKINSON, *FEDERAL INDIAN LAW: CASES AND MATERIALS* 847 (2d ed. 1986). These authors, experts on laws pertaining to Indigenous Peoples in the United States, noted that "[t]he law relating to indigenous people has only begun to develop in most other countries." *Id.* Scholars have been increasingly concerned with the international dimensions of indigenous national sovereignty. This is illustrated, in fact, in the editions of the casebook that Getches, Wilkinson and their co-authors have assembled: the first edition having no substantial mention of law outside the United States, the second edition having a section in a chapter on "The Frontiers of Indian Law" entitled "Native Law in Other Nations" and the third edition having a chapter entitled "Comparative and International Legal Perspectives on Indigenous Peoples' Rights." GETCHES ET AL., *FEDERAL INDIAN LAW: CASES AND MATERIALS* (1st ed. 1979); GETCHES & WILKINSON, *supra*, at 847-73; GETCHES ET AL., *FEDERAL INDIAN LAW: CASES AND MATERIALS* 973-1047 (3d ed. 1993) [hereinafter GETCHES ET AL. (3d ed.)].

19. The importance of understanding the particular history and circumstances of Indigenous Peoples is emphasized, for instance, by human rights advocates who call for legal protections that specifically address the demands of Indigenous Peoples. As Richard Falk points out, these advocates acknowledge:

the impact of past experience, in particular the appreciation that to grant mere autonomy to indigenous people, or to assure their participation in the dominant society on the basis of equality and non-discrimination is insufficient. That is, there is a special set of demands and grievances that cannot be easily understood, much less accommodated, by existing international law rules, procedures, and structures for ascertaining and protecting human rights. The present international framework does not

Part II of this Note clarifies the distinction between states and Indigenous Nations by identifying a political and international legal dynamic in the historical relations between the two. State expansion was accompanied by efforts to establish exclusive political and economic relations with Indigenous Nations. These efforts were expressed, for example, in laws that restricted indigenous trade and curtailed indigenous participation in the international economy. The current international political status of Indigenous Nations as self-governing entities lacking the right to conduct foreign relations<sup>20</sup> reflects

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give access to the main political arenas to the representatives of indigenous people themselves, nor does it seem to deal with their specific historic identity, their special claims, nor with their special value to human society as a whole.

Falk, *supra* note 8, at 31.

20. The status of Indigenous Nations as autonomous political communities that lack a recognized capacity to conduct foreign relations is reflected, for instance, in documents connected with the recent United Nations efforts to establish a framework for the protection of indigenous national interests. In these documents "indigenous people" are distinguished from "Governments." Persons involved in these efforts do recognize a need for Indigenous Nations to have a voice within the international community, but not necessarily too loud of a voice. See, e.g., *Programme of Activities of the International Decade of the World's Indigenous People: Implementation of the Programme of Activities for the Decade* [hereinafter *Implementation of the Programme*], U.N. GAOR, 51st Sess., Agenda Item 50, at 4, U.N. Doc. A/51/499 (1996) (observing the priority the High Commissioner for Human Rights has given to "promoting and ensuring an ongoing dialogue between Governments and indigenous people.").

Because Indigenous Nations are not Governments for United Nations purposes, their participation in its endeavors is very limited. Members of organizations seeking to protect indigenous national interests may nevertheless serve as experts on indigenous affairs and may, in some instances, enjoy a consultative status. Article 71 of the United Nations Charter, for instance, provides that the "Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence." U.N. CHARTER art. 71. Additionally, the goal of creating a "permanent forum for indigenous people in the United Nations system" has been set. *Implementation of the Programme, supra*, at 5. However, it is not yet clear at what level within the system the forum will be established. See *id.* at 6. See also *Programme of Activities of the International Decade of the World's Indigenous People: Procedures and Programmes Within the United Nations Concerning Indigenous People*, 51st Sess., Agenda Item 107, U.N. Doc. A/51/493 (1996) (stating that "[t]hirteen indigenous peoples' organizations have consultative status with the Economic and Social Council," five in "the United States . . . four in Canada, two in Australia, one in Finland and one in Peru."). For an overview of avenues available for indigenous participation in the United Nations see *id.* at 6-10. Notwithstanding the indirect participation of Indigenous Peoples' organizations as consultants, "[m]any participants" at a workshop on the permanent forum concluded that "there are virtually no mechanisms within the United Nations systems which give indig-

this political and economic isolation.

Part III describes the trade relations that were formed between states and Indigenous Nations in North America. Two periods of trade relations are identified and discussed: (1) a period prior to the conclusion of the War of 1812 characterized by a rivalry among states for the allegiance of Indigenous Nations; and (2) a subsequent period characterized by the establishment of single-state monopolies over trade with Indigenous Nations. Each period yielded a body of laws that reflected the political and economic relations between states and Indigenous Nations. Part III also discusses the Berlin Africa Conference<sup>21</sup> and the attempt of states there to use trade laws to control international competition for resources in West Africa and concomitantly "protect" the interests of Indigenous Nations. A comparison of these early laws with current efforts to protect Indigenous Peoples reveals a continuity: current international rights protections reflect the economic relations that unfolded between states and Indigenous Nations historically.

Part IV examines the current state of indigenous national participation in trade, pointing to two prominent examples of state-imposed barriers to indigenous commerce. These barriers invariably involve the subordination of indigenous national

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enous peoples an opportunity to take part in decision-making." *Indigenous Issues: Report of the Second Workshop on a Permanent Forum for Indigenous People within the United Nations System held in Accordance with Commission on Human Rights Resolution 1997/30*, Hum. Rts. Comm., 54th Sess. Prov. Agenda Item 23, U.N. Doc. E/CN.4/1988/11 (1997) [hereinafter *Report of the Second Workshop*].

21. The Berlin Conference, as one scholar describes it, created an international legal framework whereby European states could regulate their competition to acquire territory in Africa:

The partition of Africa, it should be emphasized, was not only a scramble for territories by European powers but was also a joint takeover based on an international agreement made at the Berlin Conference (1884-5) which established basic rules of partition intended to prevent conflict between these powers. And it succeeded by and large. Therefore, while the conference itself did not partition Africa it did institutionalize the process in the aim of creating a *pax Europaea* in the continent. European states occupied territories by signing bilateral treaties with African rulers in accordance with rules set down by the conference. It should be emphasised that these rules concerned only relations of the European powers *inter se* and did not apply to African rulers who were not present at the Berlin Conference and were excluded entirely from this sovereignty game. Their exclusive role was to sign a treaty. If they refused they could be forced in accordance with international law.

ROBERT H. JACKSON, *QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD* 69-70 (1990).

interests to state or to nonindigenous commercial interests. One such example is the principle in Canadian decisional law that selectively recognizes a right to fish for food—while upholding statutes prohibiting the sale of fish—and thereby effectively subordinating the interests of Indigenous Nations to that of the fishing industry.<sup>22</sup> A second example is the principle derived from judicial decisions in the United States that allows state governments, on a case-by-case basis, to tax economic activities occurring on tribal territories and thereby subverts the sovereignty of Indigenous Nations in that country.<sup>23</sup>

A conclusion that follows readily from the historic isolation of Indigenous Nations from trade, as well as from the current tendency of decision-makers to subordinate indigenous interests to state or to nonindigenous commercial interests, is that the economic rights of Indigenous Nations must be based—at least in large part—on a policy of encouraging a robust indigenous national participation in international trade. Moreover, in light of the United Nations General Assembly guidelines for drafting human rights instruments—which call for provisions “sufficiently precise to give rise to identifiable and practicable rights and obligations”<sup>24</sup>—a reasonable way for international fora to proceed would be to identify particular state barriers to indigenous participation in international trade and draft specific provisions removing them. In such a manner, for example, state taxation of economic activity occurring on indigenous territories could be identified and proscribed. Similarly, indigenous rights to subsistence could be elevated to a more substantial economic right. In light of the history of state/indigenous national relations it is reasonable to conclude that the broad goal of increased indigenous participation in international trade is imperative if the international legal rights of Indigenous Nations are to be more than mere exhortations.

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22. See *infra* Part IV.

23. See *infra* Part IV.

24. See *Setting International Standards in the Field of Human Rights*, G.A. Res. 41/120, U.N. GAOR, 41st Sess., 97th plenary mtg., U.N. Doc. A/Res/41/150, at 2 (1986).

## II. DEFINITIONAL MATTERS: WHAT ARE STATES? WHAT ARE INDIGENOUS NATIONS?

### A. *Indigenous Nations as Political Enclaves Within a World Dominated by States*

Indigenous Peoples live in a world made small by the actions of states. As modern states expanded their influence throughout the globe, indigenous possession of territory was reduced,<sup>25</sup> indigenous access to natural resources was limited,<sup>26</sup> widespread loss of life was incurred,<sup>27</sup> and the opportunity for Indigenous Nations to participate in international

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25. Exacerbating the loss of access to resources that accompanied reductions in acreage were the numerous relocations of Indigenous Peoples to areas that were often only marginally economically viable or that were not economically viable at all.

26. Possession of territory and access to natural resources are closely related considerations. Many treaties for the cession of land held by an Indigenous Nation reserved property rights in the ceded territory. *See, e.g.*, Treaty of Peace and Alliance between Great Britain and the American Indian Tribes of Virginia, May 29, 1677, 14 Consol. T.S. 257, 258-59 (Indigenous Nations to cede land and give up independence to crown in return for assurances of sufficient land for cultivation and extra-territorial fishing and oystering rights). As Felix Cohen observed, such provisions were intended to make land cessions seem less severe:

By way of softening the shock of land cession, the Indian tribes were often guaranteed special rights in ceded lands, such as the exclusive right of taking fish in streams bordering on the reservation . . . or to hunt on lands ceded to the United States . . . or to hunt and make sugar on ceded lands.

FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 44 (citing Treaty of June 11, 1855, Nez Perce-U.S., art. 3, 12 Stat. 957; Treaty of June 6, 1820, Chippeway-U.S., art. 3, 7 Stat. 206; Treaty of Sept. 29, 1817, Wyandots and others-U.S., art. 7, 7 Stat. 49). *See also id.* at 336 (discussing *Kennedy v. Becker*, 241 U.S. 556 (1916) wherein it was held that these treaty-based rights were property rights and not sovereign rights).

These treaty provisions have given rise to bitter controversies concerning the conflicting rights of tribal members and state citizens to harvest natural resources. *See, e.g.*, *United States v. Washington*, 384 F. Supp. 312, 343, *aff'd* 520 F.2d 676 (9th Cir. 1975) (construing language in the Treaty of Medicine Creek, Dec. 26, 1854, Muckleshoot, Nisqually, Puyallup and Sqauxin Island Nations-U.S. 10 Stat. 1132, whereby the "right of taking fish, at all usual and accustomed grounds" was "secured to said Indians, in common with all citizens of the territory" to mean that the "opportunity to take fish" would be shared equally).

27. For a detailed study of the impact of epidemics, warfare, and various other catastrophes on North American Indigenous Peoples see RUSSELL THORNTON, *AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492* (1987). Thornton concludes that Native American populations in Alaska, Canada and the United States declined precipitously until the 20th century and then began to recover. *See id.* at 159, 242, 243.

trade was eventually curtailed.<sup>28</sup> In recent years, as international organizations have devoted increased attention to indigenous rights,<sup>29</sup> the question of how to widen the world of Indigenous Nations—of how to expand relations between Indigenous Nations and the international community—has arisen.<sup>30</sup> International cooperation to ensure that Indigenous Nations can trade vigorously in the global marketplace presents one possibility for flexibly and effectively pursuing a broad expansion of the relations between Indigenous Peoples and the rest of the world.<sup>31</sup>

The documents and literature of international law distinguish Indigenous Peoples from other entities, such as states or ethnic minorities, with reference to varying clusters of cultural and historical features. In discussing attempts to define “indigenous peoples,” for instance, one scholar juxtaposed four definitional “elements” that the Independent Commission on

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28. See *infra* Part III.B.

29. See, e.g., Draft Declaration, *supra* note 5.

30. One straightforward method of broadening the international relations of Indigenous Nations has been to include organizations composed of indigenous national representatives in international fora. Currently there is interest in creating a permanent forum for Indigenous Peoples within the United Nations system. See *Commission On Human Rights, Indigenous Issues: Report of the Second Workshop on a Permanent Forum for Indigenous People within the United Nations System held in Accordance with Commission on Human Rights Resolution 1997/30*, U.N. ESCOR, 54th Sess., Prov. Agenda Item 23, U.N. Doc. E/CN.4/1998/11 (1997). Additionally, the Arctic Council has included three such organizations—the Inuit Circumpolar Conference, the Saami Council and the Association of the Indigenous Minorities of the North, Siberia, and the Far East of the Russian Federation—as permanent participants at inception and made provision for permanent participation by “other Arctic organizations of indigenous peoples, with majority Arctic indigenous constituency, representing: (a) a single indigenous people resident in more than one Arctic state; or (b) more than one Arctic indigenous people resident in a single Arctic state.” See Canada-Denmark-Finland-Iceland-Norway-Russian Federation-Sweden-United States Declaration on the Establishment of the Arctic Council, Sept. 19, 1996, 35 I.L.M. 1382, 1387 (1996). See also United Nations Fourth World Conference on Women: Declaration and Platform for Action, Sept. 15, 1995, 35 I.L.M. 401, 453 (1996) (calling for United Nations to “encourage the participation of indigenous women in the working group elaborating the draft declaration.”).

31. Fuller participation in international trade would, for instance, be consistent with goals expressed in the Draft Declaration. See, e.g., Draft Declaration, *supra* note 5, art. 4 (right of Indigenous Peoples to “maintain and strengthen their distinct political, economic, social and cultural characteristics”); *id.* art. 35 (right of Indigenous Peoples to “maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders”).

International Humanitarian Issues (Independent Commission) relies on—"(1) pre-existence; (2) non-dominance; (3) cultural difference; and (4) self-identification as indigenous"—against five identifying "characteristics" used by the International Bank for Reconstruction and Development (World Bank):

- (1) close attachment to ancestral territories and natural resources; (2) self-identification and identification by others as members of a distinct cultural group; (3) possession of an indigenous language, which is often distinct from a national language; (4) presence of customary social or political institutions; and (5) subsistence-oriented production systems.<sup>32</sup>

The Independent Commission's element of pre-existence and the World Bank's characteristic of customary institutions point to a central feature of indigenous national existence: they exist in spite of the fact that states have surrounded them and have attempted to absorb them; they occupy—in both a political and a territorial sense—lacunae left in the wake of state formation.<sup>33</sup>

Modern states emerged historically as methods were devised to administrate broad expanses of territory centrally. As these methods were refined, the territories of the emergent states increased. As Giannfranco Poggi points out:

Typically, a state's territory is continuous, has no enclaves,

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32. Robert K. Hitchcock, *International Human Rights, the Environment, and Indigenous Peoples*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 1, 1 (1994). These definitions depart from older ones that focused on an assumed primitive character that Indigenous Peoples were assumed to possess. See, e.g., Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, *adopted* [by the International Labour Organization] June 26, 1957, art. 1, § 1(a), 328 U.N.T.S. 247 (applying the convention's provisions to "members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by other sections of the national community.").

33. Alpheus Snow recognized this feature of Indigenous Nations in his singular survey of the international law of Indigenous Peoples, which Snow undertook at the request of the United States Department of State. Snow's working definition of Aborigines depicted them, in the spirit of the times, as "the members of uncivilized tribes which inhabit a region at the time a civilized State extends its sovereignty over the region, and which have so inhabited from time immemorial; and also the uncivilized descendants of such persons dwelling in the region." ALPHEUS HENRY SNOW, *THE QUESTION OF ABORIGINES IN THE LAW AND PRACTICE OF NATIONS: INCLUDING A COLLECTION OF AUTHORITIES AND DOCUMENTS* 7 (Scholarly Resources, Inc. 1974) (1919).

and is relatively large. The most visible aspect of the development of the modern state in Europe was the dramatic simplification of the continent's political map, which around 1500 comprised some 150 independent political entities, and around 1900, about 25.<sup>34</sup>

Methods of state administration did not, however, displace non-state methods of political organization easily or completely.<sup>35</sup> Sociologist and historian Frederick Teggart observed that the imposition of these new methods of political organization was accompanied by conflict and uncertainty:

[T]he breakdown of the old organization has not been accompanied by the revelation of any 'best possible' substitute, and so, in the stress of emergency, the old forms are made over to do service as best they may, new forms are called by old names, and new ideas masquerade in faded habiliments.<sup>36</sup>

A survey of the world's political landscape today would reveal a great many enclaves wherein the extension of state administration remains permanently incomplete; enclaves where pre-existing forms of political administration have been intertwined with state-imposed forms in the uneasy hybrid known as tribal government.

#### *B. The Importance of the North American Case for Understanding Indigenous Rights Globally*

Laws regulating trade between the European powers and the Indigenous Nations of North America were developed very early in the history of those nations' relations with one another.<sup>37</sup> These early laws serve as important historical precedents

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34. GIANNFRANCO POGGI, *THE STATE: ITS NATURE, DEVELOPMENT AND PROCESSES* 22 (1990).

35. The Haudenosaunee or Iroquois Confederacy, for example, continues to employ a political structure that had been established prior to the founding of European colonies in North America. Under this structure six confederated Indigenous Nations "enjoy internal sovereignty, with the jurisdiction of the Grand Council of the whole centered primarily around matters concerning inter-nation and external relations." Howard R. Berman, *Perspectives on American Indian Sovereignty and International Law, 1600 to 1776*, in *EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS AND THE U.S. CONSTITUTION* 135 (Oren R. Lyons & John C. Mohawk eds., 1992) (citations omitted).

36. FREDERICK J. TEGGART, *THEORY AND PROCESSES OF HISTORY* 275 (Peter Smith 1972) (1949).

37. See, e.g., the Massachusetts law of 1650 prohibiting "any Frenchman,



for understanding the legal status of Indigenous Nations today. Importantly, these laws serve as indicia of the high degree of political and economic independence that Indigenous Nations were acknowledged to have. Illustrating this is James McClurken's identification of a treaty of 1836 as a turning point in Ottawa political history:

By the time settlers came to the Great Lakes, the Ottawas already had two hundred years of experience in dealing with representatives of European civilization and their descendants. From 1615 forward they had done so by incorporating their traditional subsistence and economic pursuits into the broader regional and global economy . . . . The 1836 Treaty of Washington, however, ended the balanced Ottawa and European economic accommodation that had allowed Indian communities to thrive for so long. The U.S. government acquired ownership of and political jurisdiction over the Ottawa's core territory and with it the control of many natural resources that had provided the Ottawas' economic base.<sup>38</sup>

Establishing relations with Indigenous Nations was an economic imperative for the European powers,<sup>39</sup> as these relations were tied closely to those powers' ability to gain access to American territory and to the resources located therein.<sup>40</sup>

Dutchman, or any person of any other foreign nation whatsoever" from trading with Indigenous Peoples within the colony's borders. 4 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND (PART I: 1650-1660) 21. The measure sought to enhance the security of the colony by suppressing the indigenous trade in arms:

[T]he French, Dutch, and other fforaigne nations, doe ordjnarily trade gunns, powder and shott, &c, wth Indjans, to our great p'judice, and strengthning and animating the Indjans against vs, as by dajly experience wee finde, and . . . the aforesajd French, Dutch, &c, doe prohibite all trade wth the Indjans wthin their respective jurisdiccons, vnder penalty of confiscation, &c.

*Id.* See also Several Orders made at Cascoe at a Court Houlden 26: July: 1666 [etc.] in 1 PROVINCE AND COURT RECORDS OF MAINE 268 (1928) (court order extending statutory prohibition against "the tradeing of Lyquours with the Indeans" throughout "all the Lymitts" of Maine).

38. James M. McClurken, *Wage Labor in Two Michigan Communities*, in NATIVE AMERICANS AND WAGE LABOR: ETHNOHISTORICAL PERSPECTIVES 67 (Alice Littlefield and Martha C. Knack eds., 1996) (citations omitted).

39. As one scholar noted, "[t]rade required agreements relating to access to (or monopoly of) indigenous markets, continuous sources of furs, relative valuation of goods, networks of supply and distribution, and defense of trade routes. Treaty-making and stable relations were essential for all these purposes." Berman, *supra* note 35, at 129.

40. In addition to being important trading partners, members of Indigenous

States competed with one another for access to indigenous trade and took steps to insure that their relations with Indigenous Nations were tranquil. The efforts of states to monopolize indigenous trade were accompanied by constructions and reconstructions of indigenous rights that were at once instrumental and ideological, facilitating the expansionist policies of the states and providing an interpretive framework in which expansion could be understood as an eminently moral undertaking that was ultimately in the best interests of the world's Indigenous Peoples. An ideology of assimilation provided an overarching framework that state actors used to understand, and to formulate, expansionist policies. Defenders of these policies typically referred to a process of civilization and assimilation, through which non-Europeans would learn the religion, language and values of Europeans and become absorbed into a larger social body. The ideology of assimilation provided a resource with which virtually any policy could be justified. The Georgia General Assembly exemplified this use of ideology when they urged the federal government to remove the people of the Cherokee Nation westward:

[A] large portion of the most valuable territory within the chartered limits of this state, is occupied by savage tribes, interspersed with disorderly whites, whose vicious and intemperate habits give the example, and afford the facility of indulging in intoxicating liquors, a practice rapidly extinguishing their numbers, and entirely hostile to the progress of civilization. Your memorialists therefore, respectfully suggest, that the removal of the aforesaid white persons by general government, and a judicious selection of commissioners to treat with these nations for their lands, would obviate most of the difficulties which have heretofore opposed themselves to the acquirement of the Indian lands; with these advantages we should be able, easily to produce on the minds of the most intelligent amongst them, a full conviction, that their true interest, can only be found in their removal to a region more congenial to their nature, and remote from the

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Nations also possessed valued knowledge regarding the location of resources. *See, e.g.,* Instructions Appointed by Me Ferdinando Gorges Lord Proprietor of the Province of Mayne, [etc.], June 21, 1664, in 1 PROVINCE AND COURT RECORDS OF MAINE 202, 207 (instructing inhabitants of Province to "inform your selves by the Natives or any other waies you can whether there be any mineral Stone such as is like to produce Tynne Copper Lead & other").

influence of vicious example, at the same time that civilization might advance uninterruptedly, and their permanent interest be secured, by applying part of the proceeds of the sale of their lands, to the establishment of primary schools; the annual supply of implements of husbandry, and other conveniences of civilized life.<sup>41</sup>

The history of relationships that unfolded between the European powers and the Indigenous Nations of North America are of central importance to an understanding of international recognition of indigenous rights today for many reasons. Indigenous Nations of North America are leaders in the effort to ensure that Indigenous Peoples are represented in international forums.<sup>42</sup> Moreover, the understandings that the European powers and their successor states arrived at to manage relations with the North American Indigenous Nations were not confined within that region, but became the conceptual resources of the international community. While Indigenous Nations do not enjoy a nation-to-nation relationship with other sovereigns in the international community, they are under-

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41. Memorial of Feb. 11, 1828, in 1828 LAWS OF THE STATE OF MISSISSIPPI 144-45.

In a similar fashion, J.D.C. Atkins, a U.S. Commissioner of Indian Affairs, relied on assimilationist sentiments when he championed the policy of allotment: a policy of reducing tribal land holdings by allotting parcels to individual tribal members and selling off the surplus. Allotment, contended Atkins, would expose tribal members to the civilizing influence of agriculture:

Historians, philosophers, and statesmen freely admit that civilization as naturally follows the improved arts of agriculture as vegetation follows the genial sunshine and the shower, and that those races who are in ignorance of agriculture are also ignorant of almost everything else. The Indian constitutes no exception to this political maxim. Steeped as his progenitors were, and as more than half of the race now are, in blind ignorance, the devotees of abominable superstitions, and the victims of idleness and thriftlessness, the absorbing query which the hopelessness of his situation, if left to his own guidance, suggests to the philanthropist, and particularly to a great Christian people like ours, is to know how to relieve him from this state of dependence and barbarism, and to direct him in paths that will eventually lead him to the light and liberty of American citizenship.

J.D.C. Atkins, *Report of the Commissioner of Indian Affairs, Oct. 5, 1885*, HOUSE EXEC. DOC. NO. 1, at 3, 4, 49 Cong., 1 Sess., CONG. SERIAL SET, serial 2379.

42. See, e.g., Oren Lyons, *Law, Principle, and Reality*, 20 N.Y.U. REV. L. & SOC. CHANGE 209, 210 (1993) (discussing Haudenosaunee participation in the United Nations Conference on Environment and Development and in the Working Group for Indigenous Populations).

stood to have a collective identity distinct from ethnic minorities.<sup>43</sup> There is an ongoing debate among participants in the United Nations as to whether Indigenous Nations should be recognized as having a right to self-determination.<sup>44</sup> Participants in the United Nations' Second Workshop on a Permanent Forum for Indigenous People, for instance, differed over whether indigenous political communities should be called "indigenous people" or "indigenous peoples," some participants being fearful that the latter term "suggested a right of self-determination and sovereignty over natural resources."<sup>45</sup> Other participants, however, "reiterated the importance of the right to self-determination."<sup>46</sup>

The history of North American Indigenous Nations also demonstrates powerfully the importance of the ability to trade internationally. In the face of European expansion, Indigenous Nations in North America were able to retain substantial and recognized powers of self-government, while losing the ability to independently establish relations with foreign powers. Their inability to trade freely contributed to an enduring legacy of poverty. European expansion in North America was accompanied by the application of principles of international law,<sup>47</sup> as

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43. See, e.g., Delia Opekokew, *International Law, International Institutions, and Indigenous Issues*, in *THE RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW: SELECTED ESSAYS ON SELF-DETERMINATION* 1, at 2-3 (Ruth Thompson ed., 1987) (observing that the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities distinguishes "indigenous peoples . . . from ethnic, linguistic, and religious minorities by the way they perceive land ownership and self-determination.").

44. Opekokew notes that while the United Nations has disavowed the doctrine and embraced the principle of self-determination with regard to nations that were former colonies, no parallel transition has yet taken place with regard to Indigenous Nations:

The governments who deny the right of self-determination to indigenous peoples have manipulated the international formulae for decolonization so that indigenous groups have been excluded from the principles setting out the obligations of those governments to decolonize their territories . . . . However, eminent international law scholars . . . have extended the principle of decolonization to indigenous peoples in the Americas.

See *id.* at 3.

45. *Report of the Second Workshop*, *supra* note 20.

46. *Indigenous Issues: Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, Comm. Hum. Rts., 54th Sess., Prov. Agenda Item 23, U.N. Doc. E/CN.4/1998/106 (1997).

47. For an early international legal exposition of indigenous rights see FRANCISCO DE VICTORIA, *ON THE INDIANS LATELY DISCOVERED* (1557), reprinted in *CLASSICS OF INTERNATIONAL LAW* (Ernest Nys ed., 1995) (examining and finding unper-

well as the applications of domestic law.<sup>48</sup>

North America also is a case of critical importance because the economic histories of North American Indigenous Nations provides a working model for identifying barriers and impediments to indigenous commerce. By examining the history of commercial regulation of Indigenous Nations in North America, it is possible to both identify a fundamental method used by state actors to constrain Indigenous Nations and begin to understand how the economic constraints contributing to indigenous poverty might be eased.

### III. HISTORICAL BACKGROUND: STATE CONTROL OF INDIGENOUS NATIONAL TRADE

#### A. *State Competition for Trade with Indigenous Nations*

Relationships of exchange provided the primordial ground upon which Indigenous North Americans and Europeans came to understand one another and to arrive at a dense thicket of law written to protect their mutual interests in peace and trade.<sup>49</sup> Trade provisions appeared in the earliest treaties and

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suasive various arguments claiming Spanish title for indigenous national territory).

48. The United States, for example, first attempted to regulate relations with Indigenous Nations through a series of trade and intercourse acts. See 1 Stat. 137, Act of July 22, 1790; 1 Stat. 329, Act of Mar. 1, 1793; 1 Stat. 469, Act of May 19, 1796; 1 Stat. 743, Act of Mar. 3, 1799; 2 Stat. 139, Act of Mar. 30, 1802; 3 Stat. 682, Act of May 6, 1822; 4 Stat. 729, Act of June 30, 1834 (providing that persons trading with Indigenous Nations be licensed and bonded, providing for the forfeiture of merchandise involved in unlicensed trade; voiding transfers of indigenous national land that were not made pursuant to a United States treaty; and providing for the apprehension and trial of non-Indians accused of committing crimes within indigenous nations).

49. As one author has pointed out, for many Indigenous Nations trade was "the first, and for long periods, the only, medium of contact" with Europeans. COLIN G. CALLOWAY, *CROWN AND CALUMET: BRITISH-INDIAN RELATIONS, 1783-1815*, at 131-32 (1987). It is interesting to observe that Henry Hudson and his crew traded with people living along the Atlantic coast and along the Hudson River. Hudson's chronologer revealed, however, that trading was an area of mutual endeavor where one party could take advantage of the other and where violence could follow fast on the heels of a misunderstanding. Hudson's crew found that they could provision their vessel for "trifles" and occasionally resorted to violence, as when a crew member shot an Indian to death for pilfering. Robert Ivett, *The Third Voyage of Master Henry Hudson, etc.* 118, 139, 144 (1609), appended to SAMUEL MILLER, *A DISCOURSE, DESIGNED TO COMMEMORATE THE DISCOVERY OF NEW YORK BY HENRY HUDSON* (1809).

Trade came to be recognized as a source of friction with the potential for igniting warfare. Samuel Penhallow acknowledged that many of his contemporaries

statutes regulating state/indigenous relations.<sup>50</sup> European states treating with Indigenous Nations made assurances that those nations would enjoy both trade and fair dealing.<sup>51</sup> Trade

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believed that hostilities with Indigenous Nations stemmed from English trading practices: "many have stigmatiz'd the *English* as chiefly culpable in causing the . . . Breach between them and us; by invading their Properties, and defrauding them in their Dealings." SAMUEL PENHALLOW, *THE HISTORY OF THE WARS OF NEW-ENGLAND, WITH THE EASTERN INDIANS* 2 (Corner House Publishers, 1973) (1726). Penhallow's account also suggests that an interest in preserving trade could exert a pacific influence on international relations. Penhallow believed that attempts to persuade the Iroquois Confederacy to join the English in their war with various Indigenous Nations cooperating with the French failed due to fact that the Dutch urged the Iroquois to stay neutral. As Penhallow wrote of the English failure to induce the Iroquois to war: "The only Account we can give of it is, the vast trade between the *Dutch* and *Indians*; for the sake of which, that Government have always chosen to restrain their *Indians* from joyning with us in our Wars." *Id.* at 25-26.

Trade with the North American Indigenous Nations was placed under a system of government regulation early on. Indeed, the treaties that concluded the hostilities that Penhallow detailed both contained provisions for the regulation of trade:

That for Mutual Safety and Benefit, all Trade and Commerce which may hereafter be allowed betwixt the *English* and the *Indians*, shall be only in such Places, and under such Management and Regulation, as shall be stated by her Majesty's Government of the said Provinces respectively.

Articles of Pacification, July 13, 1713 [Great Britain and the Naridgwalk, the Narahamegock, and other Indigenous Nations], *Id.* at 74, 76.

That all Trade and Commerce which may hereafter be allowed betwixt the *English* and the *Indians*, shall be under such management and Regulation, as the Government of the *Massachusetts* Province shall direct.

Submission and Agreement of the Delegates of the Eastern Indians, Dec. 15, 1725, [Great Britain and Penobscot, Naridgwalk, and other Indigenous Nations], *Id.* at 122, 124.

50. See, e.g., E.M. RUTTENBER, *HISTORY OF INDIAN TRIBES OF HUDSON'S RIVER TO 1700* 54 (observing that a Dutch treaty of 1623 with the Mahicans expressed a desire for "constant free trade" between the parties); see also Pennsylvania treaty of 1701 made with the "Shawonnah" People and with the Peoples of the "Sasquehannah" and "Powtowmeck" Rivers, 2 *COLONIAL RECORDS (PENNSYLVANIA)* 15, 16, 17 (requiring that the indigenous parties trade only with licensed traders of the province; guaranteeing that the provincial government "shall take Care to have them, the Said Indians duly furnished with all sorts of necessary Goods for their use, at reasonable rates;" requiring the indigenous parties to conduct "themselves Regularly & Soberly, according to the Laws of this Governmt while they live Near or amongst ye Christian Inhabitants thereof"; and extending to the indigenous parties "the full & free privileges and Immunities of all the [provincial] Laws as any other Inhabitants").

51. For example, the Governor of New Hampshire delegated the governmental power to treat with Indigenous Nations on behalf of England, had interpreters advise indigenous national leaders from "Kennebeck," "Ponobscut," "Pegwacket" and "Ammarescoggin" as follows:

Tell them, That the English Settlements that have lately been made in

provisions contained in treaties and statutes often sought to prevent conflict from arising from recognized sources such as sharp trading practices or trading in liquor.<sup>52</sup> The statutory provisions also often strove to gain exclusive access to indigenous trade.<sup>53</sup>

In their competition for control of resources, states sought to create exclusive trade and military alliances with the Indigenous Nations.<sup>54</sup> In a treaty conference at Georgetown in 1717

these Eastern Parts, have been promoted partly on their accounts, and that they will find the benefit of them in having Trade brought so near them, besides the advantage of the Neighborhood and Conversation of the English, to whom I have given strict Orders, that they be very just and kind to the Indians, upon all accounts, and therefore if at any time, they meet with any Oppression, Fraud, or unfair Dealing, from the English in any of their affairs; let them make their Complaint to any of my Officers here, and then I shall soon hear of it, and take speedy and effectual care to do them right.

A Conference of his Excellency the Governour with the Sachems and Chief Men of the Eastern Indians, Aug. 9, 1717, in 3 DOCUMENTS AND RECORDS RELATING TO THE PROVINCE OF NEW-HAMPSHIRE, FROM 1692 TO 1722, at 693, 695 (1869) [hereinafter Conference of his Excellency].

52. See, e.g., the Massachusetts Province Laws of 1693-1694, 1 ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY 150, 151 (prohibiting supplying liquor to indigenous traders; providing for a forfeiture of forty shillings per pint of liquor seized (or, if not paid, for two months' imprisonment); directing that half of the forfeiture go to the crown and half "to him or them that shall inform and prosecute" the forfeiture "by bill, plaint or information"). This law punished Indians who were convicted of drunkenness by imposing a fine of five shillings for the poor or a flogging "not exceeding ten lashes." The law sought to forward Indigenous Peoples "in civility and Christianity," and to suppress among them "drunkenness and other vices." *Id.* at 150-51.

53. See, e.g., New York's law of 1720 "for the Encouragement of the Indian Trade," 2 COLONIAL LAWS OF NEW YORK 8-9 (prohibiting the sale of "Indian Goods" to the French). The New York law's preamble expressed the fear that French/Iroquoian trade would threaten the security of the colony:

[I]t is found by Experience that the French of Canada by meanes of Indian Goods Purchased from the Inhabitants of this Province have not only almost wholly Engross'd the Indian Trade to themselves but have on great Measure withdrawne the Affections of the five Nations of Indians from the Inhabitants of this Province and rendred them Waivering in their faith and Aliegance to his Majesty and will if Such trade be not prevented altogether Alienate the minds of the Said Indians, which will prove of the most dangerous Consequence to the English Interest in America.

*Id.* at 8.

54. Illustrating this competition were the founding, in the 1720s, of trading posts by the French at Niagara and Oswego by the British. See HERBERT L. OSGOOD, 3 THE AMERICAN COLONIES IN THE EIGHTEENTH CENTURIES 375 (1924) (contending that the "principal motive for the founding of Niagara and Oswego" was the control of trade with Indigenous Nations). At Niagara, the French hoped

the English made great efforts to convince the representatives of the various nations in attendance that subjection to the crown was in their best interests.<sup>55</sup> The Indigenous national parties were sent a British flag to carry to the negotiations "in token of their subjection to his Majesty King George."<sup>56</sup> Upon their arrival they were reminded that they were King George's "Subjects, under His Allegiance and Protection" and that they would "always find themselves safest under the Government of *Great Britain*."<sup>57</sup>

The competition among states for trade with Indigenous Nations shaped early American foreign policy, which emphasized creating exclusive relations with Indigenous Nations in order to provide security against European incursions.<sup>58</sup> When it appeared, for example, that the Creek nation was continuing

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they "and their allies among the Iroquois would control the trade of the region between Lake Huron and the Ottawa river, inhabited by the Chippewas and other tribes." *Id.* at 365. The British founded Oswego in response. *See id.* at 372.

55. *See* Conference of his Excellency, *supra* note 51, at 693.

56. *Id.*

57. *Id.* at 694. A substantial source of tension in this treaty conference was the establishment of British forts. An indigenous national representative, Wiwurna, made objections to the erection of new forts clear to the Governor of New Hampshire:

Wi. We don't know what to think of the new forts built.

Gov. I have spoke to that fully already, and told them they are for our mutual defense.

Wi. We should be pleased with King GEORGE if there was never a Fort in the Eastern Parts.

Gov. Tell them that whenever there is a new Settlement, I shall always order a Fort, if I think it proper, and that it is for the security of them and us, and so do the French. Are any People under the same Government afraid of being made too strong to keep out Enemies?

Wi. We are a little uneasy concerning these Lands, but willing the English shall possess all they have done, excepting Forts.

*Id.* at 698. Shortly after this exchange the indigenous national representatives withdrew from the conference until the next day, leaving their British flag behind them. *Id.* at 699.

58. In August of 1789, George Washington sought the Senate's advice and consent for a proposed treaty with the Southern nations. In addressing the Senate, he underscored the strategic value of the anticipated agreement. The treaty, Washington contended, would not only provide for "peace and security" across "the whole southern frontier," but was:

calculated to form a barrier against the colonies of a European Power, which in the mutations of policy, may one day become the enemy of the United States. The fate of the Southern States, therefore, or the neighboring colonies, may principally depend on the present measures of the Union toward the Southern Indians.

Executive Statement of Facts, Aug. 22, 1789, 1 ANNALS OF CONGRESS 66.



to trade with England through Spanish ports in the South, President George Washington proposed that the treaty with the Creek nation include a secret article designed to end that trade peacefully. In discussing the need for the article, Washington explained the importance of trade to the "political management" of Indigenous Nations:

In preparing the articles of this treaty, the present arrangements of the trade with the Creeks have caused much embarrassment. It seems to be well ascertained, that the trade is almost exclusively in the hands of a company of British merchants, who, by agreement, make their importations of goods from England into the Spanish ports.

As the trade of the Indians is a main means of their political management, it is, therefore, obvious that the United States cannot possess any security for the performance of treaties with the Creeks, while their trade is liable to be interrupted, or withheld, at the caprice of two foreign Powers.<sup>59</sup>

The secret article provided the federal government with the authority to usurp the Creek trade from the British over a two-year period:

Secret Article.

The commerce necessary for the Creek nation shall be carried on through the ports, and by the citizens of the United States, if substantial and effectual arrangements shall be made for that purpose by the United States, on or before the 1st day of August, one thousand seven hundred and ninety-two. In the mean time, the said commerce may be carried on through its present channels, and according to its present regulations.

And whereas the trade of the said Creek nation is now carried wholly, or principally, through the territories of Spain, and obstructions thereto may happen by war or prohibitions of the Spanish Government, it is therefore agreed between the said parties that, in the event of such obstructions happening, it shall be lawful for such persons as [the President of the United States] shall designate, to introduce into, and transport through, the territories of the United States to the country of the said Creek nation, any quantity

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59. Message from the President, Aug. 4, 1790, 1 ANNALS OF CONGRESS 1024-25.

of goods, wares, and merchandise, not exceeding in value, in any one year, sixty thousand dollars, and that free from any duties or impositions whatsoever, but subject to such regulations for guarding against abuse, as the United States shall judge necessary; which privilege shall continue as long as such obstruction shall continue.<sup>60</sup>

Ultimately treaty-making alone proved insufficient to cure the economic independence of the Creek Nation from the United States and the matter was resolved in a more violent manner during the Creek War.<sup>61</sup>

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60. *Id.* at 1025 (bracketed text added later by Senate resolution).

61. The Creek War was a regional component of the War of 1812. A major factor drawing the United States into the larger conflict was unrest among the Indigenous Nations to the west of the United States. The War Department attributed that unrest, in large part, to the persistence of the trade between those nations and the British, PRUCHA, *supra* note 4, at 76-78, though the British insisted that the "charge of exciting the Indians to offensive measures against The United States" was "void of foundation." British Declaration, Relative to the War between Great Britain and The United States, Jan. 9, 1813, in 1 BRITISH AND FOREIGN STATE PAPERS 1508.

The Creek conflict in the south originated in a civil war that erupted between nativist and non-nativist factions within the Creek Nation. The conflict reached a critical turning point in 1813 when members of the nativist faction—defined by their violent opposition to the intrusions of nonindigenous nationals—were attacked by settlers while returning from Pensacola, where the Spanish had supplied them with gunpowder. In response, nativist warriors—or "Redsticks"—massacred the inhabitants of Fort Mims. *Id.* at 79. Outrage over the incident was widespread and militias from Tennessee, Georgia, and the Territory of Mississippi, accompanied by Choctaw, Cherokee, and non-nativist Creek allies engaged and dispersed the nativist Creeks. See MICHAEL D. GREEN, *THE POLITICS OF INDIAN REMOVAL: CREEK GOVERNMENT AND SOCIETY IN CRISIS* 42 (1982).

During the peace negotiations to end the war, the British commissioners initially insisted that any peace treaty between the two warring states must "embrace the Indians as Allies of His Britannic Majesty" and that a boundary be established between the United States and "the Indian Territory," which area would then serve as "a barrier between the British Dominions and those of The United States." Message of the President of The United States to Congress, transmitting Communications from the American Plenipotentiaries at Ghent, in August and September, 1814, Relative to the Negotiation for Peace with Great Britain, Oct. 10, 1814 in 1 BRITISH AND FOREIGN STATE PAPERS 1580, 1583. The American plenipotentiaries objected. They argued that there was no precedent for such a boundary and attempted to differentiate their relationship with the Indigenous Nations from that of Great Britain by asserting a claim to the territory in question:

In reply to our observation, that the proposed Stipulation of an Indian Boundary was without example in the practice of European Nations, it was asserted that the Indians must in some sort be considered as an independent People, since Treaties were made with them, both by Great

Prior to the War of 1812, British influence among the tribes to the West of the United States had been diminishing.<sup>62</sup> Following that war, competition among states to create alliances with Indigenous Nations was, for the most part, foreclosed.<sup>63</sup> Indigenous Nations on the frontiers, like those who had previously been entirely surrounded by expanding states, no longer had a viable choice over which states they could deal with and found they had lost whatever autonomy such a choice may have allowed them.<sup>64</sup> The conclusion of the War of 1812

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Britain and by The United States; upon which we pointed out the obvious and important difference between the Treaties we might make with Indians, living in our Territory, and such a Treaty as was proposed to be made respecting them with a Foreign Power, who had solemnly acknowledged the Territory on which they resided to be part of The United States.

*Id.* at 1582.

The British commissioners ultimately abandoned their insistence on an indigenous national territory between the United States and the British possessions. The peace treaty concluding the war contained, instead, a reciprocal provision under which the United States and Great Britain agreed, respectively, to negotiate a separate peace with each of those Indigenous Nations "with whom they may be at war" and further agreed to restore to those nations "all the possessions, rights, and privileges, which they may have enjoyed or been entitled to . . . previous to such hostilities." Treaty of Peace and Amity, Between his Britannic Majesty and the United States of America, Dec. 24, 1814, 8 Stat. 218, 222-23.

62. See CALLOWAY, *supra* note 49, at 227-28 (contending that Britain had been distracted by events in Europe from efforts to maintain relations with Indigenous Nations, although when a conflict with the United States appeared imminent, "the British in Canada made frantic efforts to renew their connections with the Indian tribes to whom they had to turn for help in the event of war").

63. Competition for alliances with Indigenous Nations in North America did, however, occur when the United States fragmented into two belligerent states. The Confederate States of America, as Annie Abel pointed out, "assiduously sought" and "laboriously built up" an unsteady military alliance with the Cherokee, Creek, Choctaw, Chickasaw and Seminole nations. See ANNIE HELOISE ABEL, *THE AMERICAN INDIAN IN THE CIVIL WAR* 15 (University of Nebraska Press, 1992) (1919). The Confederacy forged this alliance by offering these nations more favorable treaty terms than had existed between the nations and the United States. As Deloria and Lytle explain:

The Confederate Treaties were probably the most favorable treaties any Indian tribes ever signed with a foreign, non-Indian government. They consisted of precise articles outlining the rights of the tribes, allowing participation in the Confederate congress for tribal officials, [and] guaranteeing title to Indian lands . . . .

VINE DELORIA JR. & CLIFFORD LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* 24 (1984).

64. Those factions within Indigenous Nations that chose to emigrate rather than submit to the control of the United States nevertheless did preserve some measure of choice over which state to align with. A substantial portion of the Cayuga Nation, for example, emigrated to Canada following the War of 1812.

served as a watershed between the use of trade as an instrument of international diplomacy and the use of trade as a tool of state policy.

## *B. Single-State Monopolization of Indigenous National Trade*

### 1. The American Reconstruction of Indigenous National Sovereignty: The Executive Branch

By the second decade of the nineteenth century, the United States had fought two wars to exclude the European powers from its territory proper and from its western frontier. In the wake of these intercontinental crises, the North American

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Descendants of the emigres brought claims before the New York legislature in 1849, and before the Board of Commissioners of the Land Office of New York in 1884, seeking their share of annuity payments the Cayuga Nation had received from New York pursuant to land cession treaties made in 1790 and 1795. *Cayuga Indians v. Comm'rs*, 41 N.Y. Sup. Ct. 588, 590, (3d Dep't) (holding that members of Cayuga nation are entitled to share of annuity payments made to entire Cayuga nation), *rev'd* *Cayuga Nation of Indians v. The State*, 99 N.Y. 235 (1885) (holding individual members of Cayuga nation have no cause of action under treaties made between New York and Cayuga Nation).

The Canadian Cayuga's 1884 claim before the board of commissioners was rejected on the advice of New York's Attorney General. *Id.* at 589. The Attorney General wrote an opinion contending that although the board of land commissioners had jurisdiction, they should refer the matter to the legislature. *Id.* at 592. The Attorney General noted that the Canadian Cayugas had not received a share of the annuity since "their participation in the war of 1812 and 1814, as subjects of the British crown," and that the legislature was the appropriate branch to reverse such a long-standing state policy. *Id.* at 590, 592.

A New York court disagreed, finding that the Canadian Cayugas' *individual* rights in the annuity were intact. *Id.* at 598. As the judge observed:

It matters not where they live, whether under this government or under that of England, their rights are the same. Nor does it matter that they are broken up into portions and can no longer be called one nation, or that their several rights are thus in conflict. So far as possible, the rights of all should be protected, so that, in the way best suited to their habits, every family or every individual should enjoy the benefits of the annuity.

*Id.* at 598.

The New York Court of Appeals reversed, holding that, inasmuch as the land cessions were made pursuant to treaties, no private right of action existed whereby any individual member of the Cayuga Nation could sue:

The treaties were made by competent authority, and are obligatory upon both parties. But if violated by either, the other contracting party can alone demand satisfaction, and neither a citizen of the State, nor a member of the "Indian Nation," nor any portion of those members, unless recognized by the State as such, can complain.

*Cayuga Nation of Indians*, 99 N.Y. at 237.

Indigenous Nations found themselves, for the most part, dealing with one state exclusively: either with Britain in Canada or with the United States. In the absence of competition for trade and military alliances the strategic position of the Indigenous Nations was fundamentally altered and their political status became subject to reinterpretation.

The reliance of the European powers and the United States upon treaty negotiations to construct inter-governmental relations with Indigenous Nations clearly indicated that the states regarded Indigenous Nations as having the sovereign capacity to wage war, to establish peace, to extradite criminals and to sign away great expanses of territory. There were, however, powers of sovereignty—such as the power to tax economic activity taking place on the territory of the sovereign government—that the treaties did not address. Indigenous leaders soon discovered that these powers, not addressed in treaties, were susceptible to redefinition by a state to accommodate that state's economic interests. This tendency of states to narrow indigenous powers of self-government for economic reasons is exemplified in a tax dispute which arose early in the nineteenth century between the United States and the Cherokee Nation.

The Cherokee tax dispute arose when the Cherokee Nation taxed traders who were doing business on Cherokee lands. The United States deducted the amounts collected from annuity payments due the Cherokee Nation.<sup>65</sup> The question of whether the Cherokee Nation had the sovereign power to tax trade was referred to the United States Attorney General, William Wirt. Wirt determined that the Cherokee Nation had not previously had such a power and could not exercise such a power absent the approval of Congress.<sup>66</sup>

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65. 1 Op. Att'y Gen. 645 (1824).

66. The Principle Chief of the Cherokee Nation, John Ross, interpreted Wirt's opinion as indicating that the United States would take no further steps until Congress could consider the matter. *See* Letter of John Ross to Thomas L. McKenney, Apr. 29, 1824, in 1 JOHN ROSS, *THE PAPERS OF CHIEF JOHN ROSS* 80 (Gary E. Moulton ed., 1985) (indicating Ross' belief that the executive branch would delay restoration of the monies deducted from the annuities to the traders until Congress could make a decision on the matter and requesting that the United States prevent non-Indian traders from permanently locating themselves on Cherokee territory). Thomas L. McKenney, the Commissioner of Indian Affairs, informed Ross that a memorial sent by the Cherokee Nation to Congress asking for their decision on the tax issue could not be considered an appeal of Wirt's

There was little in either the laws of the United States, in the laws of the Cherokee Nation or in the treaties that existed between the two nations that Wirt could use to justify a unilateral abrogation of the Cherokee power to tax. Instead Wirt relied on ideological resources and grounded his opinion in the imagined primitive character of the Cherokee Nation when that nation signed its earliest treaty with United States: "[t]he first treaty was that of November 28, 1785. At that time the nation was in the first stage of society—the hunter state; and, consequently, government, laws, and taxes were wholly unknown among them."<sup>67</sup>

Using his dubious understanding of Cherokee political society in 1785 as a springboard, Wirt reinterpreted the rights contained in the agreements the United States and the Cherokee Nation had concluded concerning trade. The agreements, in Wirt's view, gave the United States an exclusive right to regulate trade. The Cherokee Nation was pre-empted from concomitantly regulating trade. The treaties gave the United States a right, Wirt opined, "to prescribe the whole system of regulations, *on both sides*, under which the trade should be carried on," and subsequent treaties had simply reiterated the United States' right to regulate the whole of the Cherokee trade.<sup>68</sup>

Wirt was aware that the Cherokee Nation had seen drastic changes over the thirty-nine years that had passed since the first treaty was made. Wirt attributed these changes to efforts of the United States to civilize the Cherokees. He considered that the Cherokee Nation may have reached a stage of civilization where their own methods of taxation would be possible. But, Wirt averred, whether such taxation should now be permitted was a political and not a legal question:

Whether the United States, in enforcing their rights under

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opinion. McKenney wrote that the amounts deducted from the annuity would be paid over to the traders. See Letter of Thomas L. McKenney to John Ross, et al. in ROSS, *supra*, at 101-02. The United States also made deductions from Cherokee annuity funds to compensate traders who had liquor seized under authority of Cherokee law. See Letter of John Ross to George Lowry, et al., Nov. 27, 1829, in ROSS, *supra*, at 177, 178 (instructing Cherokee delegates to draft as memorial to Congress asking for a refund of annuity money's deducted to compensate the owners of the seized liquor).

67. *Id.* at 646.

68. *Id.*

these treaties, may not and will not have respect to the altered condition of the Cherokees, to the stage of civilization to which they have been now carried by the measures adopted by the United States to produce this very effect; whether Congress will not adapt their future regulations to this altered condition, so as to enable that nation to raise a revenue for the support of their government, by an equal tax upon our traders as well as their own, are political considerations which, although it may not be improper for me to hint at them for your consideration, are foreign to the question of strict law, on which my opinion has been requested.<sup>69</sup>

Similarly the United States unilaterally abrogated other Indigenous powers of sovereignty, such as the right of an indigenous nation to determine who could become a member of that political community or the right of indigenous national courts to exercise jurisdiction over matters occurring on indigenous territory. Attorney General John MacPherson Berrien rendered an advisory opinion, for example, on whether a United States citizen who had become a member of the Cherokee Nation would be exempt from provisions in the trade laws that applied only to non-Indians. Berrien did not believe such an exemption would be lawful. Although the trader who sought the exemption had been adopted into that portion of the Cherokee Nation that had emigrated west of the Mississippi, he was still within the external boundaries of the United States. As Berrien pointed out: "a citizen of the United states cannot divest himself of his allegiance to this government, so long as he remains within the limits of its sovereignty." Berrien also pointed out that if such an exemption were widely granted it "might be employed to the subversion of the whole legislation and policy of this government in relation to the Indian tribes within its limits."<sup>70</sup>

Attorney General Benjamin Butler rendered an opinion advising the Secretary of War on the authority of a Choctaw court to try a non-Indian for murder. The matter arose when a woman—a slave held in bondage by a non-Indian residing within Choctaw territory—was murdered by another non-Indian (also a slave). The Choctaw court tried the accused and

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69. *Id.* at 652-53.

70. 2 Op. Att'y Gen. 402 at 404, 405 (1830).

sentenced him to death. Butler thought such a court would not have the authority to conduct such a trial. To ground his opinion in law, Butler relied on language from the Treaty of Dancing Rabbit Creek that guaranteed to the Choctaw Nation "a right to pass laws for the government of the Choctaw Nation of Red People and their descendants,"<sup>71</sup> which language, Butler concluded, limited the application of Choctaw law solely to Indians. Butler recommended an Arkansas Territorial Court as the proper forum for the matter to find resolution. He stated:

[T]he political condition of negro slaves, owned by white men residing in the Choctaw country, must depend on that of their owners. And as the owner of the slave now under sentence of death could not have been lawfully tried in a Choctaw court for the offence in question, provided it had been committed by such owner, so neither is his slave amenable to such court. The proper remedy will be in the United States court for the Territory of Arkansas, to which the Choctaw country is annexed by the Act of the 30th of June, 1834; and it is undoubtedly the duty of the officers of the United States, resident among the Choctaws, to take all necessary measures to cause the offender to be brought to justice for the crime alleged to have been committed by him.<sup>72</sup>

## 2. The American Reconstruction of Indigenous National Sovereignty: The Judiciary

The task of clarifying the legal character of indigenous sovereignty was taken up by the United States judiciary, which issued a series of pivotal decisions<sup>73</sup> that selectively adumbrated the sovereign powers of Indigenous Nations for domestic legal purposes. These decisions offered varying approaches to modifying the existing international legal structure that existed amidst the competition among European nations to accommodate exclusive relations between a single state and

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71. Treaty of Sept. 27, 1830, 7 Stat. 333 at 334 (Choctaw Nation-U.S.).

72. 2 Op. Att'y Gen. 693 at 695-96 (1834).

73. These decisions arose in response to three crises: (1) a growing confusion surrounding transfers of lands that were once held by Indigenous Nations; (2) the refusal of certain of the United States—and especially the Southern states—to respect the principle of exclusive federal authority to regulate relations with Indigenous Nations; and (3) an uncertainty on the part of courts regarding their jurisdiction to try criminal offenses that occurred on indigenous territories.



Indigenous Nations lying within that state's exterior boundaries. The opinions sought either to (1) abrogate indigenous sovereign rights entirely, (2) preserve the earlier practice of regarding the Indigenous Nations as having full sovereignty as foreign nations, or (3) to regard Indigenous Nations as having a qualified sovereignty characterized by strong internal powers of sovereignty (powers relating to matters of self-government) and virtually no external powers of sovereignty (powers relating to international matters outside their exclusive dealings with a single state).

a. Decisions Urging a Complete Abrogation of Indigenous Sovereignty.

Judges rendering opinions that argued for the complete annulment of indigenous sovereignty took two basic approaches: (1) a change in circumstances approach, according to which Indigenous Nations were acknowledged to have once been sovereign, but were sovereign no longer due to increased commerce and contact with Europeans; and (2) a primitive character of Indigenous Peoples approach, according to which Indigenous Peoples were regarded as being insufficiently advanced in the arts of civilization to be considered a nation. Some, taking the change in circumstances approach, relied on the notion that the political status of any particular Indigenous Nation could be re-examined by the judiciary and that the sovereign rights of such nation could be disavowed if it appeared that sufficient assimilation of its members had occurred. Judges taking the fundamental character approach made a more direct attack on indigenous national rights and centered their opinions on the claim that Indigenous Peoples were too primitive to form nations.<sup>74</sup> Judges relying on that approach typi-

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74. Although the two approaches seem exclusive of one another, they could indeed be combined by arguing that the members of an Indigenous Nation were once too primitive to be members of civil society, but had subsequently advanced and could be governed by the laws of a nonindigenous sovereign entity. Georgia made such an argument in *The State v. George Tassels*:

When America was first discovered, . . . discovery was considered equivalent to conquest. It became therefore the duty of the discovering, or conquering nation, to make some provision for the aborigines, who were a savage race, and of imbecile intellect. In ordinary conquest, one of two modes was adopted. Either the conquered people were amalgamated with their vanquishers, and became one people; or they were governed as a

cally insisted that although such entities might be called "nations" for reasons of political expediency, they were not nations in fact.

Characteristic of the change in circumstances approach was an opinion written by Chief Justice Spencer for the New York Supreme Court,<sup>75</sup> the state court of general jurisdiction. An action had been brought to recover land that had once been granted to a member of the Oneida Nation as compensation for military service rendered during the Revolutionary War.<sup>76</sup> Spencer expressed disdain for the notion that the Indigenous Nations retained even a qualified sovereignty. He insisted that the Indigenous Nations must either be fully sovereign or not sovereign at all, and argued that the latter alternative more accurately reflected their status:

We do not mean to say, that the condition of the *Indian* tribes, at former and remote periods, has been that of subjects, or citizens of the state. Their condition has been gradually changing until they have lost every attribute of sovereignty, and become entirely dependant upon, and subject to our government. I know of no half-way doctrine on this subject. We either have an exclusive jurisdiction, pervading every part of the state, including the territory held by the *Indians*, or we have no jurisdictions over their lands, or over them, whilst acting within their reservations. It cannot be a

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separate but dependent State. The habits, manners, and imbecile intellect of the Indians, opposed impracticable barriers to either of these modes of procedure. They could neither sink into the common mass of their discoverers or conquerers, or be governed as a separate dependent people. They were judged incapable of complying with the obligations which the laws of civilized society imposed, or of being subjected to any code of laws which could be sanctioned by any christian community . . . . But the Cherokees now say, they have advanced in civilization, and have formed for themselves a regular government. Admit the fact, they are there in a situation to be brought under the influence of the laws of a civilized State—of the State of Georgia.

The State v. George Tassels, 1 Dud. 229, 235, 36 (Ga. Super. Ct., 1830) (upholding validity of Georgia law extending criminal jurisdiction over offenses committed on Cherokee territory). Although Corn (or George) Tassel's lawyer appealed to the Supreme Court and received a writ of error, the Georgia legislature "voted to defy the writ," and Tassels was hung. SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 29-30 (1994).

75. See Jackson v. Goodell, 20 Johns. 188 (Sup. Ct., Albany Co., 1822), *rev'd* 20 Johns. 693 (N.Y. Court of Errors, 1822).

76. See *id.*

divided empire; it must be exclusive, as regards them, or us . . . .<sup>77</sup>

Under Spencer's analysis indigenous sovereignty and the associated principle of communal ownership of land dropped out of the picture: members of Indigenous Nations would transfer land in the same manner as state citizens, absent a specific statute to the contrary.<sup>78</sup> Spencer acknowledged that, subsequent to the sale of land at issue in his case, statutes had been enacted regulating trade and land transfers between members of Indigenous Nations and non-Indians.<sup>79</sup> Spencer did not consider those statutes to be indicia of indigenous sovereignty, however, characterizing them instead as protections for persons lacking in discretion. The court did not intend, Spencer clarified, "to question the power of the Legislature to regulate the manner in which *Indians* are to convey their property, real or personal." The legislature "may treat them" Spencer continued, "as wanting discretion to manage their property, and devise guards and checks against frauds upon them."<sup>80</sup>

Other judicial decisions relied on the assertion that Indigenous Peoples were primitive to attack Indigenous National sovereignty. Characteristic of such an approach were concur-

77. *Id.* at 193.

78. *See id.*

79. *See id.*

80. *Id.* A change in circumstances theory, similar to Spencer's, was employed by Justice John McClean to argue that the state of Ohio, and not the federal government, had jurisdiction over a crime committed by a non-Indian on Wyandott territory. *United States v. Cisna*, 25 F. Cas. 422 (C.C.D. Ohio, 1835). McClean argued that a federal trade statute placing jurisdiction over such crimes in the federal government had been rendered "inoperative by the progress of time and the change of circumstances." *Id.* at 424. McClean asserted that the statute was based solely on the legislative power "[t]o regulate Commerce . . . with the Indian Tribes," U.S. CONST., art. I, § 8, cl. 3, and that when circumstances rendered that exercise of that constitutional power impracticable, the exercise of the power "must . . . of necessity cease." *Cisna*, 25 F. Cas. 425. The changes on which McClean based his opinion were the diminution of Wyandott territory from "a very extensive territory," *Id.* at 423, to a territory of "twelve miles square" and the establishment of regular trading between the Wyandott Nation and the Ohioans that lived proximate to that nation's territory: "Stores and taverns are kept within the reservation by the Indians or those connected with them, which are as much resorted to for trade and other purposes, by the surrounding white population, as similar establishments in any other part of the country." *Id.* at 424. As David Getches and his co-author's point out, McClean's attempt to limit the congressional commerce power to "the regulation commercial intercourse," ultimately did not prevail. GETCHES ET AL. (3d ed.), *supra* note 18, at 150.

ring opinions in *Cherokee Nation v. Georgia*,<sup>81</sup> which agreed with the decision Chief Justice Marshall authored finding that the Supreme Court did not have jurisdiction over the case. Whereas Marshall found that the Cherokee Nation was a "domestic dependent nation"—and not a foreign state within the meaning of the Constitution<sup>82</sup>—the concurring justices concluded that the Cherokee Nation was not a nation at all.

Justice Johnson, for instance, posed three questions to determine whether the Cherokee Nation had been recognized

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81. 30 U.S. (5 Pet.) 1 (1831). The backdrop for the *Cherokee Nation* case was a sectional crisis within the United States touched off by the southern states asserting the right to fashion their own policy with regard to the southeastern Indigenous Nations. The southern states passed a series of laws that were intended to undermine indigenous national sovereignty. See, e.g., Act of Jan. 19, 1830, 1830 LAWS OF THE STATE OF MISSISSIPPI 5, (extending Mississippi jurisdiction across Choctaw and Chickasaw territories and imposing criminal penalties upon "any person or persons who shall assume on him or themselves, and exercise in any manner whatever the office of chief, mingo, head-man or other post of power, established by tribal statutes, ordinances or customs"), *id.* at 6; 1832 Acts of the State of Alabama 7, Act of Jan. 16, 1832 (extending Alabama jurisdiction across Creek and Cherokee territories and abolishing indigenous national law); and 1833 Public Acts of the State of Tennessee 10, Act of Nov. 8, 1833 (extending Tennessee jurisdiction across Cherokee territory).

Relations between Georgia and the Cherokee Nation were particularly strained by two events: gold was discovered on Cherokee territory and when the Cherokee Nation reinforced their sovereignty by adopting a constitution modeled on that of the United States. See CHARLES WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY 731 (1937). The Georgia legislature passed a series of statutes abridging Cherokee sovereignty. See 1828 Acts of the State of Georgia 88, 98, Act of Dec. 20, 1828 (nullifying "all laws, usages, and customs" of the Cherokee Nation and annexing Cherokee territory to five Georgia counties); 1829 Acts of the State of Georgia 98, 99, Act of Dec. 19, 1829 (expanding provisions of the 1828 Act); 1830 Acts of the State of Georgia 154, Act of Dec. 2, 1830 (authorizing governor to take possession of gold and silver mines within Cherokee territory); 1830 Acts of the State of Georgia 127, Act of Dec. 21, 1830 (providing for distribution of unimproved Cherokee lands to Georgia citizens by land lottery); 1830 Acts of the State of Georgia 115, 116, Act of Dec. 22, 1830 (prohibiting Cherokees from assembling for governmental purposes and authorizing governor to organize a force of up to sixty persons to enforce state laws and to protect non-Cherokee mining operations within Cherokee territory). The Cherokee Nation, in response, brought an original bill in equity before the Supreme Court seeking an injunction against the enforcement of Georgia statutes on Cherokee territory. See *Cherokee Nation*, 30 U.S. (5 Pet.) at 2. As memorialists generated support for the rights of the Indigenous Nations in the Northeast, the Supreme Court was faced with what Charles Warren described as the most serious crisis in its history. See *New York Memorial (1829) in Jeremiah Evarts, CHEROKEE REMOVAL: THE "WILLIAM PENN" ESSAYS AND OTHER WRITINGS* 212 (Francis Paul Prucha ed., 1981); WARREN, *supra*, at 729.

82. U.S. CONST. Art. III, sec. 2 (extending the "judicial Power . . . to all Cases . . . between a State, or the Citizens thereof, and foreign States").

as a state: "1. By whom are they acknowledged as such? 2. When did they become so? 3. And what are the attributes by which they are identified with other States?"<sup>83</sup> Johnson's answers to these questions did not discuss the long history of diplomacy between the Indigenous Nations and the European powers to establish trade and military alliances. It focused instead on the present circumstances of the Cherokee Nation as an entity isolated from international relations:

As to the first question, it is clear that as a State they are known to nobody on earth but ourselves, if to us: how, then, can they be said to be recognized as a member of the community of nations? Would any nation on earth treat them as such? Suppose when they occupied the banks of the Mississippi or the sea coast of Florida . . . they had declared war and issued letters of marque and reprisal against us or Great Britain, would their commissions be respected? If known as a State, it is by us and by us alone; and what are the proofs? The treaty of Hopewell does not even give them a name other than that of the Indians; not even nation or State: but regards them as what they were, a band of hunters, occupying as hunting-grounds just what territory we chose to allot to them.<sup>84</sup>

Johnson's argument took into account the fact that there were states in Europe whose political autonomy had been compromised by their relations with more powerful states, but which were nevertheless considered to retain sovereign powers. He was nevertheless able to distinguish the Cherokee Nation from those states on the basis of property rights: "They have in Europe sovereign and demi-sovereign states and states of doubtful sovereignty. But if this State, if it be a State, is still a

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83. *Cherokee Nation*, 30 U.S. (5 Pet.) at 24.

84. *Id.* Johnson warned that one consequence of recognition of the Cherokee Nation as a state would be that it would encourage the recognition of the national sovereignty of other Indigenous Nations:

There is one consequence that would necessarily flow from the recognition of this people as a State, which of itself must operate greatly against its admission.

Where is the rule to stop? Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a State? We should indeed force into the family of nations a very numerous and very heterogeneous progeny.

*Id.* at 25.

grade below them all; for not to be able to alienate without permission of the remainderman or lord, places them in a state of feudal dependence."<sup>85</sup>

b. The View that Indigenous Nations are Fully Sovereign Foreign Nations

A dissenting opinion in the Cherokee Nation case took the position that the Cherokee Nation was a fully sovereign foreign state and that the Supreme Court therefore had jurisdiction over the controversy. Justice Thompson, joined by Justice Story, based the dissent on the long-standing state practice of making treaties with Indigenous Nations<sup>86</sup> and upon sections

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85. *Id.* at 26-27. Here Justice Johnson was departing from an earlier position he had taken in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). In that case the ability of Georgia to grant indigenous national lands was called into question. Chief Justice Marshall, for the majority, determined that Georgia could be "seised in fee of lands" that were, at the same time, held by an Indigenous Nation under "Indian title." *Id.* at 142-43. Justice Johnson, in dissent, cast doubt on the propriety of applying the concept of fee-simple to "the interests of a nation" and insisted that a correct analysis of the situation before the Court hinged on "a just view of the state of the Indian nations:"

Some have totally extinguished their national fire, and submitted themselves to the laws of the states[;] others have, by treaty, acknowledged that they hold their national existence at the will of the state within which they reside[;] others retain a limited sovereignty, and the absolute proprietorship of their soil. The latter is the case of the tribes to the west of Georgia. We legislate upon the conduct of strangers or citizens within their limits, but innumerable treaties formed with them acknowledge them to be an independent people, and the uniform practice of acknowledging their right of soil, by purchasing from them, and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their right of soil.

*Id.* at 146-47.

A state's interest in the territory of an Indigenous Nation was nothing more, Johnson insisted, than the "pre-emptive right," to prevent other states from acquiring such territories as the Indigenous Nations might be willing to part with:

What, then, practically, is the interest of the states in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusive of all competitors within certain defined limits. All the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves.

*Id.*

86. Indeed, as Thompson pointed out, the law of nations understood a treaty, by definition, to be "an agreement or contract between two or more nations or sovereigns." *Cherokee Nation*, 30 U.S. (5 Pet.) at 60.

of Emmerich de Vattel's influential<sup>87</sup> treatise on international law<sup>88</sup> that took the position that a comparatively weak state could accept the protection of a more powerful state without surrendering its sovereignty.<sup>89</sup>

Thompson's opinion took great care to establish that nothing in its practice of making treaties with states suggested that the Cherokee Nation had lost its status as an independent nation. The Cherokee Nation had rather:

been treated as a people governed solely and exclusively by their own laws, usages and customs within their own territory, claiming and exercising exclusive dominion over the same; yielding up by treaty, from time to time, portions of their

87. Justice Lewis Powell observed that in the United States Vattel was the "international jurist most widely cited in the first 50 years after the revolution." U.S. Steel Corp. Multistate Tax Comm'n, 434 U.S. 452, 462 n. 11 (1978), citing 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 18 (1826).

88. EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 38 (1758) (Book 1, Section 81) (Charles G. Fenwick, Trans., Carnegie Institution of Washington, 1916), reprinted in JAMES B. SCOTT, THE CLASSIC OF INTERNATIONAL LAW, 1995.

89. *Cherokee Nation*, 30 U.S. (5 Pet.) at 53, 55. Vattel's treatise also served as a resource for lawyers and jurists whose interests were adverse to indigenous national sovereignty. For instance, counsel in *Fletcher v. Peck*, seeking to argue that indigenous title to land should not preclude Georgia from granting that land, relied on Vattel to argue that "Indian title" was no title at all:

What is the Indian title? It is a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. It is not a true and legal possession. Vattel, b. 1, § 81, p. 37, and § 209; b. 2, § 97.

*Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 121 (1810).

In the sections cited by counsel, Vattel had propounded a natural law-based obligation of nations to "cultivate the land which has fallen to its share," and had pointed to what he characterized as the marginal status of "idle" peoples who were not sufficiently agricultural in their endeavors:

There are others who, in order to avoid labor, seek to live upon their flocks and the fruits of the chase. This might well enough be done in the first age of the world, when the earth produced more than enough, without cultivation, for the small number of its inhabitants. But now that the human race has multiplied so greatly, it could not subsist if every people wished to live after that fashion. Those who still pursue this idle mode of life occupy more land than they would have need of under a system of honest labor, and they may not complain if other more industrious Nations, too confined at home, should come and occupy part of their homes.

In Book 1, Section 209, Vattel wrote that the "Nations of Europe" may "lawfully take possession of" whatever "lands which the savages have no special need of and are making no present and continuous use of." *Id.* at 85. In Book 2, Section 97, Vattel reiterated his view that the Indigenous Nations in North America had no right to possess "the whole of that vast continent." *Id.* at 143.

land but still claiming absolute sovereignty and self-government over what remained unsold.<sup>90</sup>

While Thompson acknowledged that some Indigenous Nations had lost the capacity to be self-governing and existed as "mere remnants of tribes,"<sup>91</sup> he made it clear that the Cherokee Nation and many other Indigenous Nations had:

never been, by conquest, reduced to the situation of subjects to any conqueror, and thereby lost their separate national existence and the rights of self-government, and became subject to the laws of the conqueror. Whenever wars have taken place, they have been followed by regular treaties of peace, containing stipulations on each side according to existing circumstances; the Indian nation always preserving its distinct and separate national character.<sup>92</sup>

Thompson also found support for his dissent in Vattel's treatise on International law.<sup>93</sup> Vattel had written that a state could accept the protection of a more powerful state without surrendering its sovereignty:

[A] weak State, that, in order to provide for its safety, places itself under the protection of a more powerful one without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power. Tributary and feudatory States do not thereby cease to be sovereign and independent States so long as self-government and sovereign and independent authority is left in the administration of the State. Vattel, c. 1, pp. 16, 17.<sup>94</sup>

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90. *Cherokee Nation*, 30 U.S. (5 Pet.) at 53.

91. *Id.* at 74.

92. *Id.* at 55-56.

93. Justice Baldwin, in a concurring opinion concluding that Indigenous Nations could not be considered nations, disavowed any resort to international law to resolve the question of "whether the Indians were considered and treated with as tribes of savages or independent nations . . ." *Id.* at 32. Baldwin preferred, instead, to "expound the Constitution without a reference to the definitions of a State or nation by any foreign writer . . ." *Id.* at 40-41. Examining previous cases decided by the Court, Baldwin concluded that Indigenous Nations had not been considered to be nations, but rather "were considered as tribes of fierce savages; a people with whom it was impossible to mix, and who could not be governed as a distinct society." *Id.* at 48.

94. *Id.* at 53. It is a basic principle of international law that all states are equal; that a political entity does not become a nation on the basis of size or



c. The View that Indigenous Nations are Quasi-sovereign Domestic dependent Nations.

The majority opinion in *Cherokee Nation* determined that Indigenous Nations were not foreign states and that the Court could not, therefore, constitutionally exercise jurisdiction over the case. Marshall's opinion left no doubt that he considered the Indigenous Nations to be states,<sup>95</sup> although he questioned whether they could properly be considered to be "foreign" states. In highly influential and widely cited dicta,<sup>96</sup> Marshall reaffirmed the national rights of Indigenous Nations, not as foreign nations, but as domestic dependent nations:

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, per-

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strength. Oren Lyons, a traditional chief of the Onondaga Nation, expressed this foundational idea of the international community as follows:

Principled, honorable, international councils agree that size does not define equality. Inherent in all discussions is that the integrity of a nation lies in the spiritual and moral will of its people. And so when the nations gather, some may be richer, some may be poorer, some may be stronger, and some weaker, but in principle, all agree that they are equal. As we are.

Lyons, *supra* note 42, at 211.

95. Marshall wrote that the Cherokee Nation had:

been uniformly treated as a State from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community.

*Cherokee Nation*, 30 U.S. (5 Pet.) at 16.

96. The definition in *Cherokee Nation* of Indigenous Nations as "domestic dependant nations"—coupled with the holdings in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) (defining indigenous national title to territory as a right of occupancy), and in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), that state law cannot extend to indigenous territory—forms the basic foundation for modern law concerning Indigenous Nations in the United States. The basic principles set forth in these cases have been embraced by courts in the British Commonwealth countries. *See, e.g.*, *Regina v. Van der Peet*, 137 D.L.R.4th 289, 306-07 (1996) (relying on *Johnson* and *Worcester* to discuss history and legal consequences of European exploration and occupation of North America).

haps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.<sup>97</sup>

### C. *An International Dichotomy at the Berlin African Conference*

Several decades after the international competition for access to the Americas had subsided, a similar competition for access to the African continent came to be recognized as an international crisis.<sup>98</sup> At the urging of Germany and France, several nations convened at the Berlin Conference to determine how they could co-operate to regulate and insure freedom of commerce in Western Africa.<sup>99</sup> A by-product of such free

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97. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

98. John Kasson, a member of the American Legation at Berlin, expressed the fear that this crisis would move some of the states involved to belligerent actions: Almost daily notices reach us either of efforts on the part of some European nation to take actual possession of unoccupied coasts or islands or sections of the interior, or of the dispatch of vessels of war to those regions for some unavowed purpose. Thus, during the last few days, we hear of the dispatch of two naval vessels by Italy, and of the immediate departure of one of the Spanish vessels from Cadiz; and of the reported importation at Lisbon of a Congo native chief to claim the protection of that Government against other European encroachments.

Letter from John A. Kasson to Frederick Frelinghuysen, Secretary of State, Nov. 3, 1884, in A REPORT OF THE SECRETARY OF STATE RELATIVE TO AFFAIRS OF THE INDEPENDENT STATE OF THE CONGO 20 S. EXEC. DOC. NO. 196, 49th Cong., 1st Sess., (1886) (alteration in original) [hereinafter AFFAIRS OF THE INDEPENDENT STATE OF THE CONGO].

99. As Secretary of State Frelinghuysen wrote, the Conference sought to create "a great state in the heart of Western Africa, whose organization and administration shall afford a guarantee that it is to be held for all time . . . in trust for the benefit of all peoples . . . ." Letter from Frelinghuysen to John Kasson, Oct. 3, 1884, in AFFAIRS OF THE INDEPENDENT STATE OF THE CONGO, *supra* note 98, at 13, 14. Alpheus Snow described the result of the Berlin African Conference as the creation of a "Middle-African Zone of International Jurisdiction."

[T]he conference . . . created a political and territorial institution affecting territory greater in extent than that described as "the heart of western Africa," and having in some respects the character or, at least, the possibilities of a "great State" administering a "trust for all peoples."

The first step taken by the conference in this respect was the establishment of a "conventional basin of the Congo," which was in fact all middle Africa from ocean to ocean, including substantially all the

trade would be, the participants believed, the protection of the rights and interests of the Indigenous Peoples residing there.<sup>100</sup>

Participants at the Berlin Conference expressed concern over "the development, material and moral, of the indigenous populations."<sup>101</sup> Echoing Chief Justice Marshall's description of U.S./indigenous relations as resembling "that of a ward to his guardian,"<sup>102</sup> the participants determined that the conference would become the official guardian of the indigenous African nations affected:

In regard to these populations, which for the most part should, without doubt, be considered as finding themselves without the community of the law of nations, but who, in the present state of affairs, are scarcely qualified to defend their own interests, the Conference has thought proper to assume the role of official guardian. The necessity of securing the preservation of aborigines, the duty to aid them to attain higher political and social status, the obligation to instruct

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country between the Sahara Desert on the north and the rivers forming the northern boundary of what has since become South Africa.

Over this middle African zone the conference assumed what came very near to being an international over-sovereignty, supreme over the sovereignties exercised by the States having colonies in the zone. It decreed a régime in the nature of a supreme law of the land for the region, which the States having colonies in the region obligated themselves to follow, but which none of the States participating in the conference obliged itself to enforce. The zone established seems fairly to be described as one of international jurisdiction . . .

SNOW, *supra* note 33, at 145.

100. The conference participants' primary economic goal of regulating trade in Western Africa and their secondary moral goal of protecting Indigenous West Africans could be linked, as Prince von Bismarck, Chancellor of the German Empire, made clear during his welcoming remarks:

"In extending its invitations to this Conference, the Imperial Government was guided by the conviction that all the Governments invited shared the desire to promote the civilization of the natives of Africa by opening the interior of that continent to commerce, by furnishing the means of instruction to its inhabitants, by encouraging missions and enterprises calculated to diffuse useful knowledge, and by preparing the way to the abolition of slavery, and especially of the slave trade . . ."

Protocol No. 1. (Nov. 15, 1884), in *AFFAIRS OF THE INDEPENDENT STATE OF THE CONGO*, *supra* note 98, at 25.

101. Report Made in the Name of the Commission Charged to Examine the *Projet de Declaration Concerning Liberty of Commerce in the Basin of the Congo and its Affluents* [hereinafter *Commission Report*], in *AFFAIRS OF THE INDEPENDENT STATE OF THE CONGO*, *supra* note 98, at 76.

102. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

and initiate them into the advantages of civilization are unanimously recognized.

It is the future of Africa which is here at issue. No dissent manifested itself, in this respect in the commission.<sup>103</sup>

The Berlin Conference was an attempt to avoid the single-state monopolization of trade that had occurred in North America, which the participants believed would also protect indigenous national interests.<sup>104</sup> State monopolization of trade nevertheless took place, the most conspicuous example being Belgium's control over the Congo Free State. The Congo Free State had been organized under the auspices of the International African Association, a private international association controlled by Belgium.<sup>105</sup> As journalist and sociologist

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103. Commission Report, *supra* note 101. Of particular concern to the conference participants was the practice of slave holding and the traffic in slaves. The former scourge would disappear, the participants believed, as the civilizing influences of international commerce were extended throughout Africa. The slave trade, however, involved violations of norms so basic that the participants were of the opinion that it should be actively repressed when the international community was in a position to do so:

Two heavy scourges weigh on the actual condition of the African people, and paralyze their development—slavery and the trade. Every one knows . . . what deep roots slavery has in the constitution of the African societies. Certainly this malevolent institution should disappear; it is the condition even of all progress, economic and political; but superintendence, changes will be indispensable. It is enough to indicate the object; the local governments will seek the means and adapt them to the time and the instrumentality . . . . The trade has another character; it is the negation even of all law, of all social order. The hunting of men is a crime of treason against humanity. It should be repressed wherever it will be possible to extinguish it, on land as on sea.

*Id.*

104. As Snow points out, the conference participants believed that their goal of freedom of commerce could not be realized unless Indigenous African Nations were "given their proper and just relationship to the civilized governments and their citizens, and peace and order prevails." SNOW, *supra* note 33, at 147.

105. Snow described the origins of this organization as follows:

The International African Association was the result of an international conference of geographical societies held at Brussels in 1876, which had been suggested in various quarters, but was actually called by King Leopold II of Belgium. Belgium was under a neutrality guaranteed by Great Britain, France, and Germany, and was not a colonizing power. It was doubtless felt that an international agency to civilize Africa would be more likely to appeal to the public as truly international if it had its foundation in Belgium, than if it were founded in one of the colonizing States. Leopold II, having interested himself in geography and exploration, naturally was elected to the presidency.

Robert Park revealed, the Congo Free State became a Belgian colony in which trade was tightly controlled.<sup>106</sup> Park explained, Leopold initially encouraged international commerce in the Congo Free State and then:

crowded out or absorbed all private trade in 800,000 of the 900,000 square miles of territory in the state. Trade was supplanted by taxation. The territory of the state has been parceled out among stock companies, who pay fifty per cent of the profit to the state for the privilege of assessing and collecting these taxes. The men employed to collect the taxes are mostly armed Savages.

Leopold says the results are civilization. *The missionaries say they are hell. But everybody admits they are profitable.*

At the close of the Berlin Conference in 1885 the world looked upon the Congo State as a sort of international colony of which King Leopold had been appointed trustee. By the time he had begun to capitalize its wealth and the labor of its people, and to sell the stocks on the Brussels Exchange, the Congo had come to be regarded as a Belgian colony.<sup>107</sup>

The human rights abuses visited upon the Indigenous Peoples of the Congo under Leopold's system of extraction were severe. In Park's words it was a "system more ruthless than any the world has known since the Spanish conquest of America."<sup>108</sup>

#### IV. THE CURRENT STATE OF INDIGENOUS COMMERCE IN NORTH AMERICA

##### A. *The Adumbration of Indigenous National Sovereignty as a Barrier to Participation in Commerce*

The historic adumbrations of indigenous national sovereignty discussed in the previous section serve to impede indigenous participation in international trade by interposing a system of municipal law between Indigenous Nations and international markets. This interposition limits both indigenous access

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*Id.* at 133.

106. Robert E. Park, *A King in Business: Leopold II of Belgium, Autocrat of the Congo and International Broker* (1906), in STANFORD M. LYMAN, *MILITARISM, IMPERIALISM, AND RACIAL ACCOMMODATION: AN ANALYSIS AND INTERPRETATION OF THE EARLY WRITINGS OF ROBERT E. PARK* 218-19 (1992).

107. *Id.* at 218.

108. Robert E. Park, *Recent Atrocities in the Congo State* (1904), in LYMAN, *supra* note 106, at 205.

to natural resources as well as indigenous opportunity to introduce such resources into commerce. Whereas a state would have an inherent right to exploit natural resources lying within its territory for commercial purposes, subject only to whatever conservation or other measures it may voluntarily assent to by treaty,<sup>109</sup> an Indigenous Nation must comply with a system of state-imposed restrictions.<sup>110</sup> The national legal barrier to indigenous trade is illustrated in the Canadian Supreme Court's recent decisions on the extent to which regulations can impinge on indigenous fishing, an important economic activity for many Indigenous Nations.<sup>111</sup>

These decisions interpret a broad statutory recognition of aboriginal rights that is contained in Section 35(1) of the Constitution Act, 1982.<sup>112</sup> The Court, in determining to what ex-

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109. See, e.g., North Sea Continental Shelf Cases, [Ger. v. Den.; Ger. v. Neth.], 1969 I.C.J. 3, 22. The International Court of Justice there discussed the inherent sovereign right of states to exploit natural resources on the continental shelf:

[T]he rights of the coastal state in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is "exclusive" in the sense that if the coastal State does not choose to explore or exploit the areas of Shelf appertaining to it, that is its own affair, but no one else may do so without its express consent.

*Id.*

110. These restrictions may be statutory in nature or may be the products of decisional law. A restriction on indigenous national commerce in the United States is the common law doctrine of *Utah & Northern Railway v. Fisher* whereby state governments can tax economic activity on tribal territory where the tax does not interfere with an indigenous national interest. Although Chief Justice Marshall's well known discussion in *McCulloch v. Maryland* might suggest that any state taxation would interfere with a paramount indigenous national interest in preserving political independence, courts over the decades have extended the *Utah & Northern Railway* doctrine to great and intrusive lengths. See *Utah & N. Railway v. Fisher*, 116 U.S. 29 (1885).

111. See *Regina v. Adams*, 138 D.L.R.4th 657 (1996) (holding that Mohawks have "the aboriginal right to fish for food . . . , as opposed to the right to fish commercially, is a right which should be given first priority after conservation concerns are met"); *Regina v. Van der Peet*, 137 D.L.R.4th 289, 306-07 (1996) (holding that Sto:lo have no aboriginal right to sell fish).

112. Constitution Act, 1982, § 35(1) provides that "The existing aboriginal and

tent fishing regulations can be enforced against members of Indigenous Nations, has placed the aboriginal right to fish on a hierarchy: aboriginal rights fall below conservation and commercial fishing interests in importance, but are superior to the interest in sports fishing, at least in cases where sports fishing lacks "a meaningful commercial dimension."<sup>113</sup>

The Court in these cases recognized two types of aboriginal rights: (1) aboriginal title to land and related rights based on such title; and (2) aboriginal rights that "exist independently of a claim to aboriginal title," the so-called "free-standing aboriginal rights."<sup>114</sup> A challenge to the application of fishing regulations to members of an Indigenous Nation, when it is based on an assertion of a free-standing right, must be supported by a showing that the right was part of the traditional customs and practices of the nation in question: "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."<sup>115</sup>

The Court determined that only the customs and practices of an Indigenous Nation prior to contact with Europeans could support a claim based on an aboriginal right and then only if there is sufficient continuity between pre-contact and practices today: "The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the traditions, customs and practices that existed prior to contact."<sup>116</sup> Even where a practice is integral to an indigenous culture and sufficient continuity with pre-contact indigenous culture can be shown, a regulation that infringes on an aboriginal right may be upheld if the infringement is justified.<sup>117</sup>

It is important to note that judges who are more sympa-

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treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

113. See *Regina v. Adams*, 138 D.L.R.4th at 679.

114. *Id.* at 660, 661.

115. *Regina v. Van der Peet*, 137 D.L.R.4th at 310. It is not sufficient under *Van der Peet* to merely show that a custom or practice claimed as a right "was an aspect of, took place in, the aboriginal society." A claimant rather must show that the right claimed was "integral" by "demonstrating that the practice, tradition or custom was a central and significant part of the society's distinctive culture . . . —that it was one of the things that truly *made the society what it was.*" *Id.* at 313-14.

116. *Id.* at 315.

117. See *Regina v. Adams*, 138 D.L.R.4th at 678.

thetic to the promotion of indigenous national commerce have a different reading of history. The British Columbia Court of Appeals, in upholding an aboriginal right to sell fish, believed that the Sto:lo and other Indigenous Nations of the "Upper Great Lakes" did indeed participate in "a far-flung trade and exchange network which extended at least as far south as the Gulf of Mexico."<sup>118</sup> Furthermore, not willing to "freeze" aboriginal rights at an arbitrary point in history—at contact—the British Columbia court described the Sto:lo's participation in the cured salmon trade during the nineteenth century. The court described how records of the Sto:lo trade in fish from 1830 to 1873 revealed that this commercial activity grew steadily and was not limited to the Great Lakes region. Fish supplied by the Sto:lo were traded to the Hudson's Bay Company, which, in turn: "established a major market for very significant quantities of cured salmon in the Sandwich Islands [and] tried to establish markets in the United States at San Francisco, in China, in England and in Tahiti."<sup>119</sup>

A substantial barrier to indigenous commerce in the United States is the ability of state governments to tax economic activities occurring on tribal territories under *Utah & Northern Railway v. Fisher*.<sup>120</sup> Under *Utah & Northern Railway*, the Supreme Court determined that a railroad company was not exempt from paying taxes to a territorial government on 69 miles of its track running across the Fort Hill Reservation.<sup>121</sup> The case held that, inasmuch as no indigenous national interest was infringed, the territory could tax the railroad.<sup>122</sup> This holding soon gave rise to a widely-applied doctrine under which state governments justified taxing any economic activity save that conducted exclusively between members of Indigenous Nations. Although the doctrine is based on the assumption that such taxation infringes upon *no* indigenous national interest, an examination of the decisions that cite *Utah & Northern Railway* for support reveal that, to the contrary, the economic interests that state taxation affected were wide-rang-

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118. *Regina v Van der Peet*, 83 C.C.C. 3d 289, *rev'd* 137 D.L.R.4th 289 (1993) (quoting *United States v. Michigan*, 471 F. Supp. 192 at 223 (1979)).

119. *Id.*

120. *Utah & N. Railway v. Fisher*, 116 U.S. 29 (1885).

121. *Id.*

122. *Id.*



ing and important. These economic interests included—in addition to taxes on a railroad<sup>123</sup>—taxes on cattle grazing;<sup>124</sup> taxes on the property of nonindigenous persons residing on tribal territories;<sup>125</sup> mining operations;<sup>126</sup> and cigarette sales.<sup>127</sup> *Utah & Northern Railway* has also been cited to support territorial intrusions made upon Indigenous Nations,<sup>128</sup> a state

123. See *Maricopa & Phoenix R.R. Co. v. Territory of Arizona*, 156 U.S. 347 (1895) (tax by the Territory of Arizona on 6.24 miles of railroad lying within the Gila River Reservation valid).

124. See *Torrey v. Baldwin*, 26 P. 908 (Wyo. 1891) (Shoshone Reservation is within the Territory of Wyoming and cattle grazed on that reservation by nonindigenous nationals can properly be taxed by the territorial government); *Truscott v. Hurlbut Land & Cattle Co.*, 73 F. 60, 62 (9th Cir. 1896) (Montana may validly tax nonindigenous-owned cattle grazing carried out pursuant to leases with the Crow Nation, notwithstanding an Indian agreement of 1882 [22 Stat. 42] directing the Secretary of the Interior to "fix the amount to be paid" by parties permitted to graze cattle on tribal lands and directing that "all moneys arising from this source" be paid to the Crow Nation); *Thomas v. Gay*, 169 U.S. 263 (1897) (upholding the validity of an Oklahoma Territorial tax on nonindigenous-owned cattle that were grazed on Osage and Kansas tribal territories pursuant to tribal leases).

125. See *Coe v. Cleghorn*, 79 P. 72 (Idaho 1904) (attachment levied against the property of a nonindigenous national farmer residing on the Cœur d'Alene Reservation held valid); *Lebo v. Griffith*, 173 N.W. 841 (S.D. 1919) (school board validly included portion of Cheyenne River Reservation within its boundaries and properly taxed nonindigenous national residing therein); *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253 (9th Cir. 1976) (San Bernardino County's possessory interest tax placed on nonindigenous lessees of indigenous national [Fort Mojave] land valid); *Chief Seattle Properties v. Kitsap County*, 541 P.2d 699 (Wash. 1976) (State may collect personal property tax on leasehold interest and improvements of nonindigenous lessee of Suquamish land).

126. See *In re Skelton Lead & Zinc Co.'s Gross Prod. Tax for 1919*, 197 P. 495 (Okla. 1921) (state tax on the gross production of minerals from nonindigenous-owned mining operations located within lands allotted to the Quapaw Nation and held in trust by the federal government held valid); *Protest of Bendelari, Gross Prod. Tax, 1919*, 198 P. 606 (Okla. 1921) (same).

127. See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980) (holding that "principles of federal Indian law whether stated in terms of pre-emption, tribal self-government, or otherwise" do not authorize Indigenous Nations "to market an exemption from state taxation to persons who would normally do their business elsewhere." Washington could therefore validly tax cigarettes sold on tribal territories to nonindigenous nationals and enforce such tax through seizures of untaxed cigarettes en route to indigenous national territories).

128. See *King v. M'Andrews*, 104 F. 430, 435 (C.C.D.S.D. 1900); rev'd 111 F. 860 (8th Cir. 1901) (1885 extension of the corporate limits of the City of Chamberlain into the Great Sioux Reservation was valid inasmuch as "the inclusion of a few acres" of indigenous national territory within the city "in no way interfered with the rights or property of the Indians"); *Shore v. Shell Petroleum Corp.*, 55 F.2d 696, 702 (D. Kan. 1931) (portion of bed of Arkansas river historically within

condemnation proceeding taking indigenous national land<sup>129</sup> and extensions of state jurisdiction.<sup>130</sup>

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territory of Osage Nation was beneath navigable waters and had become part of state of Kansas upon Kansas' admission to Union); *Anderson v. Brule County*, 292 N.W. 429 (S.D. 1940) (1885 act of the territorial legislature extending the city limits of Chamberlain to include a portion of the Great Sioux Reservation valid).

129. See *United States v. Cattaraugus County*, 71 F. Supp. 413 (W.D.N.Y. 1947) (upholding validity of New York condemnation proceeding whereby lands of the Seneca Nation were acquired for state highway purposes).

130. See *Red Hawk v. Joines*, 278 P. 572 (Or. 1929) (state has jurisdiction over replevin action arising on allotted land within the Umatilla Reservation); *State Securities, Inc. v. Anderson*, 506 P.2d 786 at 789 (N.M. 1973) (state has jurisdiction in cases between members of Indigenous Nations and nonindigenous nationals involving contractual obligations incurred off the reservation; process may be served on indigenous nationals while they are within the boundaries of the reservation); *Norvell v. Sangre de Cristo Dev. Co.*, 372 F. Supp. 353 (D.N.M. 1974) (New Mexico's regulation of land subdivision, construction licensing and water did not substantially interfere with the Pueblo of Tesuque where regulations were applied to nonindigenous lessees' large commercial and residential development built on Pueblo lands); *People v. Snyder*, 141 Misc. 2d 444 at 452 (Co. Ct. 1988) (New York has criminal jurisdiction over operation of electronic gambling devices located on the Cattaraugus Reservation since there was no applicable Seneca ordinance prohibiting gambling at the time the offense occurred and application of state law would result in "no infringement of the Seneca Nation's right to create rules governing their internal and social relations"); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) (Alaska can validly apply prohibition on fish traps to Organized Village of Kake's use of fish traps and the Angoon Community Association); *State v. McCoy*, 387 P.2d 942 (Wash. 1963) (State has right to regulate off-reservation fishing notwithstanding 1855 Treaty of Point Elliott guaranteeing "right of taking fish at usual and accustomed grounds and stations"). *But see Territory v. Annette Island Packing Co.*, 6 Alaska 585, 624 (D. Alaska 1922) (nonindigenous-owned salmon canning operation conducted under a lease from the Secretary of the Interior for the benefit of the Metlakatla Nation was federal instrumentality and occupational license tax imposed by the territorial government on cannery was unlawful); *United States v. Minnesota*, 95 F.2d 468 (8th Cir. 1938) (condemnation of allotted lands within Grand Portage Reservation for state highway purposes not valid absent federal permission); *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965) (Federal regulation of Indian traders, including their appointment and licensing by the Commissioner of Indian Affairs, is sufficiently comprehensive as to exclude Arizona's 2% gross proceeds tax on trading post); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) (Arizona could not validly collect income taxes from individual members of the Navajo Nation and state's argument that the rights of individual members of the tribe were distinct from the interests of the tribe as a whole for state tax purposes deemed unpersuasive); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (federal regulation of indigenous national timber harvesting pre-empts state jurisdiction over it and Arizona motor carrier license tax and excise or use fuel tax were improperly applied to nonindigenous-owned logging companies that hauled lumber across state highways located within the Fort Apache Reservation); *Yakima Indian Nation v. Whiteside*, 735 F. Supp. 735, 745-746 (D.C. Wash. 1985) (although county has jurisdiction over nonindigenous-owned land located within the

The economic barriers to indigenous national participation in global commerce are the residuum of an earlier system in which the isolation of Indigenous Nations was extreme and was, in many instances, enforced with military power.<sup>131</sup> The boundaries that enclosed Indigenous Nations within frequently barren territories—boundaries that shrunk under the impact of repeated coerced land cessions—set Indigenous Nations apart from states as “enclaved peoples.” As two commentators note:

The political and legal system of Native American reservations in the United States is an unusual structural arrangement between enclaved peoples and the larger political state that encapsulates them. The forms of “native administration” that developed here and in other English colonies such as Australia, Canada, and New Zealand have in common almost total displacement of an aboriginal population by massive European migration, followed by the development of a system of permanent political reserves and administered communities. This pattern is by no means a common, inevitable, or self-explanatory outcome of cultural contact; nor was it even in the era of colonialism.<sup>132</sup>

While the boundaries surrounding indigenous national territories fall short of a hermetic confinement today,<sup>133</sup> they

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external boundaries of reservation, except to the extent such jurisdiction infringes on indigenous national sovereignty or is preempted by federal law, indigenous national interest in regulating land at issue outweighed county's minimal regulatory interest and county's jurisdiction therefore preempted by federal law).

131. See FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN CRISIS* 72-102 (1976) (detailing the historic policy debate over whether U.S. administration of Indian affairs should be conducted by military or civilian departments of government). See also Frederick E. Hoxie, *Crow Leadership Amidst Reservation Oppression*, in *STATE AND RESERVATION* 38 (George Pierre Castile & Robert L. Bee eds., 1992) (observing that “[e]ven after [some] Native Americans had received individual titles to real estate previously occupied communally, federal agents continued to incarcerate Indians for infractions of reservation rules and to enforce their ‘civilization program’ with military power.”).

132. George Pierre Castile & Robert L. Bee, *Introduction*, in *STATE AND RESERVATION*, *supra* note 131, at 1.

133. As learned sociologists have observed, interactions among people—and among peoples—do not invariably stop and start at national boundaries. See, e.g., STANFORD M. LYMAN, *NATO AND GERMANY: A STUDY IN THE SOCIOLOGY OF SUPRANATIONAL RELATIONS* 203 (1995) (observing that “[n]etworks of interaction need not and often do not form themselves along the lines drawn to mark nation-state borders on geopolitical maps” and that “[s]uch networks range from the personal to the professional and indicate elements of a burgeoning international civil society that transcends the boundaries and circumvents the defenses against interaction

do demarcate political spaces characterized by biting and enduring poverty. This enduring poverty continues to constitute a barrier to indigenous national participation in world trade. Moreover, inasmuch as economic opportunity for individual members of Indigenous Nations outside of the reservations remains dwarfed by racial discrimination,<sup>134</sup> the mere possibility of exit from these enclaves is a poor remedy for a history of enforced isolation.<sup>135</sup>

*B. Conclusion: The Feasibility of Relying on International Law to Encourage Free Indigenous National Participation in Commerce*

The historic isolation of Indigenous Nations from international trade is perpetuated by currently-existing municipal legal barriers to indigenous commerce. This circumstance makes it likely that the current legal framework will hinder Indigenous Nations that wish to revitalize their economies. One alternative is to rely on international law to guarantee that Indigenous Nations will have an opportunity to participate substantially—and without undue state hindrance—in international trade and global commerce. Present international efforts to bolster the rights of Indigenous Peoples tend to stop short of recognizing an indigenous national right to self-deter-

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across state lines.”); STANFORD M. LYMAN, *CIVILIZATION: CONTENTS, DISCONTENTS, MALCONTENTS, AND OTHER ESSAYS IN SOCIAL THEORY* 19 (1990) (discussing the use of the term “civilization” by sociologists Émile Durkheim and Marcel Mauss, to describe the “often seen but rarely noticed fact that certain phenomena—including tools, aesthetic styles, languages, and institutions—thrive beyond politically determined boundaries and . . . have a life that is ‘supranational’”).

134. Stanford Lyman raises the possibility that “the racial and ethnic discriminations suffered by Asians, Hispanics, and Indians are vestiges of the system of black slavery” and that these groups are properly the subject of remedies fashioned by Congress to address such racial and ethnic discrimination. STANFORD M. LYMAN, *COLOR, CULTURE, CIVILIZATION: RACE AND MINORITY ISSUES IN AMERICAN SOCIETY* 332-33 (1994).

135. For example, when the Choctaw Nation ceded its eastern lands and migrated west, some members of the nation chose to stay behind and become citizens of the state of Mississippi. Departure from the main body of the tribe, however, proved to be easier than full entry into the privileges and immunities of state citizenship. As two noted authorities explain, “[t]hose Indians who remained behind in Mississippi . . . fared poorly as state citizens in spite of a federal guarantee that they could reserve a homestead of 640 acres and assimilate into southern society.” VINE DELORIA JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 7 (1983).

minacy and instead focus exclusively on "non-economic" human rights. This focus tends to leave the economic isolation of Indigenous Nations largely unchallenged.

A more energetic approach to addressing the economic isolation of Indigenous Nations would require at least some recognition of the political autonomy of Indigenous Nations.

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