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America's First Nations: The Origins, History and Future of American Indian Sovereignty

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AMERICA'S FIRST NATIONS: THE ORIGINS, HISTORY AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY

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INTRODUCTION

It is often said that Christopher Columbus "discovered" America. The truth is, the territory now known as the United States was occupied by large groups of indigenous people long before the Europeans reached her shores. If asked, these native people will tell you that they have occupied this land since time immemorial.[1] Indeed, many native tribes have creation stories which teach that their people first came to this land when it was covered with water.[2] These creation theories are, of course, contrary to the Euro-anthropologists' theory that there was once a land bridge between Asia and North America, making a one-way street by which the people of Asia migrated to a previously empty North America.

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[1] America's indigenous people are commonly referred to as Indians due to Columbus' mistaken belief that he had reached the East Indies (hence the term "Indian").

[2] *See, e.g.*, WILLIAM E. COFFER, SPIRITS OF THE SACRED MOUNTAINS: CREATION STORIES OF THE AMERICAN INDIAN 74, 89-90 (1978) (relating the creation stories of the Yakima and Kansa tribes); THE WORLD BEGINS HERE: AN ANTHOLOGY OF OREGON SHORT FICTION 17 (Glen A. Love, ed., 1993).

At any rate, it is undisputed that the lands which now comprise the United States were occupied by distinct groups of native people prior to the introduction of the first Europeans on the continent. These distinct nations of people, referred to as "tribes" in most texts, possessed their own unique social, cultural and political system under which they were free to govern themselves and to exist as a separate people. Their history is inextricably intertwined with the history behind the creation of the United States and the westward movement. Indian tribes today continue to possess sovereign jurisdiction over both their members and the territory which they occupy (commonly referred to today as Indian reservations or Indian Country).[3]

This Article examines Indian tribal sovereignty, its history, what it has come to mean in the present, and what it should mean for the future. The analysis will show that the Indian nations that continue to exist today are distinct peoples culturally and politically, and have always possessed sovereignty over both their members and their territory—sovereignty which has survived the formation and growth of the United States, and is recognized in the United States Constitution, numerous treaties and the annals of history. Yet this sovereignty, though at times recognized and protected by the federal judiciary and Congress, has at other times been attacked by lawyers and politicians who have either forgotten history or who choose to ignore it.

The concept of "tribal sovereignty" is hard to define, primarily because the pendulum-like swing of federal Indian policy since the creation of the United States Constitution has been so inconsistent and has affected tribal sovereignty as much as it has affected Indian people themselves. Indeed, if one were to ask tribal leaders to define tribal sovereignty in general, it would be impossible to obtain a unanimous response. And yet, most would agree with Chief Red Cloud, the great Oglala Sioux chief, who said:

> The Great Spirit made us, the Indians, and gave us this land we live in. He gave us the buffalo, the antelope, and the deer for food and clothing. We moved on our hunting

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[3] *See, e.g.*, Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. § 1151 (1994)).

> grounds from the Minnesota to the Platte and from the Mississippi to the great mountains. No one put bounds on us. We were free as the winds and eagle.[4]

Tribal sovereignty, then, essentially means freedom. An independence which allows Indian people to make and be governed by their own laws, to control the social, economic and political forces within the territory they occupy, to practice their religion and sustain their culture free of constraints. The various groups of native people historically possessed absolute sovereignty in the traditional legal sense. They governed themselves, they made war and peace, and were essentially free to live as they saw fit. With the arrival of the Europeans and eventual creation of the United States, a few tribes were extinguished, a few others assimilated. But most tribes successfully fought for and retained their separate cultural, social and political identity, and most were able to retain at least a portion of the territory they historically occupied.

Today there are over 500 federally recognized Indian tribes, most of which occupy reservations with distinct boundaries that define their territory.[5] Many of these tribes still occupy reservations within their traditional homeland.[6] Their fight to retain their sovereignty, which historically took the form of warfare and treaty making, continues today in the halls of Congress, in the courts and through the power of civil demonstration.[7] These tribes have survived the onslaught of the westward movement under the naturalistic theory of "manifest destiny;" they have survived wars, prejudice, disease, and the destruction of their food sources; and most notably, they have survived the imposition of over 200 years of inconsistent and at times brutal and inhumane federal policy and

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[4] AMERICAN INDIAN QUOTATIONS 58 (Howard J. Langer ed., 1996).

[5] DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 8 (3d ed. 1993).

[6] There are some exceptions of course. Most notable are some of the Indian tribes currently residing in Oklahoma, which previously were removed from their traditional eastern homelands with the expansion of white settlers west from the original thirteen colonies.

[7] *See generally* VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE (1974) [hereinafter DELORIA, BEHIND THE TRAIL OF BROKEN TREATIES].

corrupt bureaucrats. Felix S. Cohen, the acknowledged expert on Indian law and policy, was certainly correct when he described the history of America's federal Indian policy:

> Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith . . . .[8]

It is a tribute to the endurance of America's first nations that they have survived the various political shifts in congressional policy and judicial decision-making, and that they have clung to their sovereignty and their right to exist as separate political communities within the United States. This Article will illustrate that, with the exception of the federal policy supporting tribal self-government, every single federal Indian policy, from attempted assimilation to termination, has failed miserably. These federal policies have failed primarily because of resistance from the Indian tribes themselves, and their steadfast refusal to part with what remains of their land base and their sovereignty. These policies also failed because the Indian tribes had the support of a number of dedicated policymakers who understood history, the Indians' perspective, and the importance of abiding by the United States' treaty obligations. In the end, these policies failed because they simply could not be morally justified by any civilized democratic society concerned with the preservation of basic human rights.

Part I of this Article will trace the historical origins and evolution of tribal sovereignty from pre-colonial time through the present. This Part will explain how the United States' political climate has influenced the development and/or diminishment of tribal sovereignty, and how the lack of a meaningful and consistent federal policy protecting tribal sovereignty has resulted in the weakening of the Indian tribes' social, political and cultural structures.

Part II of this Article will discuss the present condition of tribal sovereignty, focusing on the legal limitations that have been placed

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[8] F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW v (Rennard Strickland et al. eds., 1982).

on sovereignty by Congress and the courts, including the current trend of the Supreme Court to limit the territorial exercise of tribal sovereignty—a trend supported by some members of Congress. This Part will also suggest measures Indian tribes and tribal governments can take to stop this renewed effort to erode their historic right to occupy and govern within the remnants of their territory.

Finally, in Part III, this Article will explain why it would be disastrous for Congress to once again shift away from its current policy of promoting tribal self-government. Maintaining and actually enforcing the current federal policy is particularly important because Indian tribes are just now becoming familiar with the rules governing their effort to incorporate and adopt a new system of government that is in many ways foreign to their traditional ways. They are continuously learning how to survive in the world of capitalism, and have in the past twenty-five years made great strides in business and economic development. With this advancement comes increased regulation, and the need to exercise jurisdiction in areas previously left unregulated. The increased regulation by tribes seeking social and economic advancement often results in disputes between tribes and non-Indians either residing or doing business in Indian country. The result has been increasing attacks on sovereignty itself. This Article will show that the continued preservation of tribal sovereignty is critical to the continued advancement of America's first nations. Hopefully, lawyers, judges, and lawmakers at local, state and national levels will recognize that tribal sovereignty is the foundation upon which Indian tribes can revitalize their communities, engage in constructive commerce with their non-Indian neighbors, and become self-sufficient political entities within our constitutional scheme.

The focus throughout this Article will be on the government-to-government relationship between the United States and Indian tribes—a relationship founded upon early treaties, and later upon laws and executive orders continuously recognizing the right of the Indian tribes to occupy their own distinct territory. The ultimate goal is to provide a historical and legal understanding of tribal sovereignty, and to explain the basis upon which tribes exist as sovereigns within the framework of the Constitution and laws and

why their sovereignty must be protected. From this understanding should come the recognition that a return to the assimilation/termination policies of the past, by which its proponents have attempted to destroy Indian sovereignty, is legally and morally wrong.

I. THE HISTORICAL ORIGINS AND EVOLUTION OF TRIBAL SOVEREIGNTY

Federal Indian law is informed by many academic disciplines, but "[p]robably the most significant source . . . is history."[9] Many of today's policy makers, lawyers and judges forget that the sovereignty of this country's Indian tribes has a unique historical basis which must inform their present day status. The failure to understand history is the primary reason why so many fail to understand why tribal sovereignty exists at all.

A. Early History: Colonization, the Constitution and the Indian Treaties

From pre-colonial times to approximately 1870, tribal sovereignty was expressly recognized in numerous treaties between the British, the colonists and later the United States, and the various Indian tribes with whom they came in contact. When the Constitution was drafted and ratified, and for over a century following, the native Indian tribes who occupied their own territory were military forces to be reckoned with. The European countries exploring the New World, including England, sought the tribes as allies in their wars with each other over the right to occupy the New World. When the colonists declared their independence and drafted the Constitution, the Indian tribes to the north, south and west of the original colonies were considered sovereign powers, to be dealt with on a government-to-government basis.

Of course, the Indians did not take part in drafting the Constitution, so the Constitution, not surprisingly, does not expressly mention Indian sovereignty. Nor does it deal with the natives' prior

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[9] COHEN, *supra* note 8, at 48.

title to the land the colonists occupied. Instead, the Constitution is dominated by two major concerns: "the allocation of governmental authority between the federal and state sovereigns and the distribution of federal authority within the executive, legislative and judicial branches of [the federal] government."[10] Nevertheless, America's first nations were given express constitutional recognition in the Commerce Clause, which gives Congress the power to "regulate [c]ommerce with foreign Nations, and among the several States, and with the Indian Tribes."[11] Because there were many powerful Indian tribes who constituted a real threat to the young United States, it is no coincidence that the Commerce Clause of the Constitution places Indian tribes alongside foreign nations and the various states within the constitutional framework.

Tribal sovereignty also finds implicit recognition in the treaty clause of the Constitution, which gives the President the power to make treaties with the advice and consent of the Senate.[12] At the time the Constitution was created, it was common practice for the colonists to execute treaties with the Indian tribes, so it is not hard to conclude that the treaty clause was drafted with the Indians in mind.

This country's native people were organized socially, politically and economically prior to the drafting of the Constitution and long before the Europeans arrived on the continent.[13] The first visitors to the New World encountered many nations of native people. The Chesapeake Bay region was characterized as "densely populated with towns of independent nations . . . well supported by farming, hunting, fishing, and . . . gathering."[14] Spanish explorers met the Zuni in the Southwest and commented on the "rich, watered fields

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[10] Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 MONT. L. REV. 313, 314 (1997).

[11] U.S. CONST. art. I, § 8, cl. 3.

[12] *Id.* art. II, § 2, cl. 2.

[13] *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 100 (1987).

[14] ALVIN M. JOSEPHY, JR., 500 NATIONS: AN ILLUSTRATED HISTORY OF NORTH AMERICAN INDIANS 181 (1994).

and numerous settled towns amply stocked with food and supplies."[15] The Iroquois Confederacy of the Northeast possessed a constitution known as The Great Peace Pact. It contained "practically all the safeguards which have been raised in historic parliaments to protect home affairs from centralized authority, and to insure internal peace without domestic tyranny."[16]

During the early years when Europe was exploring America, legal scholars were debating the rights of the native people the explorers encountered, particularly the tribes' prior claim to the land. Spanish legal theorist Franciscus de Victoria (1480-1546) laid the foundation for his country's colonial-era theory, based upon humane "natural law" principles, which would later influence many principles of international law.[17] Victoria argued that the indigenous people of America possessed natural legal rights as free and rational people and had inherent rights under natural law to the territory they occupied.[18] According to the law of nations, the European explorers had no lawful right to dispossess the Indians of their prior title to the land.[19] By the same token, Victoria also argued that the Indians were themselves subject to these natural law principles, such that they could not "causelessly prevent" the Europeans from economically exploiting the New World as long as it could be done without injury to the tribes.[20] Any disputes over the right of the Europeans to visit and exploit the New World could be settled by armed conflict.[21]

Victoria's writings, though persuasive to many, were in many ways at odds with the harshly stated law of discovery embraced by the Pope and England, and later the United States. The discovery doctrine was based on the belief that America was occupied by "heathens and infidels"—sinners whose lands could be taken by force and without cause.[22] Gradually, the discovery doctrine came

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[15] *Id.* at 162.

[16] ARTHUR POUND, JOHNSON OF THE MOHAWKS 68 (1930).

[17] GETCHES, *supra* note 5, at 50-51.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 52-53.

[21] *Id.*

[22] *Id.* at 45-54. *See also* Lindsay G. Robertson, *John Marshall As Colonial*

to be recognized as the legal basis upon which the Europeans, and later the United States, could acquire title to the Indians' land.[23] Upon European "discovery," it was said, (1) that fee title to the land passed to the discovering European sovereign, and (2) that the real property interest the tribes did possess, a so-called right of occupancy, could be conveyed by the tribes only to the European sovereign or successor in interest.[24] Thus, the tribes were considered by proponents of the discovery doctrine to be divested of any fee title and the right to freely alienate or sell their land to anyone other than the European sovereign who "discovered" their land.[25] The discovery doctrine cannot be easily justified historically simply because the theory was never put in practice. The Indians had never heard of the "discovery" doctrine, and probably would have scoffed at any notion that the Europeans obtained rights to their territory simply by landing on the shores of America. Nevertheless, the discovery doctrine was incorporated as federal law by Chief Justice John Marshall in *Johnson v. M'Intosh*.[26]

The fallacy underlying the discovery doctrine aside, the sovereignty of America's tribes was legally recognized well before the founding of the United States. Indians outnumbered settlers for "several decades" and as a result, early "colonial governments obtained most of their lands by purchase" rather than force or theoretical "discovery."[27] Much of the land acquisition was done by treaty, with the consent of the Indians. The practice of treating for Indian land was based on the following assumptions: "(1) that both parties to treaties were sovereign powers [since treaties are essentially agreements between nations]; (2) that Indian tribes had some form of transferrable title to the land; and (3) that acquisition of Indian lands was solely a governmental matter, not to be left to individual colonists."[28] Thus, regardless of the theoretical basis

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Historian: Reconsidering the Origins of the Discovery Doctrine, 13 J.L. & POL. 759, 761-62 (1997).

[23] *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 595-96 (1823).

[24] *Id.* at 588-94.

[25] *Id.* at 591-92. *See also* Robertson, *supra* note 22, at 760.

[26] 21 U.S. at 587-94.

[27] COHEN, *supra* note 8, at 55-56.

[28] COHEN, *supra* note 8, at 53.

underlying the discovery doctrine, in reality the Indians "were treated as sovereigns possessing full ownership rights to the lands of America."[29]

The early colonists recognized Indian sovereignty, and rebelled against British attempts to restrict colonial deals for Indian land. This can be seen in the colonists' reaction to the English Crown's Proclamation of 1763, which reserved the lands west of the Appalachian mountains to the Indian tribes, such that any land transactions in the region required royal approval.[30] Many land speculators, including George Washington and the colonial governments themselves, considered the Proclamation an infringement on their rights to purchase and treat for land directly with the tribes. Legal scholar Robert A. Williams, Jr. writes that many arguments were put forth against the Proclamation, "[b]ut undoubtedly one of [the colonists'] favorite arguments held that Indian tribes, as free and sovereign nations, possessed the natural law right to sell the lands they occupied to whomsoever they wished."[31]

The colonists were also exposed to, and heavily influenced by, native political organization. The Iroquois Confederacy, a government based upon democratic principles, had a particular influence on the founding fathers. As a result of diplomatic meetings held during the time the colonists sought the Iroquois as allies, Benjamin Franklin was impressed with the Iroquois system of uniting different tribes into a common, more powerful confederacy, and advocated the same for the several English colonies.[32] Franklin was referring not only to the alliance of the separate tribes under one confederacy, but also to the democratic principles of the Iroquois. They had "provisions for initiative, referendum and recall, and suffrage for women as well as men."[33] The Great Council of

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[29] COHEN, *supra* note 8, at 55.

[30] BARBARA GRAYMONT, THE IROQUOIS IN THE AMERICAN REVOLUTION 49 (1972).

[31] Robert A. Williams, Jr., *The Discourses of Sovereignty in Indian Country*, 11 INDIAN L. SUPPORT CTR. REP. 1, 2-3 (1988).

[32] Ray Halbritter & Steven Paul Mcsloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT'L L. & POL. 531, 544 n.49 (1994).

[33] Felix S. Cohen, *Americanizing the White Man*, *in* THE INDIAN'S QUEST

the Confederacy consisted of an upper (older brothers) house and a lower (younger brothers) house and consensus was mandatory.[34] Other eastern tribes had similar democratic governments:

> The Deep South was controlled by three confederacies: the Creeks with their town system, the Natchez, and the Powhattan confederation which extended into tidelands Virginia. The Pequots and their cousins the Mohicans controlled the area of Connecticut, Massachusetts, Rhode Island, and Long Island.[35]

Western Indian tribes had similar political systems. For example, during the period from 1782 to 1800, the Mandan and Hidatsa of the upper Missouri had a federation of three Hidatsa villages and nine or more Mandan villages organized for mutual defense against neighboring enemies.[36] The three individual Hidatsa villages had their own tribal council composed of the most distinguished war leaders of each village, reportedly consisting of ten to twelve members. Decisions were usually by unanimous consent. The Mandan maintained their own governing councils, but the two independent councils met jointly from time to time to discuss common problems.[37] The Mandan and Hidatsa would soon be joined by the Arikara, and the Three Tribes remain united to this day.[38]

At the outset of the Revolutionary War, both the British and the colonists sought the assistance of the strong eastern tribes, whose military support would undoubtedly influence the fighting. Typically, this assistance was obtained by treaty. For example, the Iroquois territory was located in the heart of the fighting. Both the British and the Americans had been soliciting the Iroquois' alliance

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FOR JUSTICE: SELECTED PAPERS OF FELIX S. COHEN 315, 319, Book 2 of THE LEGAL CONSCIENCE (Lucy Kramer Cohen ed., 1970).

[34] BRUCE E. JOHANSEN, FORGOTTEN FOUNDERS 25 (1982).

[35] VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS 12 (1988) [hereinafter DELORIA, CUSTER DIED FOR YOUR SINS].

[36] ALFRED W. BOWERS, HIDATSA SOCIAL AND CEREMONIAL ORGANIZATION 24 (1992).

[37] *Id.* at 27-29.

[38] *See* Bruce H. Lien Co. v. Three Affiliated Tribes, 93 F.3d 1412, 1414 n.1 (8th Cir. 1996).

(or continued neutrality as the colonies preferred).[39] Aware of the problems the colonies would face if the tribes did support England, the Continental Congress organized an "Indian department in competition with the British Indian administration and had formulated plans to attach the Indians to the American cause."[40] The political responses of the British and the colonies illustrate a healthy respect for the power possessed by the Indians.

Contrary to popular myth, nearly all of the early Indian treaties were treaties of peace and friendship whereby the colonists sought the aid of the tribes against the British. Most of the Indian treaties were not the result of "conquest" as many textbooks teach. Instead, they were born of the need of the colonists to have the more powerful tribes as their allies. This proposition is amply illustrated when one examines the history of the Delaware Treaty of 1778, as did Vine Deloria, Jr., in *Behind the Trail of Broken Treaties*:

> The first treaty signed between an American Indian tribe and the United States took place only three years after the beginning of the Revolutionary War, at a time when no one knew for sure whether the colonists would gain their freedom or the King of England would soon have a gigantic hanging party of rebellious subjects. In September 1778, a delegation of Americans visited the chiefs of the Delaware Nation at Fort Pitt, in western Pennsylvania. They sought permission from the Delaware Nation to travel over its lands in order to attack the British posts in southern Canada.
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> Plainly, the colonists were on the ropes in the West, and had the Delawares refused to allow passage, the United States might have been faced with a violent Indian war in addition to its scrimmage with the British. To have pretended decades later that the American Congress had always asserted its claim to Indian lands under the doctrine of discovery, or that it had always regulated the internal affairs of the Indian tribes in its guardianship capacity, is

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[39] GRAYMONT, *supra* note 30, at 48.

[40] GRAYMONT, *supra* note 30, at 66.

> sheer self-serving rhetoric when the nature of this first treaty is understood. If the Delaware treaty exemplified the way that the United States asserted its plenary power over the Indian tribes, it was certainly a humble way of doing so.[41]

During the formative years following the revolution, similar treaties were reached with the Cherokee in the South, and with other tribes with whom the United States desired peace and sought as allies. For example, during the War of 1812 with Britain, the United States sent emissaries to the then western tribes in an attempt to recruit their alliance against the British. Among the results was the Treaty of 1814 with the Wyandots, Delawares, Shawanese, Senecas and Miamies, under which the tribes became the allies of the United States against Britain.[42]

Of course, history also teaches that these early treaties were systematically broken by the United States at its convenience. Indian allies, once so critical to the wars with Britain, France and Spain were cast aside and removed once the United States became powerful enough in its own right and the eastern tribes were no longer necessary to its existence. The history behind the betrayal and forced removal of these once powerful allies is beyond the scope of this Article.[43] The point to be made is that the European

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[41] DELORIA, BEHIND THE TRAIL OF BROKEN TREATIES, *supra* note 7, at 118-19. *See infra* pp. 370-71, discussing the "plenary power" doctrine.

[42] DELORIA, CUSTER DIED FOR YOUR SINS, *supra* note 35, at 41.

[43] It must be noted, however, that the forced removal of the eastern tribes in the 1830s is really no different than the current attempts at ethnic cleansing practiced by the Serbs in Kosovo, a practice abhorred by the Clinton Administration and rightly so. The United States has its own closet skeletons in this respect, for it was once guilty of the very same sin it now so publicly decries. *See* SAMUEL CARTER III, CHEROKEE SUNSET, A NATION BETRAYED 239-66 (1976). History teaches that other tribes suffered the same fate as the United States moved west. This is why it is so critical today that Indian treaty rights and sovereignty be protected, maintained and rebuilt. Allowing the continued erosion of these rights by states and the federal government simply makes the United States appear hypocritical in the eyes of the world in light of its own history. *See infra* pp. 403-06. *See also* DELORIA, BEHIND THE TRAIL OF BROKEN TREATIES, *supra* note 7, at 4-12 (discussing the removal of Indian tribes from their traditional homeland with the expansion of white settlers); DELORIA, CUSTER

explorers, the colonists, and the United States historically treated the Indian tribes who occupied the land prior to their arrival as sovereign nations. These early treaties and the Indian treaties that followed the settlement of the West embodied the notion that the tribes possessed original sovereignty and had a prior legal claim to the land the colonists wanted for themselves. This sovereignty would be incorporated by the young Supreme Court into United States law in a series of early cases involving the Cherokee Nation.

B. The Cherokee Experience

The historical relationship between the United States and the Cherokee Nation during and immediately following the American Revolution is important because it influenced several early decisions of the United States Supreme Court. The Cherokee cases ultimately reaffirmed the historical fact that this country's Indian tribes are sovereign, albeit in a strange, controversial sort of way.[44]

In the years following the American Revolution, Indian relations with the new federal government were tenuous in the south for at least three reasons. First, the southern Indian nations of the Cherokee, Creek, Choctaw, and Chickasaw "had organized governments and astute leaders, who put forth their rights to land and who could field sizable military forces."[45] Second, the southern "states of Virginia, North Carolina, South Carolina, and Georgia . . . were imbued with a strong sense of their state sovereignty."[46] Third, the Spanish presence in Florida and the treaties they signed with the Creeks, Choctaws, and Chickasaws, continued to threaten American interests.[47]

By 1785, Congress established a commission to treat with the southern tribes. The Treaty of Hopewell with the Cherokees

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DIED FOR YOUR SINS, *supra* note 35, at 31-53 (exploring the legacy of broken treaties in detail).

[44] *See infra* note 68 and accompanying text (discussing generally the dichotomy between tribal sovereignty and federal power).

[45] FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES 59 (1994).

[46] *Id.*

[47] *Id.*

pledged peace with the tribe, defined the boundaries of the Cherokee nation, allowed "'the Indians [to] punish [trespassers] or not as they please'," and committed the United States as protectorate.[48] Within a few years, however, the United States would break its word. As early as 1789, President Washington reported to the Senate that the Hopewell Treaty with the Cherokees "has been entirely violated by the disorderly white people on the frontiers."[49] Instead of protecting the rights of the tribe, however, the federal government simply negotiated a new treaty with the Cherokee, the 1791 Treaty of Holston, in which the tribe ceded more of its land to the federal government in return for a reservation of smaller territory.[50]

In *Cherokee Nation v. Georgia*, the Cherokee Nation sought an injunction to prevent the state of Georgia from enforcing its laws and trespassing upon the territory reserved to the Cherokee by treaty.[51] The Cherokee argued that their history of treaty making with the United States and the language of the treaties themselves were an express recognition of tribal sovereignty.[52] In addition, the Cherokee asserted the supremacy of federal treaties over state law under the Constitution's Supremacy Clause. Chief Justice John Marshall agreed:

> So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have 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

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[48] GETCHES, *supra* note 5, at 97 (citing Treaty of Hopewell, Nov. 28, 1785, U.S.-Cherokee Indians, 7 Stat. 18).

[49] GETCHES, *supra* note 5, at 122.

[50] GETCHES, *supra* note 5, at 122.

[51] 30 U.S. (5 Pet.) 1 (1831).

[52] *Id.* at 16.

> citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.[53]

Although the Court recognized the Cherokee as a state, Marshall ruled that the tribe did not constitute a *foreign* state and therefore the Court had no original jurisdiction over the case.[54] Marshall's opinion was not without controversy among the other Justices. At the time, the Court was composed of seven Justices. Justice Duvall was absent and the remaining six Justices were equally divided 2-2-2 as to the status of Indian tribes. Justices Marshall and McLean took a middle-of-the-road approach, characterizing tribes as "domestic dependent nations."[55] Justices Johnson and Baldwin saw tribes as possessing no sovereignty at all.[56] Justices Thompson and Story concluded that the Cherokee was a "foreign nation possessing sovereignty in the international sense."[57] Attorney General William Wirt, writing an opinion for then President Andrew Jackson on the validity of the Cherokee treaty, agreed with Justices Thompson and Story, finding no reason to distinguish between the Cherokee treaty and the treaties with other nations. Wirt concluded that if "the Indians are independent to the purpose of treating, their independence is, to that purpose, as absolute as that of any other nation."[58] Thus, although the Court was divided on the precise constitutional status of Indian tribes, four of the six justices, joined by the Attorney General, embraced the notion that Indian tribes were sovereign nations capable of maintaining their own government.

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[53] *Id.*

[54] *Id.* at 20.

[55] *Id.* at 17.

[56] *Id.* at 22, 50 (Baldwin, Johnson, J.J., concurring in separate opinions).

[57] GETCHES, *supra* note 5, at 137 (referring to *Cherokee Nation*, 30 U.S. at 58 (Thompson, J., dissenting)).

[58] *See* DELORIA, BEHIND THE TRAIL OF BROKEN TREATIES, *supra* note 7, at 262-63 (quoting from Attorney General Wirt's opinion and arguing persuasively that this is the more legally defensible view).

The opinions in *Cherokee Nation* were dicta because the Court ultimately found that it lacked jurisdiction. Nevertheless, *Cherokee Nation* is important, not only because it is part of the foundation upon which principles of federal Indian law are based, but because it illustrates that, from the beginning of this nation's existence, Indian tribes were considered sovereign, and that their sovereignty was embodied in the treaties and relations with the United States.

One year later, the Supreme Court had an opportunity to clarify its discussion in *Cherokee Nation.* In *Worcester v. Georgia,*[59] the state of Georgia had arrested and convicted non-Indians of violating the Georgia law requiring travelers to the Cherokee territory to obtain a license from the governor.[60] This time the Court was clear: Georgia had no jurisdiction in Cherokee Territory. By virtue of the treaties signed with the Cherokees and under the Indian Commerce Clause of the Constitution, the Court ruled that Congress had the exclusive right to manage all affairs with the tribe.[61] Politically, the Cherokee territory was separate from the state of Georgia, though geographically within its bounds. Absent the consent of Congress, Georgia had no jurisdiction over the non-Indian missionaries because the Cherokee Nation's authority within its territory was exclusive.[62]

In *Worcester*, Marshall reviewed the historical and legal development of the federal-tribal relationship. He found that the tribes had signed treaties and been treated as sovereigns by the European nations, and the United States had continued this relationship of alliances through treaties, "which itself evidenced an acknowledgment of the tribes' sovereign status":[63]

> 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. . . . The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The [C]onstitution, by declaring treaties already

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[59] 31 U.S. (6 Pet.) 515 (1832).

[60] *Id.* at 542.

[61] *Id.* at 573.

[62] *Id.* at 556-57; COHEN, *supra* note 8, at 261.

[63] COHEN, *supra* note 8, at 234.

> made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.
>
> Georgia, herself, has furnished conclusive evidence that her former opinions on this subject concurred with those entertained by her sister states, and by the government of the United States. Various acts of her legislature have been cited in the argument, including the contract of cession made in the year 1802, all tending to prove her acquiescence in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent: that their territory was separated from that of any state within whose chartered limits they might reside, by a boundary line, established by treaties: that, within their boundary, they possessed rights with which no state could interfere: and that the whole power of regulating the intercourse with them, was vested in the United States.[64]

Marshall then rejected Georgia's argument that the Cherokee Nation had somehow given up its sovereignty by agreeing to a treaty in which the Cherokee agreed to peace and accepted the care and protection of the United States. Other articles of the treaty recognized the Cherokee's right to self government, and the mere fact that the Cherokee accepted the care and protection of the United States did not mean they had given up their right to self-government.[65] More importantly, such a proposition was inconsistent with the law of nations:

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[64] *Worcester*, 31 U.S. at 559-60.

[65] *Id.* at 560-61.

> [T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. 'Tributary and feudatory states,' says Vattel, do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state. At the present day, more than one state may be considered as holding its right of self government under the guarantee and protection of one or more allies.
>
> The Cherokee [N]ation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of [C]ongress. The whole intercourse between the United States and this nation, is, by our [C]onstitution and laws, vested in the government of the United States.[66]

Worcester established that Georgia had no authority to regulate activities within the territory reserved to the tribe by treaty, unless Congress, pursuant to the exercise of its own authority under the Commerce Clause, expressly authorized state jurisdiction.[67] Together, the cases of *Cherokee Nation* and *Worcester* stand for the proposition that there exists, within our constitutional framework, a unique government-to-government relationship between the United States and Indian tribes. The relationship is one of trust—grounded in treaties, tribal sovereignty and the Indian Commerce Clause—under which the tribes within their territory govern free of state interference, subject only to the power of

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[66] *Id.*

[67] *Id.*

Congress to limit their authority. The Cherokee cases are the legal foundation upon which tribal sovereignty is based, a foundation which is supported by history.[68]

C. *Treaty Making and the Westward Expansion*

The process of treaty making with Indian tribes continued as the United States expanded westward. Again, very few if any of the early Indian treaties were made because the United States conquered the Indians or felt a moral obligation to protect them. Instead, the treaties were often born of necessity. The United States, far from being the superpower it is today, had to acknowledge the right of the many still powerful Indian tribes to occupy their territory as sovereigns. In many cases this was to avoid additional warfare, and in others it was to acknowledge the peace and friendship that had always existed between the United States and a particular tribe. The Comanche treaty of 1835, for example, was executed because the Comanches, Wichitas and their allies controlled a vast territory into which no one strayed without permission. The treaty of 1835 allowed the United States and her citizens safe passage across Comanche territory, and at the same time recognized that the Comanche and their allies were sovereign powers and must be dealt with as such.[69]

After the Civil War, Americans increased their westward expansion under the so-called doctrine of "Manifest Destiny," attracted by the promise of gold, cheap land, and an abundance of natural resources waiting to be exploited.[70] The western Indian

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[68] While Justice Marshall's opinion in *Worcester* recognized that tribes existed as separate sovereigns, he also wrote that tribal sovereignty was subject to the overriding power of Congress, creating what some consider a dichotomy between tribal sovereignty and federal power/trust responsibility that many find hard to reconcile. Yet the law of nations cited by Marshall to support the continued sovereignty of a smaller state makes it easier to see that the power of Congress versus tribal self-government concepts are really not inconsistent. *See id.* at 561; *see also infra* notes 86-90 and accompanying text.

[69] DELORIA, BEHIND THE TRAIL OF BROKEN TREATIES, *supra* note 7, at 132-33.

[70] The doctrine of Manifest Destiny essentially embodied the Christian notion that it was the American Destiny to "overspread the continent allotted by

tribes soon found themselves having to deal with non-Indian settlers seeking their fortunes in the west. Numerous treaties were signed with the western tribes during this period. The early treaties—those signed at Fort Laramie in 1851 and at Fort Atkinson in 1853, for example—did not include any land cessions by the Indians. As with earlier treaties they were agreements of peace and "the right of the United States to establish roads and military posts in [the Indians'] territories."[71]

While some Indians agreed to peace, others' resistance to white settlement in their territories was passionate. Refusing to be confined to reservations, many tribes, including the Sioux, Cheyenne and Blackfeet in the northern plains and the Comanche, Kiowa, and Apache further south, sustained wars with the United States Cavalry. After defeating Lieutenant William Fetterman and his troops along the Bozeman Trail, Red Cloud and his Oglala Sioux warriors succeeded in having the section of the trail which ran through their territory closed via the 1868 Treaty of Fort Laramie.[72] The "virtual military standoff" between the federal government and the Sioux resulted in their reserving lands in their "traditional . . . homeland in the Dakota Territory."[73] Today, the Lakota continue to occupy their reservations under this treaty, and continue to claim that the lands reserved in this treaty, including the Black Hills, were illegally taken from them.[74] Similar treaties

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Providence for the free development of our yearly multiplying millions." ENCYCLOPEDIA OF AMERICAN HISTORY 230 (Richard B. Morris ed., 1976) (noting the first use of the phrase "Manifest Destiny" by John L. Robinson, writing in *The United States Magazine and Democratic Review*, July-Aug. 1845). The founders and settlers believed they had the divine support of God. The more skeptical view is that Manifest Destiny was simply an attempt to place God's stamp of approval on the taking of Indian land and the exploitation of the West's natural resources.

[71] PRUCHA, *supra* note 45, at 239.

[72] *Id.* at 282.

[73] FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 17 (1995).

[74] *See* EDWARD LAZARUS, BLACK HILLS WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT ch. 17 (1991) (discussing the Sioux tribe's historical and ongoing claims to the Black Hills territory).

were executed in 1868 with the Crow, the Navajo and other Northwest and Plains tribes. Virtually all of these treaties contained clauses under which the tribes ceded vast portions of their territory, in return for the right to the exclusive and undisturbed use and occupation of the lands they reserved.

The Indian treaties were written in the English language, in letters unfamiliar to the tribes. In many instances, they were negotiated with "friendly" Indians whom the federal negotiators selected as "chiefs" purporting to bind Indian tribes and bands not even present at the negotiations. The individuals signing the treaties were usually unaware that their signatures would bind these other tribes. "There [were] numerous accounts of threats, coercion, bribery, and outright fraud by the negotiators for the United States."[75] Moreover, by the latter half of the nineteenth century, the Indians' bargaining power of the early to mid 1800s had been considerably weakened by a number of factors. The ever-increasing number of non-Indians hungry for more land, the destruction of the buffalo and other game upon which many tribes depended for food, foreign diseases which decimated tribal populations, and the growing military strength of the United States all contributed to the loss of Indian strength and bargaining power. As a result, the tribes west of the Mississippi were eventually faced with the reality of ceding large portions of their territory to the United States in return for reserving smaller territory for themselves.

Nevertheless, these treaties were still binding agreements which contained the promises of the United States that the Indians could continue to use and occupy the lands they reserved. In return for these promises, the Indians agreed to peace, and to cede to the United States vast amounts of territory that had rightfully been theirs. The promises made by the United States could not be ignored or minimized simply because the tribes' position had been weakened. Chief Justice Marshall was very aware of this proposition in the context of the eastern tribes who had been forced to cede their lands by treaty:

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[75] Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601, 610 (1975).

> When the United States gave peace, did they not also receive it? Were not both parties desirous of it? If we consult the history of the day, does it not inform us that the United States were not at least as anxious to receive it as the [Indians]?[76]

The history underlying the making of the Indian treaties has led to the creation of legal canons of construction that courts must employ in interpreting Indian treaties—canons which are designed to rectify the inequality of the bargaining process:

> Three primary rules have been developed: ambiguous expressions must be resolved in favor of the Indian parties concerned; Indian treaties must be interpreted as the Indians themselves would have understood them; and Indian treaties must be liberally construed in favor of the Indians.[77]

From these canons of construction, the Supreme Court has developed the so-called reserved rights doctrine. In 1905, elaborating on the purposes of the 1859 Yakima treaty, the Court stated that a treaty is "not a grant of rights to the Indians, but a grant of right from them,—a reservation of those not granted."[78] The reservations were not "particular parcels of land . . . [but] were in large areas of territory . . . [and] [t]hey reserved rights . . . to every individual Indian, as though named therein."[79] One of the most important rights reserved by the Tribes was their territorial sovereignty.[80]

Although the Indians had the legitimate expectation that the United States would keep the promises it made, the treaties were regularly broken in a number of ways. The question became whether the United States could break its promises without legal liability. In 1903, in *Lone Wolf v. Hitchcock,* the Court ruled that Congress had the authority to nullify Indian treaties without the

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[76] *Id.* at 612 (citing Worcester v. Georgia, 31 U.S. 515, 551 (1832)).

[77] *Id.* at 617 (citations omitted).

[78] United States v. Winans, 198 U.S. 371, 381 (1905).

[79] *Id.*

[80] *See* Williams v. Lee, 358 U.S. 217, 220-22 (1959); Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 596-97 (9th Cir. 1983), *cert. denied,* 466 U.S. 926 (1984).

consent of the tribe.[81] According to Justice White, who delivered the opinion, Congress had the authority to act "in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands . . . [and] the assent of the Indians could not be obtained."[82] In a questionable interpretation of history, the Court stated that when "treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress."[83] To justify its holding, the Court essentially invented the notion of Congress' "plenary authority" over Indian tribes under the Indian Commerce Clause, an authority which was not subject to judicial review.[84] The Court had no explicit Constitutional basis for attributing such broad power to Congress. It "simply converted its perception of *congressional practice* into a valid *constitutional doctrine* without any legal support or analysis."[85]

Even so, decisions subsequent to *Lone Wolf* have clarified that the so-called plenary power of Congress over Indian tribes, especially in matters of sovereignty, is not meant to be "absolute" or "total."[86] Instead, with this power comes the duty to exercise it fairly and with due regard for the historic right of the tribes to occupy their territory free of state interference. One respected commentator has observed that Congress' plenary power can be successfully integrated into constitutional principles "if it is understood that plenary power may properly be used to advance tribal self-government and protect tribes from state encroachment

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[81] 187 U.S. 553, 556-68 (1903).

[82] *Id.* at 564.

[83] *Id.* at 566 (emphasis added). Nevertheless, the canons of construction which require that treaties be interpreted in favor of the Indians have led to the rule that courts will not find that treaties have been abrogated or modified unless Congress has made its intent to do so unmistakably clear. *See, e.g.*, United States v. Dion, 476 U.S. 734, 738 (1986); Menominee Tribe v. United States, 391 U.S. 404, 412-13 (1968).

[84] Pommersheim, *supra* note 10, at 319-20.

[85] POMMERSHEIM, *supra* note 73, at 47.

[86] COHEN, *supra* note 8, at 219. *See, e.g.*, Hodel v. Irving, 481 U.S. 704, 734 (1987) (Stevens, J., concurring); Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 83-84 (1977); United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946).

in Indian country, but it cannot be used to invade the legitimate spheres of tribal self-government and the integrity of tribal existence."[87] Such an interpretation is certainly consistent with the Cherokee cases,[88] and the concept embodied in the law of nations, that a smaller nation does not lose its sovereignty by coming under the care and protection of a larger and stronger nation.[89] Moreover, because of the relationship of trust that exists between the United States and the tribes, and because the rights reserved by tribes in their treaties are considered property rights, the Supreme Court has recognized that Congress must clearly express its intent in legislation to abrogate the tribes' treaty rights, including the territorial sovereignty reserved therein.[90]

D. The End of Treaty Making, 1870-1970: One Hundred Years of Inconsistent Indian Policy

By the late 1860s, federal officials realized that the reservation system "and the treaty system that had created it" were not working.[91] A number of factors contributed to the movement to end treaty making. First, white settlers "needed" more land in the West. Second, the bureaucrats believed that the Indians could not be "civilized" sufficiently to become white if they were allowed to continue to exist as separate politically autonomous people.[92] Ultimately though, it was a power struggle between the houses of Congress that ended treaty making with the tribes in 1871.[93] The House of Representatives resented the Senate's exclusive constitutional power to ratify treaties. The Appropriations Act of March 3,

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[87] Pommersheim, *supra* note 10, at 323.

[88] *See supra* Part I.B, discussing the Cherokee cases.

[89] *See supra* notes 59-66 and accompanying text (discussing *Worcester*).

[90] United States v. Dion, 476 U.S. 734, 738-39 (1986). As discussed more fully below, Congress has never enacted express legislation terminating tribal sovereignty and/or treaty rights, although it has in some cases enacted statutes limiting the exercise of tribal sovereignty. Instead, in apparent conflict with the doctrine of plenary congressional power, the Supreme Court has recently been most active in abrogating tribal sovereignty.

[91] GETCHES, *supra* note 5, at 175-78.

[92] GETCHES, *supra* note 5, at 175-76.

[93] COHEN, *supra* note 8, at 127; GETCHES, *supra* note 5, at 178-79.

1871, put an end to treaty making between the federal government and the tribes, but upheld the obligation of existing treaties.[94]

Although the formal policy of treaty making ended in 1871, the federal government nevertheless continued to make intergovernmental agreements with tribes, pass statutes, and deliver executive orders establishing Indian reservations. These "treaty substitutes," especially those which established reservations for tribes whose territory had not been defined by treaty, carry the same weight and legal effect as a treaty.[95] The Supreme Court confirmed the equality of each type of document in *Antoine v. Washington*[96] and *Merrion v. Jicarilla Apache Tribe*.[97] Thus, to the extent the tribes today retain the territory reserved in treaties or by executive order or congressional act, the tribal sovereignty reserved therein retains its vitality.

Following the formal end of the treaty making period, the federal government undertook approximately one hundred years of inconsistent and at times destructive policy making, in an attempt to define how Indian tribes should continue to exist within the United States. Because of this lack of consistent policy making, tribes have had to struggle to survive socially, politically and economically. Indian people still struggle to overcome the effects of these policies today.

1. Allotment and Assimilation

Prior to 1887, title to most Indian land was communally owned by the tribe, since tribes never had a concept of owning individual parcels of land.[98] From about 1887 until approximately 1928, the federal government attempted to terminate tribal cultural, social and political existence by breaking up reservation lands into individual

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[94] COHEN, *supra* note 8, at 127 (citing ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (1994))).

[95] WILKINSON, *supra* note 13, at 101-02.

[96] 420 U.S. 194, 200-04 (1975).

[97] 455 U.S. 130, 133 n.1 (1982).

[98] There were exceptions, of course. Some treaties had provisions which allowed individual Indians to select parcels of land for farming. *See, e.g.*, Treaty with the Crows, May 7, 1868, art. 6, 15 Stat. 649, *available in* 1868 WL 5270.

allotments. The professed goal was to make Indian people farmers, and assimilate them into the dominant agrarian society of the American West.[99] While this may have seemed to Congress at the time to be a noble goal, a darker side of the allotment era existed as well. Most allotments ranged from 80 to 160 acres per individual.[100] After each tribal member received an allotment, huge tracts of surplus tribal land remained—land previously reserved to the tribes by treaty. The surplus lands were opened to settlement by non-Indian homesteaders. Ultimately, the opening of tribal land for the taking by non-Indians resulted in another federal taking of Indian land to the tune of some 90 million acres.[101] In many cases affected tribes lost over fifty percent of their reserved lands to non-Indians.[102]

As a result of allotment, the affected Indian reservations were no longer the sanctuaries they had been when the Indian treaties were made. They were no longer places where the Indians could maintain a separate political and cultural existence free of non-Indian influence. The reservations became "campuses for training Indians in the 'arts of civilization.' The Bureau of Indian Affairs ["BIA"] took unprecedented control of everyday Indian life, seeking to squeeze out Indian government, religion and culture."[103] The BIA and missionaries undertook a sustained effort to "civilize" the Indian, to remake him into a white Christian God-fearing American farmer. In the eyes of the Christian reformers, allotment and assimilation would put an end to the "injurious habits" the Indians possessed, such as their "frequent feasts, community in food, heathen ceremonies, and dances, constant

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[99] COHEN, *supra* note 8, at 128-29.

[100] Under the original General Allotment (Dawes) Act of 1887, each head of a household was allotted 160 acres and minors were each allotted 40 acres. COHEN, *supra* note 8, at 133. Congress amended the Dawes Act in 1891 to provide to each Indian allotments of either 80 acres of agricultural land or 160 acres of grazing land. *See* COHEN, *supra* note 8, at 133.

[101] GETCHES, *supra* note 5, at 179.

[102] COHEN, *supra* note 8, at 138.

[103] GETCHES, *supra* note 5, at 168.

visiting."[104] The ultimate goal was to extinguish tribal sovereignty once all the Indians had been sufficiently civilized.

The allotment policy failed miserably and tribal sovereignty survived. In spite of the legislative and judicial attempts to destroy tribalism during this period, tribal culture and traditions remained alive and strong. Reservations were still "Indian Country," and tribes still fought for and maintained a "measured separatism" apart from the dominant society.[105] Tribalism survived in places like the Southwest because of its geographic isolation. It survived in more populous regions by "going underground, out of sight of the BIA Indian agents and missionaries."[106] Nationwide, "large numbers of Indians persisted in holding on to their identities as tribal peoples by maintaining their kinship relations, ways of thinking about and acting in the world, systems of meaning, and tribal languages."[107]

2. *The Indian Reorganization Act*

In the late 1920s, with the recognized failure of allotment/assimilation, non-Indian reformers initiated another change in federal Indian policy designed to "revive tribal governing structures through the Indian Reorganization Act ["IRA"] of 1934."[108] John Collier, President Roosevelt's Commissioner of Indian Affairs, Felix S. Cohen, Chairman of the Interior Department's Board of Appeals, and others had been influenced by the 1928 *Meriam Report*. The *Report* "examined the administration of Indian policy and its impact on Indian life,"[109] and found "poverty, disease, suffering, and discontent . . . pervad[ing] the life of the

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[104] *History of the Allotment Policy, Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong. 428-89 (1934) (report by Delos Sacket Otis), *reprinted in* GETCHES, *supra* note 5, at 192.

[105] GETCHES, *supra* note 5, at 215.

[106] GETCHES, *supra* note 5, at 215.

[107] GETCHES, *supra* note 5, at 215.

[108] GETCHES, *supra* note 5, at 216 (referring to ch. 576, 48 Stat. 984 (codified and amended at 25 U.S.C. §§ 461-479 (1994)).

[109] COHEN, *supra* note 8, at 144.

overwhelming majority of Indians."[110] It also found federal Indian policy to be "inefficient" and "paternalistic."[111]

Collier recommended reforms to reverse this trend, which were incorporated into the IRA. The Act

> enabled tribes to organize for their common welfare and to adopt federally approved constitutions and bylaws. It permitted the employment of legal counsel of the tribe's own choice and authorized the tribal councils established under the act to negotiate with federal, state and local governments. . . . Formal tribal government was expected to become the rule rather than the exception.[112]

This so-called Indian reorganization era reflected a policy shift away from assimilation/termination goals and back toward the policy of recognizing Indian tribes as government units with inherent sovereign authority over their territory.[113]

Underlying the IRA was the recognition that the forced assimilation policies of the allotment era worked to destroy Indians and their communities. The new generation of reformers "believed that the tribe itself, organized as a self-governing community, was better equipped to deal with the outside influences of the dominant society."[114] A major objective of the IRA was elimination of the czar-like power that the BIA exercised over practically every aspect of Indian life.[115] Tribal government was given renewed vigor by provisions of the IRA that authorized Indian tribes to reorganize their governments by adopting constitutions and by-laws under which the sovereign power of the tribes was expressly recognized.[116]

The problem was that the constitution and by-laws under which the tribes were expected to organize were generic documents

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[110] COHEN, *supra* note 8, at 144.

[111] COHEN, *supra* note 8, at 144.

[112] VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 14 (1983), *reprinted in* GETCHES, *supra* note 5, at 223.

[113] DELORIA, CUSTER DIED FOR YOUR SINS, *supra* note 35, at 54.

[114] GETCHES, *supra* note 5, at 216.

[115] Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 966-67 (1972).

[116] 25 U.S.C. § 476 (1994).

prepared by bureaucrats in the Interior Department. These documents typically vested governmental authority in an elected tribal council, in many cases vesting legislative, executive and judicial power in the one body.[117] As a result, many tribes have found it difficult to integrate their IRA constitutions with their traditional way of operating tribal government.[118] Despite these problems, many tribes reorganized their governments under the Act, and many began the long slow process of regaining the governmental/political structure that the federal government had previously attempted to extinguish. More importantly, the IRA signaled an end to the policies underlying the allotment and alienation of tribal land. Once again, tribal self-government was encouraged.

3. Termination

The renewal of tribal self-determination would be short lived. By the late 1940s, Collier and Cohen had resigned their positions with the federal government and Congress was calling for a repeal of the IRA. Though the IRA was never repealed, in 1949, the Hoover Commission "recommend[ed] an about-face in federal policy: 'complete integration' of Indians should be the goal."[119] In 1953, Congress passed Resolution 108, with little or no discussion or opposition and certainly no input from the tribes who were to be affected thereby. Resolution 108 provided that all tribes in California, Florida, New York, Texas, and certain named other tribes, "should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to

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[117] In part as a result of the IRA many tribes today have no separation of powers. Many non-Indians like to cite this fact to support their challenge to tribal jurisdiction, arguing that they will not get a fair deal in tribal courts because tribal courts are controlled by the tribal council. Most fail to realize that the IRA constitutions, under which a majority of tribes operate, were perpetuated and approved by the Department of the Interior itself. *See* COHEN, *supra* note 8, at 149-51.

[118] DELORIA & LYTLE, *supra* note 112, at 15, *reprinted in* GETCHES, *supra* note 5, at 224.

[119] GETCHES, *supra* note 5, at 229.

Indians."[120] Resolution 108 then directed the Secretary of the Interior to investigate and report to Congress by January 1, 1954 recommendations for legislation that would accomplish the purposes of the resolution.[121] Thirteen subsequent hearings were held. Tribal members who would be affected by the proposed legislation were able to testify at nine of the hearings. The majority of tribal members opposed the legislation, in part because it would result in the loss of rights they had reserved in treaties.[122] Although no comprehensive legislation was passed, individual acts were passed which resulted in the loss of federal recognition of approximately 109 tribes, most of whom were vulnerable, unsuspecting and without the resources to counter the politics of termination.[123] The termination of federal recognition of these tribes meant the end of the special relationship between the affected tribes and the federal government. It meant the end of federal assistance, which many tribes had obtained by treaty in return for the cession of most of their land to the United States. Its effects were devastating to the tribes and individual Indians. The affected tribes became subject to state law, ending the trust status of tribal land, so that their land, once promised to them forever, became taxable and freely transferable.[124] Many were no longer able to provide health care. Infant death rates rose, and the number of people on welfare increased.[125] As a result, the effect of termination in most cases wound up costing the federal government more money, when the object of termination was to save money.[126]

Although devastating to the tribes that were actually terminated, the policies of termination affected all Indian tribes in a number of

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[120] Gary Orfield, *A Study of the Termination Policy* (1966), *reprinted in* GETCHES, *supra* note 5, at 231.

[121] *Id.*

[122] *Id.* at 232-33.

[123] DELORIA, CUSTER DIED FOR YOUR SINS, *supra* note 35, at 64-65; Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 151 (1977).

[124] GETCHES, *supra* note 5, at 248.

[125] DELORIA, CUSTER DIED FOR YOUR SINS, *supra* note 35, at 60-77.

[126] *Id.* at 71.

ways.[127] Many programs pushing towards rapid assimilation dramatically impacted tribes who were not singled out for termination. For example, Public Law 280, which provided a mechanism for the extension of state jurisdiction in Indian Country, was passed during this period.[128] Many educational programs and services were transferred from the federal government to the states. Indian health responsibility was transferred from the BIA to the Department of Health, Education and Welfare. The federal government implemented relocation programs to encourage Indian migration from their reservations to the cities, with the hope that Indian people would simply disappear.[129] In fact, many eventually returned to their homeland. Of those that stayed in the cities, many lived in cultural isolation and poverty, their identity taken.[130]

Nevertheless, none of the language of the termination legislation "expressly extinguished" the inherent tribal sovereignty of the tribes whose federal recognition was terminated.[131] The federal courts continued to support inherent tribal status even without federal recognition. In *Menominee Tribe of Indians v. United States*, the Court of Claims decided that the "Termination Act did not abolish the [Menominee] tribe or its membership."[132] On appeal, the Supreme Court ruled that only the federal trust relationship with the tribes was terminated and that treaties were not affected.[133] Similarly, in *Kimball v. Callahan*, the Ninth Circuit ruled that despite termination "[t]he Klamaths still maintain a tribal constitution and tribal government," and the termination act "did not abrogate tribal treaty rights of hunting, fishing and trapping. Neither did the Act affect the sovereign authority of the Tribe to regulate the exercise of those rights."[134]

The government's attempts to ostensibly "free" Indian people from the bondage of federal supervision via termination policies

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[127] COHEN, *supra* note 8, at 152-53.

[128] *See infra* note 168 and accompanying text (discussing Public Law 280).

[129] GETCHES, *supra* note 5, at 233-34.

[130] COHEN, *supra* note 8, at 169-70.

[131] GETCHES, *supra* note 5, at 237.

[132] 388 F.2d 998, 1000-01 (Ct. Cl. 1967), *aff'd*, 391 U.S. 404 (1968).

[133] 391 U.S. 404, 412 (1968).

[134] 590 F.2d 768, 776 (9th Cir. 1979).

did not go unopposed. Indians organized against the legislative termination of tribalism, most visibly in the June 1961 American Indian Chicago Conference.[135] Moreover, state governments realized the difficulty of assuming many of the responsibilities of the federal government in Indian country. By 1958, termination without tribal consent, as it had been practiced, was viewed unfavorably. Under the Kennedy administration, the termination policy was "abandon[ed] in practice."[136] Even so, many elder tribal leaders today still remember the days of termination, and the policy has left an indelible mark on the psyche of Indian people.

E. The Modern Era, Back To Where We Started: The Federal Policy Supporting Tribal Self-Government

Following the termination era, President Johnson's Great Society programs "embraced Indian Tribes and invested millions of dollars in reservation social programs and infrastructure."[137] In 1970, President Nixon addressed Congress regarding his progressive vision for Indian policy. President Nixon argued against "forced termination" and in favor of a "new national policy toward the Indian people: [one that will] strengthen the Indian's sense of autonomy without threatening his sense of community."[138] President Nixon proposed specific actions to achieve this goal, including a repeal of the termination policy, placing administrative responsibility of federally funded programs with the tribes themselves and, with the tribes' consent, tribal control over Indian schools.[139] Riding on the coattails of the activism of Indian leaders during the preceding decades,[140] Nixon's "Message to Congress" initiated a new era of reform in Indian policy.[141] While termination had

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[135] PRUCHA, *supra* note 45, at 410.
[136] GETCHES, *supra* note 5, at 252.
[137] GETCHES, *supra* note 5, at 252.
[138] GETCHES, *supra* note 5, at 253.
[139] GETCHES, *supra* note 5, at 253-54.
[140] DELORIA, BEHIND THE TRAIL OF BROKEN TREATIES, *supra* note 7, at 2.
[141] GETCHES, *supra* note 5, at 256.

"sought to destroy tribal sovereignty . . . federal policy in the 1960s and 1970s celebrated tribal self-determination."[142]

With relatively few transgressions since 1970, the federal policy outlined in President Nixon's message to Congress continues today. In the years following Nixon's policy statement, "an unprecedented volume of Indian legislation" was passed by Congress, "most of it favorable to Indian interests."[143] Today both Congress and the Executive Branch are firmly committed to promoting and protecting tribal sovereignty and self-government.[144] The President's recent Executive Order of May 14, 1998 declares the Clinton Administration's commitment to tribal sovereignty, a commitment based upon the historic government-to-government relationship that has existed between the United States and Indian tribes:

> The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. *In treaties, our Nation has guaranteed the right of Indian tribes to self-government.* As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, trust resources, and Indian tribal treaty and other rights.[145]

There are many examples of congressional legislation promoting tribal self-government since 1970. Perhaps the most significant piece of legislation to emerge during this period was the Indian

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[142] Williams, *supra* note 31, at 4.

[143] GETCHES, *supra* note 5, at 256.

[144] Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14-15 nn.5-6 (1987) (noting the numerous federal statutes designed to promote tribal government); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335-36 n.17 (1983) (same).

[145] Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (1998) (emphasis added).

Self-Determination and Education Assistance Act of 1975.[146] It declared Congress' commitment,

> to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.[147]

The Act allowed the tribes to contract with the BIA and Indian Health Service ("IHS") for direct tribal delivery of services and administration of federal funds. Subsequent amendments to the Act allowed tribes to contract directly for any federal program administered for Indians by federal agencies in addition to the BIA or IHS. For the first time, Congress gave the Indians the means to decide for themselves how federally funded programs for their benefit would be administered. Many tribes have taken advantage of the Act to contract with the federal government to directly provide services in areas such as police protection, health care, credit, and natural resource management.

In 1978, the Indian Child Welfare Act[148] outlined the adjudication process for "child custody cases involving Indian children that deferr[ed] heavily to tribal governments."[149] The "underlying premise of the Act is that Indian tribes, as sovereign governments, have a vital interest in any decision as to whether Indian children should be separated from their families."[150] To that end, cases involving the custody of Indian children are directed to tribal courts. In addition, state courts are required to transfer such cases to a tribal forum if the parents or the tribe so requests, "absent

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[146] Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 450a (1994)).

[147] *Id.* § 450a(b); COHEN, *supra* note 8, at 201.

[148] Act of Nov. 8, 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (1994)).

[149] GETCHES, *supra* note 5, at 257.

[150] GETCHES, *supra* note 5, at 607.

good cause to the contrary."[151] The significance of the Indian Child Welfare Act is found not only in its protections for Indian children from cultural alienation, but in its recognition of tribal courts as appropriate forums to adjudicate actions involving Indian children.

There are other examples of congressional legislation promoting tribal sovereignty in the 1980s and 1990s. In the late 1980s, for example, Congress recognized the power of Indian tribes to "establish and regulate gambling businesses on [the] reservations," reaffirming the notion that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government."[152] Tribal sovereignty has also been recognized in the area of national environmental legislation. Amendments to the Clean Air Act, Clean Water Act and Safe Drinking Water Act, made during the 1980s and 1990s, authorize the Environmental Protection Agency [EPA] to treat Indian tribes as states for purposes of adopting and enforcing air and water quality standards and assuming primary enforcement responsibility.[153] Many tribes have asserted regulatory primacy under these Acts.

Perhaps the strongest recent statement made by Congress in support of tribal sovereignty comes in the Indian Tribal Justice Act of 1993.[154] The Act authorized funding to establish or expand a

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[151] GETCHES, *supra* note 5, at 608.

[152] Indian Gaming Regulatory Act, Pub. L. No. 100-497, § 2, 102 Stat. 2467 (1988) (codified at 25 U.S.C. § 2701 (1994)). However, the Indian Gaming Regulatory Act also limits tribal sovereignty by placing federal restrictions on gaming. *See infra* text accompanying notes 161-163 (discussing legal limitations on tribal sovereignty).

[153] Act of Nov. 1, 1988, Pub. L. No. 100-581, 102 Stat. 2940 (codified at 33 U.S.C. § 1377(e) (1994)); Act of June 19, 1986, Pub. L. 99-339, 100 Stat. 666 (codified at 42 U.S.C. § 300h-l(e) (1994)); Act of Nov. 15, 1990, Pub. L. No. 101-549, 104 Stat. 2464 (codified at 42 U.S.C. § 7601(d)(1)(A) (1994)); City of Albuquerque v. Browner, 97 F.3d 415, 419 (10th Cir. 1996), *cert. denied*, 118 S. Ct. 410 (1997).

[154] Pub. L. No. 103-76, 107 Stat. 2004 (codified at 25 U.S.C. § 3601-3631 (1994)).

"tribal judicial system pursuant to the Indian Self-Determination Act."[155] In the Act, Congress expressly found:

> [T]he United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government;
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> . . . Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian Tribes;
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> . . . Indian Tribes possess the inherent authority to establish their own form of government, including tribal justice systems;
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> . . . tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments;
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> . . . Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights.[156]

While the current federal Indian policy to protect and promote Indian sovereignty is firmly entrenched, defining the scope and limits of sovereignty remains a difficult task. The difficulty is attributable in part to the federal judiciary's failure to adhere consistently to the foundational principles set forth by Chief Justice Marshall in the Cherokee cases, and to the federal government's own historical failure to adhere to a consistent Indian policy supporting tribal sovereignty and treaty rights. The pendulum-like swing of federal Indian policy, from sovereignty to assimilation, to termination and back again, has severely impeded the ability of tribes to function as self-sufficient sovereigns. The failure of Congress, the executive branch and the courts throughout American history to define and adhere to any consistent Indian policy has been a significant deterrent to the growth and maturation of tribal

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[155] POMMERSHEIM, *supra* note 73, at 130.

[156] 25 U.S.C. § 3601(2)-(6).

governments, and has created cultural, social and political instability that tribes struggle to overcome everyday:

> Perhaps the greatest danger of this historic lack of agreement on the status of tribal self-governing rights in United States public discourses is its destabilizing impact on tribal governments. While thematic emphasis may change from one presidential administration to another at the national level, there is a broad society-wide consensus on the extent and limits of federal and state sovereign powers. Most of us, in fact, if we had to, could articulate a rather certain vision of the appropriate home rule powers of our own municipal governments. No such common ground exists, however, when it comes to defining what sovereign powers Tribes ought to have in United States society. Until that common ground is achieved; until it can be said that federal and state policy makers, non-Indian judges and courts, and Indians themselves, agree on the basic parameters of tribal sovereign authority, then tribal governments will have no stability in United States society. . . .
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> There is an even greater danger posed by this historic failure to agree on what tribal sovereignty is. Indian voices have rarely been heard in this nation's discursive battle on the meaning of sovereignty. They have been drowned out amidst the din of non-Indians who believe their vision of tribal sovereignty is the correct vision. In times past, . . . the unwillingness of non-Indian America to consider the views of Indians on the destiny of Indian America has resulted in disaster and the compounding of Indian powerlessness. In our present situation, a time in which tribes have struggled to redefine their role in United States society by exercising expanded governmental powers, a failure to be heard may well ensure the final extermination of tribalism in the United States. The lack of consensus on the meaning of tribal sovereignty has permitted the eruption of a violent, racist-inspired backlash against Indian peoples' vision of what tribal sovereignty ought to be in the United States. There are many who are determined to snuff that vision out. This, of course, is the greatest danger confronting Indian people, that their voices

> will not be heard in the cacophony of national debate on what is to be done with the Indian.[157]

It is possible to define the parameters of tribal sovereignty in a way which will allow tribes to transcend the instability created by the assimilation and termination policy failures of the past. But it is very difficult to define those parameters in a way that will satisfy everyone. This is primarily due to the fact that Indian tribes deal regularly with non-Indians either living in, conducting business in or passing through tribal territory. The dispute over the scope and limits of tribal sovereignty generally arises in cases where tribes assert jurisdiction over these non-Indians. In order to define the parameters of tribal sovereignty, one must explore its legal limitations. Not surprisingly, these limitations are as confusing and inconsistent as the federal policies that created them.

II. THE LEGAL LIMITATIONS ON TRIBAL SOVEREIGNTY; RECONCILING THE FAILED POLICIES OF THE PAST

When Chief Justice Marshall wrote the *Worcester* decision, he defined tribal sovereignty with an easy and straightforward approach. The Court held simply that the Cherokee Nation was a separate political entity, with a territory whose borders were defined by treaty and within which state authority could not apply absent the express consent of Congress.[158] Tribal sovereignty then, was reserved by the Cherokee in its treaties with the United States, and could not be usurped by anyone without authorization by Congress, pursuant to its delegated authority to regulate Indian commerce under the Commerce Clause. Due in part to a legacy of broken treaties, ill-conceived congressional acts, and judicial decisions placing implied limitations on the exercise of tribal sovereignty, numerous exceptions have arisen to the fundamental rule upon which Chief Justice Marshall based his decision in *Worcester*.

The concept of tribal sovereignty can be easily explained in legal terms. Indian tribes are "unique aggregations possessing

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[157] Williams, *supra* note 31, at 4-5.

[158] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556-57 (1832).

attributes of sovereignty over both their members and their territory."[159] Tribal sovereignty is *inherent*, it is not delegated to tribes by Congress. The inherent sovereignty of Indian tribes exists by virtue of the federal government's historical recognition of Indian tribes as independent political entities, whose existence predates this nation's existence.[160] Although today tribes still possess sovereign authority over both their members and their territory, their sovereignty is no longer considered absolute. Rather, it is described as having "a unique and limited character."[161] It is unique in that it is limited by the government-to-government relationship between the tribes and the United States, one premised upon the history of treaty making and broad congressional authority to regulate Indian affairs. It is limited by the Supreme Court's announcement that Indian tribes, in submitting to the power and protection of the United States government, necessarily gave up some attributes of their sovereignty.[162] The exercise of tribal sovereignty is essentially limited by the overriding interests of the United States government. These interests, of course, have been defined historically by the different federal Indian policies previously discussed. As a general rule, Indian tribes today still possess those aspects of their inherent sovereignty which are not expressly withdrawn by treaty or statute, or by "implication" as a necessary result of their so-called dependent status.[163]

The express limitations upon tribal sovereignty imposed by treaty or congressional legislation are the most apparent. The clearest examples are the numerous treaties under which the tribes ceded vast portions of their territory to the United States in exchange for certain concessions and reservations of smaller

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[159] Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987) (citing United States v. Mazurie, 419 U.S. 544, 557 (1975)); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983) (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980)).

[160] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978); Talton v. Mayes, 163 U.S. 376, 383-84 (1896).

[161] United States v. Wheeler, 435 U.S. 313, 323 (1978).

[162] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209-11 (1978); United States v. Kagama, 118 U.S. 375, 379 (1886).

[163] *Wheeler*, 435 U.S. at 323.

territory. With respect to the lands ceded to the United States, the tribes generally gave up their territorial sovereignty, though they retained their sovereignty over the territory they reserved.

Examples of express congressional limitations on tribal sovereignty after the treaty making period ended in 1870 include the Dawes Act of 1887—the centerpiece legislation of the allotment era.[164] The Dawes Act was perhaps the single most disastrous piece of legislation affecting tribal sovereignty because it resulted in a vast taking of Indian land within affected reservations.[165] The Act provided a mechanism under which the original allotments would be held in trust for a period of twenty-five years. The individual tribal members who owned the allotments then were deemed competent to manage the land and obtained fee patent interests subject to state jurisdiction.[166] In reality, after the individual trust allotments went out of trust status, they were in many cases sold to non-Indians, resulting in a further diminishment of the tribal land base. Even though the allotment policy failed and was rejected long ago with the passage of the Indian Reorganization Act in 1934,[167] the Dawes Act had its effect, and continues to create jurisdictional problems for affected Indian tribes.

Another example of an express congressional limitation on the exercise of tribal sovereignty is Public Law 280[168] under which Congress gave the courts of six states criminal and civil jurisdiction over certain causes of action arising within designated Indian reservations, and created a mechanism for other states to assume jurisdiction in Indian Country. Public Law 280 was passed during the termination era, but was amended in 1968 to require tribal consent to the assumption of state court jurisdiction, as well as give

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[164] General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-358 (1994)).

[165] COHEN, *supra* note 8, at 138.

[166] COHEN, *supra* note 8, at 131.

[167] Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified and amended at 25 U.S.C. §§ 461-479 (1994)).

[168] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (§ 7 repealed and reenacted as amended 1968) (codified as amended at 18 U.S.C. § 1162 (1994), 25 U.S.C. § 1321-1326 (1994), 28 U.S.C. § 1360 (1994)).

states the authority to retrocede their jurisdiction back to the tribes.[169]

Other examples of express congressional limitations of tribal sovereignty are the Indian Civil Rights Act,[170] which imposed certain requirements similar to those contained in the Constitution's Bill of Rights upon Indian tribal governments; the Indian Major Crimes Act,[171] which made it a federal offense for Indians to commit certain designated major crimes on Indian reservations; and the Indian Gaming Regulatory Act,[172] which placed federal restrictions upon an Indian tribe's right to conduct and regulate casino-type gambling.[173]

Since the dawn of the modern era of self-determination, however, with few exceptions Congress has refused to expressly limit the exercise of tribal sovereignty. Ironically, in the last two decades the Supreme Court has failed to follow Congress' lead in this respect. The so-called implied limitations on tribal sovereignty (i.e., the implicit limitations resulting from the tribes' status as domestic dependent nations subject to the overriding authority of the federal government) are generally judicially imposed and are more difficult to define with any clarity. These implied limitations are judicially created by the Court under the guise of interpreting treaties and congressional statutes as "implicitly" diminishing tribal sovereignty. Most of the cases in which the Supreme Court has diminished tribal sovereignty by implication have involved a tribe's relations with non-Indians:

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[169] COHEN, *supra* note 8, at 362-63.

[170] Pub. L. No. 90-284, §§ 201-701, 82 Stat. 73, 77-81 (1968) (codified at 25 U.S.C. §§ 1301-1341 (1994)).

[171] Appropriations Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. §§ 1153, 3242 (1994)). The Major Crimes Act was passed in response to the Supreme Court's decision in *Ex Parte Crow Dog*, 109 U.S. 556 (1883), holding that federal courts did not have jurisdiction over the murder of a Brule Sioux Indian on a reservation by another Sioux.

[172] 25 U.S.C. §§ 2701-2721 (1994).

[173] Although the Indian Civil Rights Act and Indian Gaming Regulatory Act had provisions limiting tribal sovereignty, they were also narrowly drawn with the dual goals of protecting and promoting tribal sovereignty. *See* 25 U.S.C. §§ 2701-2702; Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62-66 (1978).

> Those cases in which the Court has found a tribe's sovereignty [implicitly] divested generally are those involving the relations between an Indian tribe and nonmembers of the tribe. For example, Indian tribes cannot freely alienate their lands to non-Indians, cannot enter directly into commercial or governmental relations with foreign nations, and cannot exercise criminal jurisdiction over non-Indians in tribal courts.[174]

The first two of the above noted limitations are an outgrowth of the discovery doctrine adopted in *Johnson v. M'Intosh*.[175] The notion is that upon coming under the power and protection of the United States, the independent authority of the tribes to transfer their lands to anyone other than the United States, or to deal directly with nations other than the United States, was inconsistent with the overriding interests of the federal government and was therefore implicitly lost as a result of the tribes' "dependent status."[176] Historically, these were the only real implicit limitations on the exercise of tribal sovereignty. Beginning in 1978, however, the Supreme Court began to expand the implicit limitations on tribal sovereignty, beginning with the third limitation noted above, and the Court's decision in *Oliphant v. Suquamish Indian Tribe*.[177]

In *Oliphant*, the Court held that tribal courts could not assert criminal jurisdiction over non-Indians who committed crimes on the reservation.[178] Mark Oliphant was a non-Indian arrested by the Suquamish tribal police during the tribe's annual Chief Seattle Days celebration, and charged with assaulting a police officer and resisting arrest. Oliphant was incarcerated in lieu of $200 bail but

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[174] Brendale v. Confederated Yakima Nation, 492 U.S. 408, 426 (1989).

[175] 21 U.S. (8 Wheat.) 543 (1823). The latter limitation on tribal power to freely alienate land was codified by Congress in a series of trade and intercourse acts in 1796, 1799 and 1802. It effectively prohibits the sale of Indian land to private persons, as well as other sovereigns, without Congress' approval. *See* 25 U.S.C. § 177 (1994).

[176] *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153-54 (1980).

[177] 435 U.S. 191 (1978).

[178] *Id.* at 212.

later released on his own recognizance by the tribal court.[179] The events that led to Oliphant's arrest occurred at the tribal camp grounds at a time when a number of tribal members were encamped for the celebration. Daniel Belgarde, another non-Indian resident of the reservation, was also arrested by tribal police and charged with reckless endangerment and injury to tribal property after a high speed chase through the reservation ended when he collided with a tribal police vehicle.[180] Belgarde posted bail and was released.[181] Both Oliphant and Belgarde applied for a writ of habeas corpus under the Indian Civil Rights Act, arguing that the tribe lacked criminal jurisdiction over non-Indians.[182] Oliphant's case reached the Supreme Court after the Ninth Circuit upheld tribal jurisdiction.[183] In an opinion by Justice Rehnquist, the Supreme Court reversed the Ninth Circuit, ostensibly based on two factors.

First, the Court cited a concern for protecting non-Indian citizens from "unwarranted intrusions on their personal liberty."[184] As separate sovereigns whose existence predates the Constitution, Indian tribes do not have to accord the full protections of the Bill of Rights to criminal defendants.[185] The Court was thus concerned about requiring citizens to submit to the criminal jurisdiction of tribal courts without these protections. Yet *Oliphant* came along ten years after Congress virtually eliminated this concern by enacting the Indian Civil Rights Act.[186] The Act mandates that tribes accord persons the same basic protections in criminal proceedings as are contained in the Bill of Rights.[187] Under the Act, tribes may not incarcerate any person for over one

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[179] Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976), *rev'd sub nom.* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[180] *Id.*

[181] 435 U.S. at 194.

[182] *Id.*

[183] 544 F.2d at 1009.

[184] 435 U.S. at 209-10.

[185] *Id.* at 199 n.8.

[186] Pub. L. No. 90-284, §§ 201-701, 82 Stat. 73, 77-81 (1968) (codified at 25 U.S.C. §§ 1301-1341 (1994)).

[187] 25 U.S.C. § 1302.

year for any offense.[188] More importantly, the Act gives any person the right to seek a writ of habeas corpus in federal court to test the legality of the detention by any tribal court.[189] These provisions mitigate, if not eliminate, the concern for the protection of personal liberty in Justice Rehnquist's opinion.

A second rationale for the decision in *Oliphant* was referred to by Justice Rehnquist as a "commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians."[190] The historical evidence used to support this assumption was shaky at best and has been much criticized.[191]

The Court in *Oliphant* therefore rested its holding on two primary factors: the perceived assumption by all three branches of government that tribes lacked criminal jurisdiction over non-Indians and the concern for protecting non-Indians from potential violations of their civil rights.[192] However, these concerns are not present when it comes to the exercise of tribal civil jurisdiction over non-Indians in Indian Country. The traditional view, held by the federal government, is that "Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians in which the tribes have a significant interest."[193] Thus, despite *Oliphant*'s limitations on criminal jurisdiction, the Court has continued to recognize the proposition that tribal sovereignty has a significant territorial

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[188] *Id.* § 1302(7).

[189] *Id.* § 1303.

[190] *Oliphant*, 435 U.S. at 206.

[191] *See, e.g.*, Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353 (1994); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, CAL. L. REV. 1573, 1595-1599 (1996); Peter C. Maxfield, Oliphant v. Suquamish Tribe: *The Whole is Greater Than the Sum of the Parts*, 19 J. CONTEMP. L. 391 (1993).

[192] Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153-54 (1980).

[193] *Id.* at 153 (citing 17 Op. Att'y Gen. 134 (1881)).

component.[194] The Court has, therefore, not extended *Oliphant* beyond questions of criminal jurisdiction.[195]

On the other hand, the alienation of Indian land to non-Indians within reservation boundaries, which primarily came as a result of the allotment policy, has led to a significant exception to the exercise of the broad civil jurisdiction over non-Indians. It is this judicially created limitation on a tribe's territorial sovereignty that presents the biggest threat to tribes. Three years after *Oliphant*, the Supreme Court decided *Montana v. United States*.[196] The Court held in *Montana* that as a result of the General Allotment Act and consequent alienation of tribal land to non-Indians, Indian tribes have, subject to two exceptions, generally been divested of their authority to regulate non-Indians on non-Indian fee land, even though the conduct occurs within the boundaries of the tribe's reservation.[197] This is, perhaps, the greatest tragedy that resulted from Congress' failed attempt to allot Indian reservations. It has essentially created a confusing checkerboard pattern of state/tribal jurisdiction on allotted reservations, depending on land ownership, and has been a nightmare for tribal law enforcement in Indian Country.

Ironically, *Montana* was decided only six years after Congress passed the Indian Self-Determination and Education Assistance Act of 1975,[198] and long after the allotment policy itself had been repudiated. In *Montana*, the Court held that the Crow Tribe had been implicitly divested of the authority to prohibit non-Indians from hunting and fishing on non-Indian owned reservation land on the Big Horn River, which flowed through the reservation. The Court held that this implicit loss of tribal sovereignty came by virtue of the General Allotment Act and the Crow Allotment Act enacted pursuant to the General Allotment Act, which resulted in

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[194] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 142 (1982).

[195] *See* National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 854 (1985).

[196] 450 U.S. 544 (1981).

[197] 450 U.S. at 557-67. *See infra* text accompanying notes 201-202 (discussing exceptions).

[198] Pub. L. 96-638, 88 Stat. 2203 (codified at 25 U.S.C. §§ 450-450n, 455-458e (1994)).

the alienation of the land in question to non-Indians.[199] While recognizing that the tribe's authority to regulate the conduct of non-Indians on Indian owned land remained very broad and exclusive, the Court declined to recognize the tribe's general sovereignty over land within the reservation which had been transferred in fee to non-Indians.[200] Tribal sovereignty in *Montana*, then, was essentially equated with land ownership.

The two exceptions to the general rule announced in *Montana* are easy to state but difficult to apply. The Court in *Montana* recognized that even on non-Indian fee land, tribes still retain jurisdiction when a nontribal-member enters into "consensual relationships with the tribe or its members" or when the non-member's conduct on reservation fee land directly affects the tribe's "political integrity, the economic security, or the health or welfare."[201] At first glance, these exceptions seem significant, and indeed are significant if applied consistently with the Court's other cases.[202] Unfortunately, the Supreme Court has enunciated no clear test to apply in determining whether a non-member's conduct on fee lands comes within one of these exceptions. In *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, four of the nine justices indicated that the impact to the tribe's political integrity, economic security or health or welfare must be "demonstrably serious" and must "imperil" these interests.[203] Two other justices concurred with the result, but did not indicate whether or not they agreed with this analysis.[204] Consequently, since *Montana*, lower courts and tribal governments have had to guess at whether jurisdiction exists over non-Indian activities on fee land,

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[199] *Montana*, 450 U.S. at 559.

[200] *Id.* at 563-65.

[201] *Id.* at 565-66.

[202] *See* Brendale v. Confederated Banks of the Yakima Indian Nation, 492 U.S. 408, 448-59 (1989) (Blackmun, J., concurring in part and dissenting in part).

[203] 492 U.S. at 431. The majority opinion, authored by Justice White, was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy.

[204] *Id.* at 433 (Stevens, J., joined by O'Connor, J., concurring).

and numerous disputes have arisen over the assertion of tribal sovereignty in such cases, resulting in a great deal of litigation.[205]

In *Brendale*, the Supreme Court purported to apply the *Montana* rule in two opinions, neither of which garnered a majority. At issue was whether the Yakima Nation had been implicitly divested of its sovereign authority to enforce tribal zoning laws against non-Indians on non-Indian fee lands in two different areas of the reservation. The "open area" of the reservation had been opened to non-Indian settlement after allotment. As a result, almost half of the land in the area was owned in fee by non-members.[206] The "closed area" of the reservation consisted primarily of Indian trust land, with a few non-Indian landowners. Access to the closed area was restricted to tribal members and landowners of record. A majority of the Court joined in that portion of Justice White's opinion stating that the tribe was implicitly divested of its authority to apply its zoning laws to non-Indian fee land in the open area.[207] A majority also joined Justice Stevens' opinion stating that the tribe retained its authority to apply its zoning laws to non-Indians in the closed area.[208]

Brendale was followed by *South Dakota v. Bourland*, in which the Court held that the Cheyenne River Sioux Tribe was divested of its authority to regulate hunting and fishing by non-Indians in an area within the tribe's reservation that had been acquired in fee by the United States for the operation of a dam and reservoir.[209] The flood control statutes at issue in *Bourland* specifically authorized the taking of tribal land for the dam and reservoir. The Court held that the loss of tribal jurisdiction was implicit in the taking statutes authorizing the alienation of the former Indian lands to the United

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[205] *See, e.g.*, County of Lewis v. Allen, 163 F.3d 509 (9th Cir. 1998); Montana v. United States EPA, 137 F.3d 1135 (9th Cir.), *cert. denied*, 119 S. Ct. 275 (1998); Enlow v. Moore, 134 F.3d 993 (10th Cir. 1998); Lower Brule Sioux Tribe v. South Dakota, 104 F.3d 1017 (8th Cir.), *cert. denied*, 118 S. Ct. 64 (1997); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (2d Cir. 1996); Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294 (8th Cir. 1994), *cert. denied*, 513 U.S. 1103 (1995).

[206] *Brendale*, 492 U.S. at 415-16.

[207] *Id.* at 421-33.

[208] *Id.* at 433-48.

[209] 508 U.S. 679, 680-81 (1993).

States.[210] The purpose of the federal taking statutes was to open the area for the general recreational use of the public, including hunting and fishing, subject to federal regulation.[211] Although the Cheyenne River Act gave the tribe and its members free access to the shoreline and the right to hunt and fish in the taken area, the right was "subject . . . to regulations governing the corresponding use by other citizens of the United States."[212] The alienation of tribal land under the statutes thus resulted in the loss of regulatory authority over non-Indians in the taken area under *Montana*. The Court then remanded the case for a determination of whether the tribe could assert jurisdiction under either of the two *Montana* exceptions.[213]

Most recently, in *Strate v. A-1 Contractors*, the Supreme Court relied on *Montana* and held that tribal courts cannot exercise civil jurisdiction over an action between non-Indians for actions arising on state highways crossing Indian trust land within reservations.[214] The Court in *Strate* treated the state highway as equivalent to fee land for purposes of applying *Montana*.[215] While the *Montana*, *Brendale* and *Bourland* decisions all found that Congress had expressed its intent, albeit implicitly, to limit tribal sovereignty either by the Allotment Act or by legislation authorizing the taking of reservation land for federal purposes, *Strate* relied on no such Act of Congress. Instead, in an opinion by Justice Ginsburg, the Court found that the tribes' lack of jurisdiction was established by "our case law."[216]

As a result of these four cases and the Supreme Court's liberal use of the so-called implicit limitations upon tribal sovereignty, the clarity of *Worcester* has been abandoned. The Supreme Court has

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[210] *Id.* at 689-91.

[211] *Id.* at 689-90.

[212] *Id.* at 690.

[213] *Id.* at 695-96. On remand, the Eighth Circuit held that the tribe could not regulate under either *Montana* exception. South Dakota v. Bourland, 39 F.3d 868, 870 (8th Cir. 1994).

[214] 520 U.S. 438, 442, 459 (1997).

[215] *Id.* at 455-56. The Court's decision to do so is extremely questionable. *See infra* pp. 56-57.

[216] *Id.* at 445.

essentially taken on the role of Congress and assumed the authority to decide when to modify or abrogate a tribe's treaty protected sovereignty. In all four of the cases discussed above, the Court in effect reversed the historic presumption against the loss of tribal sovereignty established by Chief Justice Marshall in the Cherokee cases—a presumption that essentially held that Indian tribes retain all attributes of their sovereign authority over lands which constitute their reservation, unless Congress explicitly limits the exercise of that sovereignty by treaty or statute.[217] In contrast, the Court in the *Montana* line of cases ruled that Indian tribes whose land has been alienated in fee to non-Indians are presumed to lack jurisdiction to regulate the lands or the conduct of non-Indians thereon unless Congress has expressly conferred such authority by statute or treaty, or unless one of the two exceptions identified by the *Montana* Court are present. However, in none of the four cases did the Court articulate any reason why the exercise of civil jurisdiction is inconsistent with the overriding interest of the United States, the true test for determining whether tribal sovereignty has been implicitly divested.[218]

At the other end of the spectrum are cases like *Williams v. Lee*,[219] *Washington v. Confederated Tribes of the Colville Indian Reservation*,[220] *Merrion v. Jicarilla Apache Tribe*,[221] *New Mexico v. Mescalero Apache Tribe*,[222] and *Santa Clara Pueblo v. Martinez*.[223] In all these cases, the Court upheld tribal sovereignty and was careful not to find an implicit loss of sovereignty unless Congress made its intention unmistakably clear. These cases

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[217] *See* Brendale v. Confederated Banks of the Yakima Indian Nation, 492 U.S. 408, 455-57 (1989) (Blackmun, J., concurring in part and dissenting in part).

[218] Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153 (1980). See *infra* note 231 and accompanying text.

[219] 358 U.S. 217 (1959).

[220] 447 U.S. 134 (1980).

[221] 455 U.S. 130 (1982).

[222] 462 U.S. 324 (1983).

[223] 436 U.S. 49 (1978).

are directly at odds with the way *Brendale*, *Bourland*, and *Strate* construe *Montana*.[224]

Merrion was decided only two years after *Montana*. The Court held that the tribe retained its sovereign authority to tax non-Indians conducting activity on tribal land which the non-Indians leased for oil and gas development.[225] Unlike *Montana*, the Court refused to presume the loss of tribal sovereignty by implication. Instead, relying on *Colville*, decided one year prior to *Montana*, the Court recognized that "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."[226] The Court found no "'clear indications' that Congress [had] implicitly deprived the Tribe of its power to impose the severance tax" against the leased lands.[227] Moreover, if there "were ambiguity on this point, the doubt would benefit the Tribe, for 'ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.'"[228]

In *Santa Clara*, the Court held that while Congress in the Indian Civil Rights Act imposed certain obligations on tribal governments similar to the Bill of Rights, the Act did not authorize a cause of action in federal court to remedy their violation. The Court implied that such a cause of action would intrude upon the tribe's sovereignty beyond that which Congress expressly authorized.[229]

In *Mescalero Apache*, the Court held that New Mexico had no jurisdiction to regulate non-Indian hunting and fishing on the Mescalero Apache Reservation, because the exercise of such

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[224] *See* Brendale v. Confederated Banks of the Yakima Indian Nation, 492 U.S. 408, 450-56 (1989) (Blackmun, J., concurring in part and dissenting in part) (discussing the anomaly created between *Montana* and the Court's other Indian law jurisprudence).

[225] *Merrion*, 455 U.S. at 144, 159.

[226] *Id.* at 149 (quoting Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980); *Martinez*, 436 U.S. at 60).

[227] *Merrion*, 455 U.S. at 152.

[228] *Id.* (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980)).

[229] 436 U.S. at 65-72.

jurisdiction was preempted by the comprehensive set of tribal hunting and fishing laws approved by the federal government.[230] The Court recognized that "tribes retain any aspect of their historical sovereignty not 'inconsistent with the overriding interests of the National Government.'"[231] This historic sovereignty included the "power to manage the use of [their] territory and resources by both members and nonmembers . . . to undertake and regulate economic activity within the reservation, . . . and to defray the cost of governmental services by levying taxes."[232] The Court also recognized that "the sovereignty retained by the Tribe under the Treaty of 1852 includes its right to regulate the use of its resources by [tribal] members as well as non-members."[233]

Williams v. Lee was decided in 1959, before *Montana* and its progeny muddied the waters. Not surprisingly, *Williams* remains true to the foundational principles laid out by Chief Justice Marshall in the Cherokee cases. The *Williams* Court held that Arizona state courts lacked jurisdiction over a case brought by a non-Indian merchant against a tribal member for nonpayment of goods purchased on the Navajo Indian Reservation.[234] The Court stated that implicit in the Navajo treaty, which "set apart" as a "permanent home" a reservation for the Navajos, was "the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed."[235] The Court further reasoned:

> [T]o allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the

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[230] 462 U.S. 324, 343-44 (1983).

[231] 462 U.S. at 332 (quoting *Colville*, 447 U.S. at 153).

[232] *Id.* at 335-36.

[233] *Id.* at 337. The Court distinguished *Montana* on the ground that *Montana* involved tribal regulation of non-Indian fee land, whereas the land on the Mescalero Reservation was all tribally owned trust land. *Id.* at 330-31. *Merrion* also involved the assertion of tribal jurisdiction over non-Indians on tribal trust land leased to non-Indians. After *Strate*, however, the distinction becomes less clear. *See infra* notes 238-239 and accompanying text (discussing the *Strate* decision).

[234] Williams v. Lee, 358 U.S. 217, 223 (1959).

[235] *Id.* at 221-22.

> Indians to govern themselves. It is immaterial that [the merchant] is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the treaty of 1868, and has done so ever since. If this power is to be taken from them, it is for Congress to do it.[236]

Unlike its decision in *Montana*, the *Williams* Court did not consider it relevant whether the reservation land upon which the non-Indian store sat was Indian or non-Indian owned. Instead, the Court focused on the fact that the non-Indian's conduct "occurred on the reservation" and the "transaction with an Indian took place there."[237] More important, underlying the Court's decision was the express recognition that the "internal affairs" of an Indian tribe can involve non-Indians when the conduct of non-Indians has an effect on the tribe or its members.

Despite the Supreme Court's decision in *Williams*, and subsequent holdings in *Martinez*, *Merrion* and *Mescalero Apache*, the Court in *Strate* made the broad and erroneous assertion that "our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances."[238] To support this broad assertion, Justice Ginsburg relied primarily on *Oliphant* and *Montana*.[239] Justice Ginsburg was undoubtedly influenced by the statement in *Montana* that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the

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[236] *Id.* at 223.

[237] *Id.*

[238] Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997). Even more troublesome is the fact that the Court in *Strate* treated the land upon which the accident occurred as alienated fee land, even though the cause of action arose on a highway easement across tribal trust land. The Court did so in order to apply the *Montana* presumption against tribal jurisdiction. *See supra* text accompanying notes 199-200).

[239] *Id.* (citing Montana v. United States, 450 U.S. 544, 565 (1981); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

tribes, and so cannot survive without express congressional delegation."[240] The statement is directly at odds with the above quoted passage of *Williams*, even though the *Montana* Court cites *Williams* to support its own statement.[241] How can one reconcile these two seemingly inconsistent approaches to tribal sovereignty? As a practical matter, one cannot, without looking at the particular facts of each case involving non-Indians.

An analysis of the Supreme Court's decisions following *Williams*, particularly those decided since 1978, indicates that there are no clearcut rules under which the Supreme Court determines whether tribal sovereignty in cases involving non-Indians has been implicitly diminished. While tribal authority over the conduct of tribal members remains broad and exclusive, tribal authority over nonmembers on reservation land, particularly non-Indian owned fee land, is increasingly restricted. The Supreme Court has essentially developed two inconsistent lines of case law. One, led by *Williams*, respects congressional authority in the area of tribal sovereignty and presumes against any loss of territorial sovereignty absent express congressional legislation.[242] The other, initiated by *Montana*, ignores and reverses the presumption in favor of the loss of territorial sovereignty.[243] This inconsistency essentially allows the Supreme Court to decide a case involving tribal sovereignty arbitrarily based upon the Court's own subjective belief as to what the law should be.[244]

The result is a great deal of frustration for Indian tribes, and the legitimate claim that the Supreme Court's decisions in *Montana* and its progeny have simply become another example of a long history of the federal government's abrogation of their historic

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[240] Montana v. United States, 450 U.S. 544, 564 (1981).

[241] *Id.* (citing *Williams*, 358 U.S. at 219-20).

[242] *See* Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.") (citations omitted).

[243] *See Strate*, 520 U.S. at 445.

[244] *See* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1575 (1996).

treaty rights. The Supreme Court's activism in this regard is particularly ironic in light of the fairly consistent congressional policy aimed at promoting tribal sovereignty and self-government since 1970, one which is currently embraced by the Clinton administration.[245]

The Supreme Court formerly was the greatest protector of tribal sovereignty because its Justices took the time to read and understand history. However, as evidenced in its decisions in *Montana*, *Brendale*, *Bourland* and *Strate*, the Court today is dominated by judicial thinking that essentially ignores the historical basis of tribal sovereignty and continues to depart from the foundational principles established by Chief Justice Marshall in the Cherokee cases. Unfortunately, today's Supreme Court has seen fit to take on the role of policy maker, a role traditionally left to Congress and the Executive Branch.

III. THE FUTURE OF TRIBAL SOVEREIGNTY

In light of *Strate*, the current trend in the Supreme Court is apparently to limit tribal sovereignty over non-Indians on reservation lands. The Court has undertaken an ad hoc subjective approach to analyzing issues of tribal sovereignty; in most cases deciding the issue not based upon the tribes' historic territorial sovereignty, but rather upon the Supreme Court Justices' own beliefs of what the "current state of affairs ought to be."[246] The result of this ad hoc approach to applying the *Montana* rule and its exceptions has been the creation of a body of law that has become extremely unpredictable. For example, lower courts have held on the one hand that an Indian tribe retains the power to regulate non-Indians use of water on non-Indian lands within the reservation.[247] On the other hand, lower courts have also held that an Indian tribe cannot

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[245] See *supra* notes 145-156 and accompanying text.

[246] Getches, *supra* note 244, at 1575.

[247] Montana v. United States EPA, 137 F.3d 1135 (9th Cir.), *cert. denied*, 119 S. Ct. 275 (1998).

provide a judicial forum for its own members who are injured or even killed by non-Indian motorists crossing the reservation.[248]

What, if anything, can be done to correct this current trend in the Supreme Court? The answer is fairly simple. The Court must recognize and understand the historic and doctrinal basis of tribal sovereignty. The Court must recognize, as it did in *Merrion* and *Martinez*, that when it undertakes to diminish sovereignty by implication, it is in reality abrogating historic treaty rights. In their treaties, the tribes reserved the right to occupy and govern what remained of their territory as they saw fit, subject only to the power of Congress. The Supreme Court must also give proper deference to the current policy of Congress, which has been unwavering since the early 1970s, to promote and encourage tribal self-government, even when the actual exercise of that self-government involves non-Indians within the territorial bounds of the reservation.

From a more practical standpoint, tribal governmental officials must recognize that with the power to exercise sovereignty comes the duty to exercise that power fairly and in a manner which comports with this nation's concepts of due process of law and fundamental fairness. Tribal governments must continue to work diligently to establish a system of government, including strong tribal court systems, responsive to the rights and needs of its own citizens and as well to non-Indian residents and visitors. Many positive steps in this direction have been made in the past.[249] The federal government must continue to encourage and support tribes in their efforts to achieve not only self-determination and strong tribal government, but eventual self-sufficiency. Navigating the road to tribal self-determination and self-sufficiency demands patience on the part of everyone. If, indeed, tribal governments lag behind federal, state and local governments in this area, it is due primarily to the failure of the federal government to follow a

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[248] Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1516 (1998); Austin's Express, Inc. v. Arneson, 996 F. Supp. 1269 (D. Mont. 1998).

[249] *See, e.g., Oversight Hearing on S.1691 Before the Senate Comm. on Indian Affairs*, 105th Cong. 6 (1998) (testimony of David Kwail, President, Inter-Tribal Council of Arizona).

consistent policy of encouraging and promoting tribal sovereignty in the last 200 years. Modern tribal governments have not been afforded the luxury of time to perfect their systems, as have state and local governments.

The Court's recent decision in *Strate* is particularly alarming for tribes and the future of tribal sovereignty. Initially, the implicit limitations on the exercise of tribal territorial sovereignty were generally aimed at the activities of non-Indians on reservation lands which had been sold or transferred in fee to non-Indians or the state or federal government. The Court in *Strate*, however, virtually ignored fundamental principles of property law and equated a public highway easement that the tribe and Bureau of Indian Affairs had granted over tribal trust land with alienated fee land. Thus, the Court was able to circumvent its own previous rule that tribal authority over non-Indian activities on trust land remains generally broad and exclusive. No legal basis exists to equate a mere possessory property interest with the absolute alienation of Indian land in fee simple. The Court's ruling calls into question tribal jurisdiction over a good deal of reservation land inasmuch as many Indian tribes have leased tribal land to non-Indians for economic development. Leases, like easements, grant limited property interests, and the question now is whether or not the Supreme Court will continue its quest to erode tribal sovereignty on leased lands as well as easements, and thus will continue to reverse the historical legal presumption against the implicit loss of tribal sovereign authority.

What is particularly ironic and frustrating to Indian tribes and their advocates is that the Supreme Court is currently engaging in a campaign to divest tribes of their territorial sovereignty, while Congress and the Executive Branch promote tribal sovereignty, self-sufficiency, and economic development. Indian tribes can neither be sovereign nor self-sufficient if their authority is limited to activities that involve their own members, unless we choose to isolate these tribes from engaging in commerce with non-Indians. Such isolation would, of course, frustrate the tribes' ability to promote economic development on reservation lands, and ultimately frustrate the federal policies favoring self-sufficiency, economic development and strong tribal government.

Perhaps the best illustration of the dichotomy created by the Court comes when one compares the Court's recent decision in *Strate* with Congress' recent enactment of the Tribal Justice Support Act. On the one hand, Justice Ginsburg stated in *Strate* that "[o]ur case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of non-members exists only in limited circumstances."[250] Some lower courts have interpreted *Strate* as establishing nearly an insurmountable presumption against tribal jurisdiction.[251] On the other hand, Congress, in the Tribal Justice Support Act of 1993, expressly found not only that the United States has a trust responsibility to protect the sovereignty of tribal governments, but that tribal courts have repeatedly been recognized as appropriate forums for the adjudication of disputes involving both Indians and non-Indians alike.[252] The legislative history of the Tribal Justice Support Act supports the exercise of sovereignty over non-Indians, regardless of whether their conduct occurs on Indian land, non-Indian land or easements. The Senate reports accompanying the Act expressly noted that tribal judicial systems are permanent institutions "charged with resolving the rights and interests of both Indian and non-Indian individuals."[253] Similarly, the House Report expressed Congress' opinion that tribal courts properly "exercise civil jurisdiction within their territory" over Indians and non-Indians alike.[254]

The Court in *Strate* never mentioned the Tribal Justice Support Act, even though the United States cited the Act throughout their amicus brief in support of the tribes. Nor has the Supreme Court ever articulated a logical reason for ignoring the historical presumption, first established by Chief Justice Marshall in *Worcester,* that Indian tribes retain every attribute of their territorial sovereignty unless Congress expressly and unequivocally takes it

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[250] Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997).

[251] *See supra* note 248.

[252] Pub. L. 103-176, 107 Stat. 2004 (1993) (codified at 25 U.S.C. § 3601 (1994)).

[253] S. REP. NO. 103-88, at 8 (1993) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 1978).

[254] H.R. REP. NO. 103-205, at 8-9 (1993).

away from them by statute or treaty. At some point in the near future the Court must clarify the dichotomy it has created, and explain how, if at all, both *Montana* and *Strate* can be reconciled with *Williams*, *Merrion*, *Mescalero Apache* and, ultimately, over "150 years of Indian law jurisprudence."[255]

Though the current trend in Congress has been to uphold the territorial integrity of tribal sovereignty and to continue to promote strong tribal governments, there are some members of Congress who, like the Rehnquist Court, are actively engaged in a campaign to divest the Indian tribes of their sovereignty. Bills have recently been introduced that would require Indian tribes to waive their sovereign immunity, and that would expressly divest Indian tribes of sovereign authority over non-Indians in certain circumstances. Many of these provisions have been attached as riders to appropriation and other bills, in order to avoid the hearing process and prevent tribes and their advocates from testifying before Congress in opposition. While these members have generally been unsuccessful in swaying the tide in Congress against tribal sovereignty, there are an alarming number of people in Congress who are leaning toward the minority view.

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[255] South Dakota v. Bourland, 508 U.S. 679, 699 n.2 (1993) (Blackmun, J., dissenting). The Court seems to have limited the effect of *Strate* when it recently vacated the Ninth Circuit's decision in *El Paso Natural Gas Co. v. Neztsosie*, 136 F.3d 610 (9th Cir.), *vacated*, 119 S. Ct. 1430 (1998). *El Paso* involved a civil nuclear tort action by tribal members against a non-Indian mining company that leased tribal trust land on the Navajo Reservation for uranium mining. The mining company sued to enjoin the tribal court from asserting jurisdiction. The Ninth Circuit held that the mining company was required to exhaust its tribal court remedies prior to seeking federal review of the tribal court's jurisdiction over the action. 136 F.3d at 613-15, 617-20. In the course of its holding, the Ninth Circuit distinguished *Strate*. *Id.* at 618 n.5. The Supreme Court vacated on the ground that the action was preempted by the "unusual preemption provision" of the Price-Anderson Act, 42 U.S.C. § 2014(hh), under which Congress expressed an unmistakable preference for a federal forum to adjudicate such actions. *El Paso*, 119 S. Ct. at 1437. In a narrow holding, the Court rejected the argument that tribal jurisdiction was foreclosed on the broader grounds discussed in *Strate*. The Court distinguished *Strate* as an action "arising on state highways" and indicated that *Strate* did not apply to actions which "occurred on tribal [lands]" even though the land at issue was leased to non-Indians. *Id.* at 1436 n.4 (citing *El Paso*, 136 F.3d at 618 n.5).

There are a number of theories as to why these voices of dissent are becoming louder in Congress. The recent trend in the Supreme Court to limit tribal sovereignty in areas that involve non-Indians has given the traditionally anti-Indian forces in Congress fuel to fire their efforts at terminating sovereignty and, ultimately, any treaty rights which remain. There is also a political backlash against Indian gaming which has turned many old eastern allies against Indian tribes and sovereignty. In particular, the rise of gaming in the eastern part of the United States and the fact that some tribes have become wealthy as a result of the location of their reservations close to metropolitan areas, has conveyed the notion that this country's Indian tribes are becoming alarmingly rich from gaming. Although, in reality relatively few tribes have actually generated a substantial amount of revenue from gaming, the mere illusion has caused a tremendous backlash, which has carried beyond gaming into other areas of Indian law.

Another reason for the political backlash is that Indian tribes are becoming more active in asserting their jurisdiction, through ordinances imposing taxes and regulatory requirements on the reservation. Tribal courts are increasingly asserting jurisdiction over the conduct of non-Indians on the reservation, in part because tribal courts are the mechanism by which the tribal regulatory laws are enforced. In many cases, this results in conflict between tribes and reservation non-Indians, who then complain to Congress and generally wage political campaigns against sovereignty there and in the media.

Despite these factors, the challenge for policymakers, lawyers and judges is to remember the lessons of the past and not repeat them. Reversing the current policy of promoting tribal sovereignty and self-government will only repeat past failures. Simply because Indian tribes, just now becoming active in asserting their political and legal authority, may sometimes assert that authority in a manner which creates controversy or disagreement among non-Indians does not mean that their authority should be taken away, either by the courts or Congress. It must be remembered that tribal sovereignty as a historical legal concept finds support in this nation's early treaties. Most of these treaties were used by the United States to obtain the vast amount of territory in the United States to which the tribes had a prior claim. At the same time, in

return for giving up their title to the lands ceded, the tribes obtained reservations of land as their remaining homeland, within which they reserved their historic sovereignty. Any diminishment of their territorial sovereignty, whether by congressional act or judicial decision, is tantamount to another broken promise by the United States.

Justice Black said in his dissent in *Federal Power Commission v. Tuscarora Indian Nation* that "Great nations, like great men, should keep their word."[256] By sustaining a real policy, both legal and political, of promoting and enforcing tribal sovereignty in Indian Country, the United States is simply keeping the promises of its ancestors. Any retreat from that policy, currently recognized in Congress and the Executive Branch, if not the Supreme Court, will have tragic consequences for the tribes, as history teaches. More significantly, it will also render the United States government susceptible to criticism from foreign countries, and result in the loss of credibility of the United States in its campaign to promote human rights world-wide. Politically speaking, tribal sovereignty and the treaty rights of this country's native people are just as much issues of basic human rights as they are legal and political issues. The history of this country's taking of Indian lands—engaging in an active campaign at times to exterminate Indian people through the spread of diseased blankets, the destruction of the once great buffalo herds upon which many tribes depended for survival, and outright warfare and bounty hunting-provides illuminating examples of this country's own weakness when it comes to basic human rights. The United States' moral, if not legal, obligation is to enforce the historical treaties that this country executed with America's first nations.

Since President Nixon's historic address to Congress in 1970, the enactment of the Indian Self-Determination Act in 1975, and the subsequent enactment of numerous legislation promoting tribal sovereignty, self-sufficiency, and economic development, Congress has been on the right path. If Congress were to once again reverse this policy as urged by a minority of its members, it will simply stand as another example of a violation of the native peoples'

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[256] 362 U.S. 99, 142 (1960) (Black, J., dissenting).

human rights, their treaty rights and their historical right to exist as unique cultural, political and sovereign nations within this nation. Neither this country's diplomats nor its presidents will ever again be able to travel overseas and preach human rights to the other nations of this earth without appearing hypocritical.

On the other hand, Indian tribes must continue to lobby Congress to ensure that their side of the dispute is always considered and that Congress and state and local policymakers have the benefit of the tribes' own views as to how and why tribal sovereignty is so important. Moreover, Indian tribal governments have their own responsibility to exercise their sovereignty so that non-Indian citizens of the United States are not threatened. Indian tribes as governments must recognize that with the increased exercise of their sovereignty over non-Indians comes the duty to exercise that sovereignty fairly and responsibly utilizing procedures and safeguards with which non-Indians are familiar. Judges and lawmakers are constantly viewing the actions of Indian tribes through a microscope, and many continue to look for legal justifications to place additional limitations on sovereignty.

State and federal governments must also realize that it has not been all that long since President Nixon's speech to Congress in 1970 ushered in the current federal policy of encouraging and promoting tribal sovereignty and self-government. It would be tragic to stray from that policy before Indian tribes have been given a legitimate chance to even begin to build a modern institution of local government, to make and correct their own mistakes along the way, and to exercise that which is their historic and legal right.

CONCLUSION

Although the current federal policy is aimed at supporting tribal sovereignty, it has not been that long since the days of termination. Tribal governments can never become stable when the federal government keeps changing the rules every twenty-five years or so. The failure of the federal government to adhere to a consistent policy toward the Indian tribes has had a devastating impact. No one can dispute that this country's Indian Nations had their traditional cultural, social, religious, and political systems all but torn down by policies of assimilation and termination. And yet

somehow these Nations were able to cling to the core of their existence, the fundamental cultural values that defined them as a separate distinct people. With the reemergence of the federal government's policy of self-government following the Termination Era of the 1950s, tribes were able to resume the rebuilding process that began in 1934—a process that remains ongoing.

If history teaches us anything, it is that the only federal Indian policy which can be justified, the only policy which is consistent with the historic treaty obligations of the United States, and the only policy which native people themselves will support, is a policy which respects and enforces Indian treaties and promotes tribal sovereignty and self-determination. Indian people have and will always fight any government attempt to take their land, their cultural values, and their sovereignty. That is why all three branches of government must support and promote a policy of tribal self-government. Indian tribes today must be given sufficient time and the resources to perfect a modern system of government, one which will fit each tribes' unique social and cultural needs and at the same time provide the required safeguards which non-Indians expect. The United States must respect the historic treaty rights and must not only recognize, but actively enforce, the notion that the tribes reserved their sovereignty in these treaties.

Congressmen, lawyers, and judges must never examine tribal sovereignty without understanding its history. They must always realize that tribal sovereignty is rooted not only in the history of this country, but in the Constitution and the numerous treaties this nation executed with Indian tribes before it became the super power it is today. It seems that the United States must periodically be reminded of its historic commitments to the tribes. The observation of Vine Deloria, Jr. in 1974 on the heels of the Indian civil rights movement remains forcefully true today:

> The contemporary demand of American Indians for a restoration of the treaty relationship must be seen in this historical setting. Few tribes would have signed treaties with the United States had they felt that the United States would violate them. The promises of self-government found in a multitude of treaties, the promises of protection by the United States from wrongs committed by its citizens, the promises that the tribes would be respected as

> nations on whose behalf the United States acted as a trustee before the eyes of the world, were all vital parts of the treaty rights which Indians believe they have received from the United States.
>
> John Marshall characterized the Cherokees, and by extension the other Indian tribes, as in a state of tutelage. The implied meaning of this phrase was that at some future time the tribes would assume full status as nations in the world community. There was never an indication that the tribes were to be destroyed and their individual members merged into the great American mass as citizens.
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> . . .
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> The recent series of incidents in Indian country is based upon a political reading of the treaties and not a reading of the treaties as symbolic real-estate documents. The history of the treaty relationship between the United States and the Indian tribes contains a strong tradition denying that tribes are wards of the government and describing them as expectant nations with eventual status as nations in the family of nations of the world.[257]

The Indian tribes are indeed America's first nations. Their sovereignty is rooted in the land that they occupied long before the United States was created. Their existence is inextricably intertwined with the history of the creation of the United States and the westward movement. They continue to occupy their own territory, promised to them by treaty or legislation. Their efforts to regain their self-sufficiency and social and cultural well-being as a people, as nations within a nation, depends upon the continued recognition by the United States that they have a historical, legal and political right to exist and to make and enforce their own laws within the territory they occupy. Until the United States and the states recognize this fundamental proposition and acknowledge this country's legal and moral obligation to actively recognize and protect tribal sovereignty, the road to tribal self-sufficiency will always be broken.

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[257] DELORIA, BEHIND THE TRAIL OF BROKEN TREATIES, *supra* note 7, at 136-37.