Page 1

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RAYMOND CROSS*

Tribes as Rich Nations

"If you have understanding and heart, show only one.
Both they will damn, if both you show together." n1

[*893]

Emancipating today's American Indian peoples requires a fundamental restructuring c contemporary concept of tribal self-determination. Bound by their legal status as tribes, as them by Supreme Court opinions now almost 200 years old, the Indian peoples are cripple governing rules of law that prevent them from realizing any meaningful measure of self-determination. By resymbolizing the Indian peoples as "tribes," Chief Justice John Marsh opinion in Johnson v. McIntosh n2 incorporated aboriginal Indian land titles into fee simp ownership, effectively subordinating the Indian peoples to paramount federal authority. n: Hundreds of linguistically, culturally **[*894]** and economically distinct indigenous people: assimilated as tribes into the American domestic sphere of control. Their ostensible sharin tribalistic existence helped rationalize Marshall's recharacterizing of fiercely independent sufficient Indian peoples as "domestic, dependent nations" legally subject to paramount fe

control. n4

Marshall's Indian legal opinions repainted, in a monochrome reddish tint, the diverse map of North America so as to project federal sovereignty over millions of acres of Indiar especially in the hotly-contested terrain west of the Mississippi River. n5 Vast areas of the American West were "up for **[*895]** grabs," and the Marshall Court sought to stake the fe government's claim to as much of that land as it could wrest from competing European na Reducing the Indian peoples to tribal status was merely one step in this unfolding process American Manifest Destiny. n6 But this federal process of tribalizing the Indian peoples s spilled over into their daily lives, locking the newly created tribal members into a sui gene status as wards of the federal government. n7

Emancipating today's Indian peoples requires a self-determination strategy that will fi from the constraints of their assigned legal status. However, a substantial federal superstr grown up around this status and conspires to make its dismantlement extremely difficult. composed of debilitating 19th century federal Indian law principles, the deep socio-econo disadvantages that prevent tribal members from fairly participating in today's American s the vested non-Indian interests which oppose any meaningful program of tribal self-deter It is not surprising that tribal self-determination, as presently conceived and implemented, little contribution to the emancipation of today's Indian peoples from those many omnipre

Page 2

economic and social ills that have made a **[*896]** mockery of self-determination's promise Indian County. n8

My goal is to critique the contemporary doctrine of tribal self-determination thirty ye inception in President Richard M. Nixon's famed 1970 Indian Message to Congress. n9 I f the three most prominent strategies for tribal self-determination. First, I evaluate the tribal that seeks to "morph" their inherent and reserved sovereign powers into tribal regulatory p that are effective throughout Indian Country. Second, I assess the tribal strategy that seeks develop and assert economic sovereignty over their lands, resources and commercial relat as a means of revitalizing Indian Country. Third, I critique the tribal strategy that seeks to traditional cultural and religious beliefs and practices as a means to regenerate their societ Indian Country.

I also compare two rival perspectives on the future of tribal self-determination. First,

I also compare two rival perspectives on the future of tribal self-determination. First, I and evaluate what I call the standard model of tribal self-determination within Indian Cou conclude that this model holds promise only for that relatively small minority of tribes wh wealth creation as the central feature of their self-determination effort and are willing to fundamentally reshape their traditional institutions and beliefs to realize that goal. Second describe and evaluate what I call the transcendent model of tribal self-determination withi Country. I conclude that this approach to tribal self-determination may hold greater promi those tribes who value cultural renewal and social revitalization as the central feature of th self-determination effort.

Given that the tribe, that legal entity created by Marshall's Indian legal opinions, occu "design-space" - the legal, economic, and social potentials and possibilities imagined and encountered by the Indian peoples - of self-determination, a brief historical account of the of the tribe is in order.

A. The Life-Cycle of the Tribe

Understanding the historic life-cycle of the tribe - its birth, its infancy, its adolescence, its death at the hands of federal Indian policy makers and its surprising rebirth - is essential fi successful reconstruction of tribal self-determination.

1. Birth

Chief Justice Marshall birthed the tribe out of a primal source that he called "the actual st things." n10 This pastiche of historical, cultural, economic and geographic circumstances orchestrated by Marshall so as to define an exclusive, bilateral relationship between the fe government and those indigenous peoples who were resident in America at the time of Eu Discovery. n11 Once fully sovereign peoples, they were reduced, by the operation of Mar "actual state of things," to "domestic dependent nations." n12 Their new status under [***89** American law, intermediate between that of a foreign nation and that of a purely voluntary association of individuals, Marshall denominated a "tribe." n13

To Marshall's credit as midwife to the tribe, he resisted the counsel of those who said should abort its delivery. They argued that it would be an illegitimate birth, born from an i liaison between a suspect legal father, a dubious interpretation of a discredited sixteenth-c European Doctrine of Discovery, and a querulous mother, the oddly-crafted Indian Comm Clause of the U.S. Constitution. n14 Only a wildly mischievous child would result from th one who would wreak discord within America's tightly-knit, constitutionally-structured nu family. Those legitimate members of that family - the states, the federal government and t American people - critics warned, would come to resent Marshall's imposition of over 50("shirt-tail" relatives, the tribes. n15 These uncouth American relatives [***899]** would likely for a place at the American family table and only disharmony would result from forcing th and the American people to welcome the tribes to their table. n16

Marshall's reasons for birthing the tribe remain cloudy and ambiguous. Some languag opinions arguably contemplates the future growth and development of the tribe into a mat American government. n17 But realizing this possibility, given Marshall's characterizatio tribe as fundamentally inferior in socio-cultural capabilities, would require the overthrow Marshall's famed Trilogy of Indian law opinions. n18 His Indian law model has resulted in of 500-plus, federally-recognized **[*900]** Indian tribes, bands and groups, who today resid an Indian Country that represents but a tiny fraction of their aboriginal territorial domain. the precatory language in Marshall's opinions, urging the American nation to assume, as g the exceptional burden of protecting and civilizing the "tribe," history has recorded only th hollowness and futility of his high-flown metaphors and flowery praise of the indomitable of Indian peoples. While the federal government exploited Marshall's Indian law opinions means to extend American sovereignty from sea-to-sea, it did not work equally assiduously protect or civilize its wards, those Indian peoples who came to be regarded as barriers to v settlement and development. n19

2. Childhood

Other American leaders - such as Presidents Washington, Jefferson and Jackson - were ta implementing Marshall's concept of the tribe in political and diplomatic terms. How shoul federal government deal with this mischievous child, the tribe? President Washington did resymbolizing the tribe as the "wolf-child." Tribal treaty-making and Indian diplomatic re were his means of temporarily accommodating their putative child-like whims, caprices a subsistence needs. n20 Federal military force would be used as "predator-control" against tribes who responded as "wolf" in raiding or killing American settlers along the frontier. n Washington saw **[*901]** the tribes as naturally retreating west, like wolves, along with the the big game animals - who understandably fled west before the encroaching American lin settlement. n22 Given the tribes' rapidly declining military powers and populations, as we voluntarily or federally-assisted retreat west of the Mississippi River, Washington and oth leaders assumed that they would never have to set a place at the American table for these children, the tribes. n23

The tribe as perpetual "wolf-child." No wonder why Huck Finn and Tom Sawyer, An literature's most famous juvenile delinquents, openly envied the lives of the Indian people mythical Indian territory. n24 They were the most fervent believers in the growing Ameri

Page 4

of the tribe. They - along with countless other boys throughout Europe and America - hop hope that this myth would remain forever true - that the tribe would remain spatially and s far beyond the reach and taint of American civilization. n25

Pragmatically, Marshall's tribe served as a protean policy device, content-empty and t in by future federal governments as the tribe's guardian. By revisioning the tribe's role as ward, future federal guardians could resolve any emerging contradictions or paradoxes cr the American people's changing attitudes towards the Indian peoples and their need for m land. This device supported the American people's growing conviction that the dwindling should not be entitled to assert exclusive sovereignty over vast expanses of **[*902]** huntin roaming lands that could easily accommodate thousands of non-Indian farmers, ranchers industrialists. n26

3. Adolescence

Huck Finn and Tom Sawyer routinely threatened to "light out to Indian Territory" to esca Aunt Polly's rigid brand of the Protestant work ethic. n27 Many real Americans and Euro just that beginning in the 1830's. Their shared motivation was to escape the dreary constra school-house, work-house, jailhouse and business firm. This led countless European and artists, writers, mountain men and criminals to flee to Indian Country. n28 Add to that infl many escaped African-American slaves who found a different type of emancipation amon tribes, and you will see why so many non-Indians had a stake in maintaining Marshall's m tribe. n29

[*903] What did all these non-Indian escapees to Indian Country have in common? T sought to restore a palpable freedom, drama and challenge to lives that had grown cold an predictable under civilization's weight. n30 But it was the brief flowering, during the shor adolescence of the tribe, of the "horse and gun" Great Plains Indian culture that truly cem American myth of the tribe. n31 The Cree and Ojibway had received the horse and the gu French fur traders in the early 1800s. This newly available technology spread rapidly to th

French fur traders in the early 1800s. This newly available technology spread rapidly to th the Great Plains, the horse giving them mobility and the gun giving them firepower. Thes technologies combined to create a tribal "high-culture" period during which the Great Plai peoples lived lives organized around raiding, inter-tribal warfare and buffalo hunting. n32 horse and the gun they were also able to seriously impede, if not completely stem, the ille incursion by thousands of non-Indians who crossed the Great Plains en route to Oregon ar California, killing the buffalo and other big game as they went. n33

The cycle of Indian treaties negotiated by President Johnson's Indian "Peace Commis between 1867 and 1868 guaranteed many of the Great Plains tribes the "exclusive use and occupancy" **[*904]** of their vast hunting and roaming areas. n34 But as a practical matter, federal government proved both unable and unwilling to protect tribal lands from non-Ind intrusion.

The federal government sought instead in the 1870s to renegotiate these treaties so as the tribes to give up their nomadic way of life in favor of farming and ranching. But this s was particularly objectionable to those tribes who saw farming as suitable employment on women or the disabled. Other tribes saw farming as sacrilege and disrespectful of the earth

Page 5

Not surprisingly, few tribes agreed to voluntarily settle down and forego hunting, raiding roaming in their traditional areas and during their traditional seasons. n35 This blatant trib resistance to "growing up" justified, according to federal policy makers, the use of militar settle the recalcitrant tribes on newly-established Indian reservations. n36

Forcing the resistant Great Plains tribes onto reservations proved to be easier said tha They rarely had much trouble escaping the army columns sent to round them up. n37 Enti including women, children and the elderly, proved elusive targets in terrain where an unob approach by an army column was extremely difficult. If the troops pressed too closely, the would disperse, forcing the army commander to either give up pursuit or persist against a diminishing target. n38

But, despite the tribes' successful guerrilla tactics, the tide slowly turned against their resistance. Federal soldiers would routinely destroy the camp equipment and household m those Indians who fled to escape reservation life. They would likewise seize or destroy the pony herds they captured. n39 Combined with the ongoing, non-Indian slaughter of **[*905** buffalo for their hides in the 1870s, there was little hope that the Great Plains tribes could maintain their war of resistance against the federal government. n40

maintain their war of resistance against the federal government. n40

By recharacterizing those tribes who resisted reservation settlement as savages and m the federal government sought to mobilize American public sentiment in favor of its ruthl "search and destroy" military missions. Ironically, it was just one such mission that result tribes' greatest military triumph over federal army troopers. On June 25, 1876, at the Battl Little Bighorn, the combined Indian forces of Sioux and Cheyenne warriors killed over ha army troopers in the Seventh Cavalry Regiment. n41 This Indian victory spawned a wave American vengeance against any tribe that resisted settlement on a reservation under the v eye of federal troops. n42

Resymbolized as unfeeling, bloodthirsty savages who understood and respected only cruelty than they could inflict, the Indian peoples were successfully recharacterized by the government in a new light. n43 No longer the impulsive, willful child who had to be place flowery promises and cheap trinkets, the Indian had been recast as the malevolent "other." - the treacherous, unscrupulous red-devil who raped **[*906]** white women for pleasure and wagon trains for entertainment - who merited extermination if he refused to settle on the reservation. It was he who would be forever engraved on the American consciousness as symbolizing the uncontrollable, and therefore dangerous, aspects of an uncivilized human was he who would be endlessly shot, stabbed, hung, starved, dismembered, buried or burn without a tear shed, in those countless popular western melodramas passed off as the "dim American epic of the Winning of the West. n44

4. Death

Mid-nineteenth century federal Indian policy, embodied in a principle of "measured triba separatism," assumed the Great Plains tribes - influenced by treaty annuities, education an Indian missionaries - would voluntarily adapt to a non-Indian way of life. n45 But soon af end of the Indian wars in the 1870s and the settlement of those tribes onto reservations, w congressmen and the BIA condemned the separatism policy as being too soft on tribalism

only served to encourage the false hope among the tribes that they could somehow contin hunting and roaming way of life. n46

What the tribes required, these reformers argued, was the stern hand of a federal guar

treated them, not as semi-sovereign peoples capable of treaty making, but as what they ha become - dependent governmental wards. The tribe was viewed by these reformers as the impediment to quickly converting tribal members into farmers, ranchers and wage-laborer consciously under-emphasized the side benefit of their proposed Indian allotment progran release of millions of acres of tribal trust lands to non-Indian settlement. n47

But many treaties with the Great Plains tribes had guaranteed the territorial integrity c tribes' reserved lands. n48 Modification of those territorial boundaries required a favorabl at least a majority of the adult male members of those tribes. n49 To accomplish their goa Indian reformers would have to breach these Indian treaties long deemed to be part of the controlling law of the land under the Supremacy Clause of the United States Constitution. attack focused on what they called "the evils of tribalism": communal Indian land tenure; extravagant give-aways by wealthy tribal members to their less fortunate tribesmen; week inter-tribal festivals and pow-wows and traditional celebrations of heathen religious practi as the Sun Dance ceremony. Branding tribalism as anti-American, as well as heathen in n recruited a wide array of supporters to their anti-tribalism crusade: mainstream religious organizations who sought to evangelize the Indians; non-Indian ranchers and farmers who the Indians' prairie and arable land base; land-starved emigrants from Scandinavia and els who arrived too late to obtain homesteads under the 1862 Homestead Act; and those liber of the Indian who **[*908]** wanted to salvage those Indian people who could successfully a non-Indian way of life. n50

The federal government's resulting war on tribalism from the 1880s to the 1930s resy the complex, life-affirming, cultural and social practices of diverse Indian peoples as the r block to their assimilation into American society. n51 But freeing up Indian lands for non use, rather than emancipating individual tribal members from the clutches of superstition communal land holding, was the real goal of the 1880s Indian reform movement. n52

This goal was to be achieved via the General Indian Allotment Act of 1887. n53 Its p envisioned the federal assignment of homestead-sized parcels of agricultural land to each tribal member on reservations throughout Indian Country. Those Indian lands that were d surplus to the allotment needs of a particular reservation would be "opened" for settlemen to non-Indian homesteaders for about a $ 1.25 an acre. The funds obtained from the sale o Indian lands would be deposited to the affected tribe's United States Treasury Account. Tl could be expended, in the federal government's discretion, for the civilizing and subsisten of the affected Indians. n54

The avowed goal of Indian allotment was the destruction of both tribes and tribalism. federal government could assert direct control over its newly-created class of Indian allott tribes were effectively removed as governing institutions. However, the Great Plains tribe Kiowa and Comanche, fiercely resisted allotment. Led by Chief Lone Wolf of the Kiowa Comanche Indians, they challenged in the United States Supreme Court the federal gover power to breach its sovereign agreements guaranteeing the territorial integrity of reserved lands. n56 The Supreme Court rejected Lone Wolf's challenge to Indian allotment and mo federal Indian law so as to accommodate the changed status of the tribes as governmental

wards. n57 In its 1903 decision in Lone Wolf v. Hitchcock n58, the Court completed its subordination of the tribe to federal plenary power. n59

The disastrous empirical consequences of allotment for the Indian peoples are well-kr About 90-100 million acres of Indian lands were lost to tribal ownership, leaving a tribal t base of only some 40 million acres to support the surviving Indian peoples. n60 Much of t tribal acreage fell into non-Indian ranchers' and farmers' hands or reverted to the states for payment, by those "competent" Indian allottees, of local property taxes. n61

Few commentators have addressed the qualitative effects of allotment on the Indian p will briefly comment on these issues. First, allotment displaced traditional tribal land uses of intensive, land-degrading ranching and dry-land farming practices by non-Indian settle Indian allottees. The health of the remaining Indian range and agricultural land-base quick deteriorated due to these altered land use patterns. n62 For example, **[*910]** prior to allotn the Fort Berthold Indian Reservation in North Dakota, tribal families subsisted largely on from their communally-farmed gardens. This gardening represented primarily the labor of women, but some men did assist them. n63 Along with hunting and berry-gathering, this community gardening sustained generations of Indian people on Fort Berthold, as well as reservations. Allotment rendered that continued agricultural use impracticable on those re: The boosters of allotment predicted that it would stimulate the rise of a hardy, self-reliant, class of Indian farmers and ranchers. The reality was that Indian allotments on virtually al allotted Indian reservations fell into disuse and decay. n64

Second, allotment encouraged tribal members to shed their tribal identities in favor of citizenship. n65 By voluntarily accepting an allotment and by successfully completing the transition into successful farmers or ranchers, tribal members could earn American citizen By this means the federal government sought to undermine the significance of tribal affili **[*911]** However, few Indians valued American citizenship enough to sacrifice their tribal in an effort to become successful Indian ranchers and farmers. n67 Those relatively few Ir allottees who did assimilate to a non-Indian way of life were deemed by their tribesmen tc "white Indians." n68

Third, allotment encouraged Indian parents to send their children to the newly-created Indian boarding schools. n69 An American-type education was deemed to be the most reli means for assimilating Indian children into a non-Indian society. n70 It was the archetypa for disabusing those children of their inherited tribal superstitions and beliefs, and it was a

means of separating those children from their parents, clan-uncles and clan-aunts who ren behind in the Indian camps. n71

Fourth, allotment fundamentally resymbolized the Indian peoples' relationship to thei well as to their fellow tribesmen. n72 By insisting that the Indian must repudiate his tribal identity as the means of entering American society, allotment demonstrated the federal government's deep fear and mistrust of tribalism. As a practical matter, the only goal that achieved was that it transferred millions of acres of Indian lands to non-Indians. Colorado Henry Teller was the lone voice protesting the Indian allotment bill in the Senate, and he that allotment would impoverish the Indian both economically and spiritually. All contem commentators agree that allotment did realize that goal. n73

By creating a deep psychological divide between the Indian peoples and their lands, it new, antagonistic classes of Indians. Class membership was defined by possession of grea lesser degrees of tribal blood. Members of these classes allegedly responded differently to economic and social incentives offered by the allotment program. A new class of Indian c brokers arose; Indian men and women who could interpret the allotment directives of the empowered BIA to the "blanket Indians" - usually those greater than half-blood tribal mer resisted allotment in particular and civilization in general. n74

[*913] Allotment also resulted in a deeply disaffected class of Indian men and wome bought into its personal emancipatory promise that, by obtaining an American-style educa could bridge the great social distance between their discarded tribal identities and assume as an esteemed American professional such as a lawyer, educator, doctor, or political lead of these individuals became the objects of derision, laughed at openly by Indian and non-I alike for their pretentious airs. n75

By exacerbating political and social tensions within reservation population segments particularly the animosities between the full-blood and half-blood factions - allotment sou explode **[*914]** tribalism from within. Traditionalists, those Indians who opposed the BIA civilizing programs, were said to represent the full-blood reservation political contingent. were at odds with the modernists, those Indians who sought to shape the BIA's civilizing to their benefit, who were said to represent the half-blood reservation political contingent.

Allotment sought to explode tribalism from the inside by mapping new economic and incentives onto intra-tribal relations. It encouraged those more astute, better educated Indi assert their individual interests at the expense of their less well-endowed tribesmen. It sou recruit the newly created allottees as agents of social change who would transform tribalis within. n76

It also introduced exotic agents of social change into tribalism. It encouraged non-Ind farmers and ranchers to undermine traditional tribal land uses by seizing the opportunity t Indian lands from the BIA at cut-rate prices. By inter-marrying with tribal women and coc with the BIA in managing fractious tribal members, these non-Indians became the most conservative force in opposing future efforts at tribal self-determination. n77 Allotment al a new class of landless Indians by later allowing disabled or incompetent tribal members t lease their allotments to non-Indians so as to realize a subsistence income. n78 The 1906 l enlarged this landless Indian **[*915]** class by issuing so-called "forced fee patents" to thos who were deemed by a federal commission competent to manage their own affairs. n79 Ir was the better-educated, half-blood or less tribal members who received these forced fee p from the federal competency commissions. Once freed of trust status, those lands became and most of those lands were lost to Indian ownership for failure to pay county or state pr taxes. n80

Despite the federal government's formal repudiation of Indian allotment in 1934, the (had already been done. n81 Allotment, along with other introduced federal laws designed tribalism in the late nineteenth-century such as the Indian Major Crimes Act of 1886, n82 intended to resymbolize a new Indian ideal: the white man's Indian. n83 Thus, the very id "Indianness" became a contested meaning that embodied the legal and administrative nee federal government, rather than the cultural survival requirements of the Indian peoples. n seeking to take jurisdiction not only over the Indians' lands but over their personal conduc

the federal government **[*916]** sought to end tribalism forever. But allotment did not succ destroying tribalism. It merely shifted the focus of the contest from the external world to t life-worlds of the Indian peoples. In that forum, any federal policy will always be doomed n85

5. Rebirth

Killing the tribe proved difficult, despite the federal government's best efforts. The In peoples themselves survived the Indian allotment era that stretched from the 1880s to the Public revulsion against the allotment era's results spurred federal studies such as the 192 Report that found that the Indian peoples were, by far, the most isolated and impoverished American minority. n86 But the rebirth of the tribe is associated with one man: Indian Commissioner John C. Collier. n87 Reviving tribalism was to be achieved through the implementation within Indian Country of the Indian Reorganization Act (IRA) of 1934. n IRA, as viewed by Collier and Interior Secretary Harold Ickes, was a logical extension of Progressivist principles of participatory democracy into Indian Country. n89 Collier's opp revive tribalism came on the heels of those twin evils of the early 1930's, the Great Depre the Dust Bowl in the American midwest. Collier's "Indian New Deal," like President Roo "American New Deal," generally promised the revitalization of Indian Country through fe economic and technical assistance to the devastated tribal communities.

Collier's social re-engineering of Indian Country sought to resymbolize tribes as cons democracies, entitled to a measure of home rule on their respective reservations. By this [device, he hoped to make tribalism's revival palatable to the American public. Collier was convinced newly created tribal institutions - tribal constitutions, tribal business councils a awakened tribal electorate - would eventually emancipate the Indian peoples from their de on the federal government. n90 He had worked to empower other fragmented American m such as the Irish and the Italians in New York, Chicago, Boston and elsewhere - by a strat emancipatory politics that organized these groups into political, economic and cultural for the larger American society. n91

However, Collier failed to recognize that, unlike the ethnically new and solid immigr the Indian peoples had adapted their own strategies to deal with their wardship status und administration. Convincing the Indian peoples that tribal home rule was a preferable alter BIA control was Collier's biggest challenge in selling the IRA to Indian Country. A traditi passive Indian resistance to BIA administration had defined a leadership tradition within I Country. These home-grown Indian leaders were skeptical of Collier's promise that if they the burdens of tribal decision-making, their decisions would be respected by the federal government. n92

Collier presumed that many Indians, particularly the more assimilated mixed-bloods, eagerly embrace the IRA. n93 This view was more than naive. He did not grasp that, as a the Indian allotment programs and a lengthy period of BIA-rule, an interlocking set of int ruled contemporary Indian Country. Those non-Indian farmers and ranchers who leased I lands constituted one such interest group. They knew their Indian allottees and the BIA ve They also knew how to spread disinformation about the effect of the IRA on the allottees'

Page 10

and thereby undermine Collier's efforts to sell the IRA within Indian Country. This influe interest group did not support Collier's goal of enhancing tribal decision-making if **[*918]** threatened their economic interests. n94

Ironically, many full-blood tribal leaders also distrusted the IRA's system of represent elected tribal councils governed by written tribal constitutions. They feared that traditiona based decision-making would be eclipsed by these over-strong tribal institutions. n95 But instinctive judgment that his IRA would be supported by the better-educated, assimilated members proved to be true on some of the reservations. They grasped the potential econo social value of the tribal offices created by the IRA, and they welcomed a voice, however their own affairs. n96

Collier also underestimated the BIA's resistance to the IRA. Through its "back channe in Congress, the BIA actively sought to undermine and limit its implementation. n97 Fina Collier overestimated his personal ability to persuade recalcitrant tribes such as the Navaj Crow to accept the IRA. n98 The Navajo sheep herders were outraged by his heavy-hand to reduce their herds within the carrying capacity of their rapidly deteriorating range. The feared that the IRA would undermine their traditional governance based on a general cour system.

Assessing the IRA as an overall success or failure is not yet possible. Many IRA tribe remaking their constitutions and governments to better fit their evolving needs and their n understandings of themselves as Indian peoples. n99 Tribal home rule, at least as envision Collier, still has not been realized on many Indian reservations. Collier's IRA applied a "l common denominator" approach for the political development of indigenous peoples fron Arctic Circle to the American southwest. Stock tribal constitutions were presented to guid political development of radically divergent Indian societies. n100 Not surprisingly, some the IRA liken Collier to Congressman Dawes: one sought to colonize tribalism with the id of individual property rights, while the other sought to colonize it with the idea of constitu democracy. Neither understood the depth and pervasiveness of Indian resistance to their i for the benefit of the Indian peoples. n101

Collateral IRA provisions, such as those establishing Indian hiring and promotion pre within the BIA, have had the most impact. n102 These provisions helped leverage the cre new Indian professional class: the Indian bureaucrat. Collier certainly would have applau creation of this new class. It notched perfectly into Collier's vision that his IRA would rec transform both the tribes and the federal government. n103 The tribes, as they gained pow experience under the IRA, would demand more and better performance from the BIA. Th it progressively became more "Indianized," would respond more sensitively to the tribes' for an enlarged decision-making role. n104 This hope likewise remains to be fully realize

Indian Country.

I

THE FAILED EFFORT TO EMANCIPATE THE AMERICAN INDIAN PEOPI

Federal Indian law has just emerged from its most recent dark age - the 1950s and ear when tribes were required to bear burdens, not exercise sovereign powers. n105 During th

Page 11

[*920] many tribes were terminated by federal action, n106 some were subjected to state jurisdiction under Public Law 280, n107 and still others had their members relocated to ur such as Denver, Chicago and the California Bay Area. n108 Since that time tribes have so ride the crest of larger, potentially emancipating movements such as the American civil ri revolution of the 1960s and a series of pro-tribal judicial decisions in the 1970s to a new e tribal self-determination. n109

A. The Origin of Tribal Self-Determination

Self-determination was introduced into the Indian Country lexicon by President Riche 1970 Indian Message to Congress. n110 He modified the phrase "self-determination," hov adding tribal as an adjective. Nixon clearly sought a new foundation for federal Indian lav policy. n111 That phrase has been extended to include several sub-areas of tribal endeavo environmental self-determination; n112 tribal cultural self-determination; n113 **[*921]** an economic self-determination. n114 This new phraseology suggests that a fundamental par shift in federal Indian law has occurred.

But beyond relatively bland assertions, legal commentators have offered remarkably l insight into the basic character, process and purpose of tribal self-determination. What is r critique that renders tribal self-determination comprehensible, useful and, most importantl adaptable to the needs of the American Indian people. Thirty years have passed since the initiation of the tribal self-determination era, so we must now step back and take stock of progress made under its banner. To do so, we must examine both the self-determination a components of Nixon's famous phrase.

1. Evaluating the Self-Determination Component

Self-determination arguably encapsulates a distinct people's inherent right to self-gov status. This right ostensibly derives from the contemporary interpretation of emerging inte human rights and indigenous peoples' law. n115 Read together, they hold that those core a of a culture - language, religious beliefs and practices, as well as the distinctive socio-eco arrangements - deserve respect under domestic and international law. n116 Indeed, moder European history, beginning in the sixteenth century, if not earlier, is largely a recounting struggles of distinct peoples to achieve self-determining status. n117 This struggle contin as indigenous peoples the world over assert their inherent and human right to self-determi n118

But a distinct people's inherent rights may be denied to them. These rights may be hel for them by a more powerful, colonizing nation. n119 Such was the experience of many o indigenous **[*922]** peoples of sub-Saharan Africa and Southeast Asia during the late ninet and early twentieth centuries. n120 The European trusteeship over those indigenous peopl described by Rudyard Kipling as the "white man's burden." n121 Later, worn down by the of colonial administration and bankrupted by the horrendous costs of World War II, most

European colonial nations during the 1950s and 1960s acceded to the demands of these in peoples and restored their self-determining status. n122

Should President Nixon's 1970 Indian Message be read as restoring self-determining s the Indian peoples? That depends on how one reads the "tribal" adjective that modifies sel determination. That modifier renders ambiguous the nature, scope and purpose of tribal se determination.

2. Evaluating the 'Tribal' Component

I seek to measure the contemporary tribe's potential for realizing self-determination again background constraints of federal Indian law. I do so by focusing on the three most promi strategies for realizing self-determination. First, tribes have sought to "morph" their inher reserved treaty rights into tribal police powers throughout Indian Country. n123 Second, t sought both economic control over their lands and to use their competitive advantages so rebuild their tribal economies. n124 Third, tribes have sought to reassert their cultural ide distinct peoples by securing constitutionally and statutorily **[*923]** protected rights to the exercise of their religious and social practices. n125

I analyze these tribal strategies for self-determination within two alternative contexts. critique these strategies against the backdrop of what I call the standard development mod Indian Country. I conclude that this model holds promise only for that minority of tribes v wealth creation and accumulation as the essential feature of their quest for self-determinat Second, I critique these strategies against the backdrop of what I call the transcendent mo tribal self-determination. I conclude that this approach likely holds greater promise for the of tribes who view cultural and social revitalization as the essential feature of their quest f determination.

B. My Critique of the Standard Model of Tribal Self-Determination

Tribal efforts to transform their inherent and treaty-reserved powers into practical means realization of their self-determination goals occasioned most of the Indian litigation of the thirty years. n126 The working thesis that informs this tribal **[*924]** strategy conceives of contemporary tribes as legitimate American governments, akin to non-Indian local and st governments. Therefore, denying a tribe the right to exercise a particular governmental po be justified by citation to a specific treaty or statutory provision expressly limiting that tri governmental authority. n127 By this approach, tribes have sought to persuade the federal the executive branch and Congress to set a place for them at the table of American govern

The tribes' efforts to transform themselves into fully-recognized American governme bumped up against the juridical limits inherent in Chief Justice Marshall's concept of the t Tribes naturally have asserted their inherent and treaty-reserved powers as constitutive of identity as legitimate American governments. They contend these powers must be judicial reinterpreted in a manner that allows the Indian people to cope with their radically altered environments, economies, welfare needs and social goals. n129 They also contend the anc

more recent organic documents - Marshall's Indian law decisions, treaties, agreements, ex orders and tribal constitutions or codes - serve as enabling legislation empowering tribal governments to enact those "necessary and proper" ordinances that will allow the Indian p adapt to their substantially changed circumstances. n130

However, the Supreme Court of the United States has recently responded in blunt terr tribal strategy for self-determination. Put simply, the Court now regards tribal governmen constitutively different from, if not inferior to, state and local governments. n131 It is like tribes will not be allowed to exercise their governmental powers in a manner that compete ostensibly threatens, the constitutionally established rights and powers of those governme citizens. n132

[*925]

1. The Limits of the Standard Model of Tribal Self-Determination

Tribal efforts to "cash-in" their inherent and treaty-reserved powers into the currency recognized police powers within Indian Country have driven recent Indian litigation. The this approach to tribal self-determination are illustrated in these following analytic section

a. Limiting Tribal Regulatory and Adjudicatory Authority Within Indian Country

The resymbolizing of tribes as sovereign authorities within Indian Country has attract attention from the courts, Congress, and state and local governments. The tribes' assertion wide-range of police powers deemed essential to the realization of their sovereign interest generated a substantial non-Indian backlash. n133

Tribal self-determination demands, from the tribes' viewpoint, judicial endorsement o tribally reserved police powers essential for the growth and maturation of self-sustaining Indian societies. n134 Tribes, from the late 1960s to the late 1970s, were somewhat succe persuading the federal courts to reinterpret their inherent and reserved sovereign powers s meet their radically altered economic, environmental and cultural circumstances. An impr string of pro-tribal judicial decisions during this era commemorated the apparent success strategy. n135 However, the Supreme Court's recent string of **[*926]** anti-tribal decisions revived Chief Justice Marshall's view of tribes as historically-determined entities severely the nature and scope of their reserved police powers within Indian Country. n136

b. The Supreme Court's Response to the Tribes' Assertion of Sweeping Police Powers Wit Country

Justice Rehnquist's opinion in Oliphant v. Suquamish Tribe n137 revived Marshall's j

concept of the tribe as a historically-determined American government whose inherent po substantially altered upon its incorporation into the United States. He revived Marshall's incorporation thesis by holding that Indian tribes had been, early on in America's history,

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Page 14

of any inherent criminal jurisdiction they may have once possessed over non-Indian defen n138

A brief analysis of the facts and holdings of that decision will demonstrate the substar imposed by the Court on the tribe's assertion of general police powers within Indian Coun Suquamish tribal police arrested Mark David Oliphant, a non-member, during the tribe's a Chief Seattle Days celebration, and charged him with assaulting a tribal officer and resisti They also arrested another non-member, David Belgarde, after a high-speed chase along t reservation highways that ended when Belgarde collided with a tribal police vehicle. He w charged at arraignment with reckless endangerment and damaging tribal property. n139

The Port Madison Reservation, wherein the Suquamish people reside, is located acros Puget Sound from Seattle. It is a checkerboard of tribal trust land, allotted Indian land, prc in fee simple by non-Indians, and various roads and public highways maintained by Kitsa n140 Both the federal district court and the Ninth Circuit Court of Appeals upheld tribal c jurisdiction over these two non-member defendants. The U.S. Supreme Court granted cert determine whether **[*927]** tribal courts have criminal jurisdiction over non-members in th circumstances.

Rehnquist reasoned, as did Chief Justice Marshall earlier, that Indian reservations are the territory of the United States" and that they "hold and occupy [the reservations] with tl of the United States," and concluded that "by submitting to the overriding sovereignty of t States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of United States except in a manner acceptable to Congress." n141

He likewise turned legal history on its head, citing dictum in a famous pro-tribal Supr n142 decision that immunized tribal Indians from federal criminal jurisdiction, by arguing Indian tribes to criminally prosecute non-Indian defendants would:

> Impose upon [non-Indian defendants] the restraints of an external and unknown c

> ..., which judges them by a standard made by others and not for them ... it tries th not by their peers, nor by the customs of their people, nor the law of their land, bu by ... a different race, according to the law of a social state of which they have an imperfect conception. n143

His sketchy historical research regarding tribal criminal jurisdiction was calculated to what he described as a uniform judicial and congressional understanding that tribes had b divested of any inherent criminal jurisdiction over non-Indian defendants who may violat laws. n144 Tribes forever remain, for Rehnquist, the wolf-child, treacherous and vengeful to inflict cruelty on any non-Indian who may fall into their grasp. n145 Allowing tribes to criminal jurisdiction over non-Indians who violate their laws would return America to the unregulated tribal world, one lacking in reliable laws or procedures for the protection of t individual liberties of non-Indians. n146

Given that the Oliphant decision dealt with the unique issues **[*928]** of individual libe lacked citation to reliable precedent, most legal commentators thought that its effect was l the criminal jurisdiction arena. n147 They were soon proven wrong. Within a few years, t Supreme Court demonstrated the virtually unbridled reach of the Oliphant rationale by sul

limiting tribal civil regulatory jurisdiction over non-Indians within Indian Country. n148 A analysis of the facts and holdings of that decision illustrates the substantial limit imposed tribes' assertion of general regulatory powers within Indian Country.

The Supreme Court's 1981 decision in Montana v. United States focused on the Crow effort to regulate duck hunting and trout fishing by non-Indians on fee-owned lands withi boundaries of the Crow Reservation. n149 The lower court had upheld tribal regulatory p incident of the inherent sovereignty of the Crow people. n150 However, Justice Stewart r that position by citing the Oliphant decision for the "general proposition that the inherent powers of an Indian tribe do not extend to the activities of non-members of the tribe." n15

The Montana decision vitiates, but does not necessarily eliminate, tribal police power Indians who reside within Indian Country. It does require a tribe to demonstrate, as the ba tribal regulation of non-Indian activity on non-trust lands, that such activity "directly and substantially" burdens a tribally-protected interest. n152 Hidden behind the lines of the M decision is President Washington's view of the Indian peoples as innately vengeful "wolf-

given at any moment to unpredictable and irrational action. Limited by the Montana and decisions, tribes can never mature into American governments worthy of being entrusted general regulatory or adjudicatory jurisdiction within their territories. n153

Tribes, after these two Supreme Court decisions, have understandably sought differen for self-determination **[*929]** within Indian Country. Some have embraced a tribal strateg administrative self-determination within Indian Country. Building internal administrative capabilities within tribal governments and preferentially employing tribal members in rela sophisticated and remunerative jobs is a practical extension of John Collier's earlier idea o home-rule within Indian Country. But it took President Nixon's "jaw-boning" of Congress bring this vision to reality via the 1975 enactment of the Indian Self-Determination Act (I

C. Building Tribal Administrative Capabilities Within Indian Country

The congressional response to President Nixon's 1970 Indian Message was to enact t n154 It authorized the tribes to contract with the Secretary of the Interior for the direct tri administration of those federally-funded Indian benefit programs presently run by the Bur Indian Affairs (BIA) or the Indian Health Service (IHS). n155 As a result, the ISDA was significantly amended in 1988 and 1994 and is now popularly known as the Tribal Self-G Act (TSGA). n156 Tribes, now by contract **[*930]** or compact, can stand in the shoes of t and IHS, or other Interior Department agencies, so as to administer on their respective res most of the federally-funded Indian benefit programs. n157

The ISDA's seeming assumption is that by baby-steps, tribes can move towards self-determination. It carries out this assumption by providing financial incentives to those tri willing to departmentalize and professionalize their staffs and administrative structures. T determination, by this reckoning, will grow out of an increasingly sophisticated, rationaliz bureaucracy. n158 Some tribes have taken this development path by opting to virtually ta BIA's and IHS's programs on their reservations. This approach has quickly yielded visible of tribal self-determination, according to its advocates, by the increased employment of tri

members, through tribal preferences for hiring and promoting tribal members into tribal administrative and staff positions.

Furthermore, these ISDA advocates argue that by empowering tribes to design and de own reservation programs, better quality goods and services will be delivered to the India Moreover, individual tribal members will be spurred to educationally and professionally i their talents and gain the required degrees or skills certifications that will enable them to t advantage of these enlarged tribal employment opportunities. n159

But the ISDA, despite its admittedly positive influences in incrementally adding triba administrative capabilities, cannot serve as an adequate approach to tribal self-determinati reason is threefold. First, tribal self-determination fails **[*931]** to define a core set of legal attributes that places tribes on par with other recognized American governments. n160 Th by this reckoning, contributes almost nothing to the growth of tribes as self-determining e Instead, the ISDA expressly limits tribes to administering narrowly defined statutory func These statutory limitations require the tribes to deliver the same, or similar, bundles of go services as the IHS or BIA would have provided to eligible Indian beneficiaries. n161

Second, this new relationship between ostensibly self-determining tribes and federal government has produced troubling evidence of federal intrusion into internal tribal decisi making. n162 Some western congressmen, such as former Senator Slade Gorton, have sou punish those tribes who exercise their treaty reserved rights by refusing them their self-determination funding. n163 Viewed in this light, the ISDA serves to potentially constrain than promote, tribal self-determination. Most tribes do have a fairly realistic view of the I promise and process. They do not view it as the royal road to self-determination. They do an instrument to promote tribal employment and development within Indian Country. n16

Tribal administrative development cannot be meaningfully equated with tribal self-determination. For this reason, tribes have understandably sought out other subject matter the meaningful expression of their peoples' power and identity. Tribes have successfully b largely anecdotal evidence of their wise stewardship of their lands and resources as the ba asserting exclusive jurisdiction over environmental resources within Indian Country. Surp allies have rallied in support of their efforts, including President Reagan in 1983 and the Environmental Protection Agency (EPA) in 1984. Will the tribe enjoy success in building of tribal environmental self-determination?

[*932]

D. Tribes as States Under Federal Environmental Statutes

Resymbolizing "tribes as states" (TAS) is the new and highly-touted approach to enha tribal authority over environmental resources located within Indian Country. n165 It was a Republican President, Ronald Reagan, who spurred the development of this approach. It v 1983 Indian Policy Statement - directing all federal executive agencies, not just the Interic Department, to develop government-to-government relationships with those tribes within respective jurisdictions - that effectively launched the TAS era. n166 Two tribal self-deter strategies derived from President Reagan's directive merit assessment.

Page 17

1. The Administrative Origin of the TAS Strategy

Some executive agencies responded more fulsomely than others to President Reagan's Indian Policy Statement. The EPA promulgated its 1984 Indian Environmental Policy (IE means of redefining its relationship with tribes throughout the United States. n167 Admin William Riley's 1991 restatement of the IEP policy clearly addresses tribal environmental determination:

> The Agency will, in making decisions on program authorization **[*933]** and other matters where jurisdiction over reservation pollution sources is critical, apply fed law as found in the U.S. Constitution, applicable treaties and statutes and federal Indian law. Consistent with the EPA Indian Policy and the interest of administrati clarity, the Agency will view Indian reservations as single administrative units fo regulatory purposes. Hence as a general rule, the agency will authorize a tribe or state government to manage reservation programs only where that government ca demonstrate adequate jurisdiction over pollution sources throughout the reservati Where, however, a tribe cannot demonstrate jurisdiction over one or more of the reservation sources, the Agency will retain enforcement primary for those resourc Until EPA formally authorizes a state or tribal program, the Agency retains full responsibility for program management. Where the EPA retains such responsibili it will carry out its duties in accordance with the principles set forth in the EPA Indian policy. n168

This pragmatically-based EPA policy thus favors tribal environmental self-determinat sound administrative and regulatory reasons. While it does contemplate the eventual tribal administration of most, if not eventually all, reservation-based environmental programs, it to promote the overriding federal environmental interests embodied in the governing envi laws. While the EPA's Indian policy does promote a tribal voice in determining the future environmental character of their tribal homelands, it does so as a strategy to achieve the o goals of federal environmental law. n169

Congress statutorily ratified and extended EPA's Indian policy via its enactment in 19 several TAS amendments to the major environmental statutes. Indian tribes, like states, ar

cooperatively with the EPA to accomplish the federally-established environmental goals. : TAS amendments authorized **[*934]** the EPA to promote - through the provision of grant assistance and technical support - the tribal governments' development of their administra capabilities to regulate reservation-based environmental resources. n171

2. EPA's Adoption of the "Direct and Substantial" Effect Test As the Regulatory Basis for TAS Status

Given the tribes' role in carrying out federal environmental policy within Indian Coun EPA's recent interpretive rule implementing section 518(e) of the Clean Water Act (CWA all the more puzzling. n172 It fundamentally undermines the TAS approach to tribal envir self-determination. It does so by expressly incorporating the "second prong" of the Monta

into the basis for tribal regulation of non-Indian activities that affect the reservation's wate EPA characterized that decision as allowing the tribe to regulate non-member conduct on within the reservation only if that conduct has a direct effect on tribal health and welfare. :

[*935] The EPA likewise incorporated the Supreme Court's 1989 holding in Brendal Confederated Tribes & Bands of Yakima Indian Nation n174 into its interpretive rule. Th was read by the EPA as holding that only the "direct and substantial" impact of a non-mer activities on a protected tribal interest will justify the tribal regulation of those activities o lands within the reservation. Despite its characterization of the Court's opinion in Brendal "deeply splintered" and expressing no clear rule for determining the scope of inherent trib jurisdiction over non-members' activities, the EPA nonetheless incorporated its holding in interpretive rule.

A brief recounting of the factual structure underlying the Court's deeply splintered ho Brendale demonstrates why the EPA was mistaken in its action. The Yakima Indian Rese located in the southeastern part of the state of Washington. Of the 1.3 million acres of res land, approximately 80% is held in federal trust status on behalf of the Yakima Nation or tribal members. The remaining 20% is owned in fee by Indian or non-Indian landowners. the fee land is located in Toppenish, Wapato and Harrah, three incorporated towns locate northeastern part of the reservation. n175

The parties and the lower courts regarded the reservation as divided into "opened" an portions. The closed or "Indian" area of the reservation consists of the western two-thirds reservation and is predominantly forest land. The overwhelming majority of the 740,000 land in that area is held in tribal trust. The open area of the reservation is primarily rangel agricultural land, and residential and commercial land. Almost half of the land in the open held in fee status. n176

The Yakima Nation adopted its zoning ordinance in 1970 and amended it to its preser 1972. It applies to all lands within the Yakima Indian Reservation including fee lands ow Indians or non-Indians. Yakima County adopted a comprehensive **[*936]** zoning ordinanc 1972. That county ordinance applies to all real property within the county boundaries, exc Indian trust lands. It established a number of use districts which generally govern agricult residential, commercial, industrial, and forest watershed uses. The particular zoning desig issue in this case are the forest watershed and general rural designations.

A non-tribal member, Philip Brendale, owned a 160-acre parcel of land near the cente closed area of the reservation. It is zoned as a "reservation restricted" area by the Yakima and as "forest watershed" by Yakima County. Brendale submitted a subdivision proposal County requesting that he be allowed to divide his 20-acre parcel into ten 2-acre summer sites. However, the proposed subdivision was not allowable under the Yakima Nation ord n177

Another non-tribal member, Stanley Wilkinson, owned a 40-acre parcel of land in the of the reservation, on a slope overlooking the county airport, less than a mile from the nor boundary of the reservation. The land is zoned as agricultural by the Yakima Nation and a rural by Yakima County. In 1983 Wilkinson applied to the county for permission to subdi acres of his land into twenty lots for single family homes. The Yakima Nation ordinance have allowed this proposed subdivision. n178

The Yakima Nation challenged both of these proposed developments in federal distric sought a declaratory judgment that the Yakima Nation had exclusive authority to zone the properties in question and an injunction barring county approval of any proposed develop inconsistent with the Yakima Nation's zoning ordinance. n179

A deeply divided Court upheld the Yakima Nation's power to zone the Brendale's pro while denying it the power to zone the Wilkinson's property. The "swing opinion" of Justi

while denying it the power to zone the Wilkinson's property. The "swing opinion" of Justi
Stevens and O'Connor distinguished between the "closed" and "opened" areas of the reser
The two justices reasoned that the undeniably "Indian" character of the closed portion of t
reservation authorized the Yakima Nation to "prevent the few individuals who own portio
closed area in fee from **[*937]** undermining its general plan to preserve the character of th
resource ...." n180 By the same token, they reasoned that the Yakima Nation lacked the au
regulate land use within the open portion of the reservation. According to Stevens and O'C
non-Indian use of the opened lands had "produced an integrated community that is not ecc
or culturally delimited by reservation boundaries." n181 This factor, coupled with the tribe
power to exclude non-members from that area, caused the two justices to hold that the Ya
Nation "lacks the power to define the essential character of the territory." n182

Their swing opinion in Brendale has been criticized as establishing an undefinable an
potentially racist test for when a portion of an Indian reservation has lost its "Indian chara
is therefore beyond tribal regulatory control. n183 Nonetheless, the EPA seized on the Br
decision as modifying its rule-making powers under section 518(e) of the CWA. It extract
that decision the "substantial effect" test that it interpolated into its final interpretive rule g
the administrative grant of TAS status to applicant tribes.

Why the EPA chose to incorporate these fundamentally flawed anti-tribal holdings as
for its TAS administration, I have criticized elsewhere. n184 By its interpretive rule, a trib
seeks reservation-wide water quality jurisdiction must now meet an administrative versior
"direct and substantial" effect test. **[*938]** Non-Indian fee land owners, joined by state and
governments, have challenged the EPA's TAS designations under this interpretive rule as
and legally invalid under the Court's Montana and Brendale decisions. n185

The recent decision by the Ninth Circuit, albeit upholding the EPA's TAS designation
Confederated Salish and Kootenai Tribes, illustrates the undermining of tribal authority to
their reservation waters, as well as the EPA's expertise in ensuring the wise administration
environmental policies embodied in the CWA. n186 While upholding the challenged TAS
designation, the Ninth Circuit denied any Chevron deference to the EPA's interpretative ru
which the TAS designation was based. n187 The court agreed with the appellant, the State
Montana, on this point:

> We agree with appellants insofar as they contend that the scope of inherent tribal
> authority is a question of law for which EPA is entitled to no deference. EPA's
> decision to adopt inherent tribal authority as the standard intended by Congress m
> well be viewed in a deferential light because the statute's language and legislative
> history were not entirely clear. [Citations omitted]. EPA's delineation of the scop
> that standard, however, has nothing to do with its own expertise or with any need
> fill interstitial gaps in the statute committed to its regulation. Therefore, EPA's
> delineation of the scope of tribal inherent authority is not entitled to deference. n1

Future federal district court judges may therefore engage in de novo judicial review o
alleged adverse effects on non-Indian governmental or economic interests occasioned by t
future TAS designations. Given that on many of the Great Plains' Indian reservations, non
settlement and economic development has rendered the resident Indians a dispossessed m
within their own homelands, those judges will be sorely tempted to disagree with the wisd
EPA's TAS designations. By giving the "direct and substantial" effect test of Montana and
undue currency within the environmental **[*939]** arena, the EPA has rendered the TAS str
problematic value to those many Indian people who reside in a deeply subordinated econc
land-owning status on their own reservations. n189

The promise of the TAS strategy as a means for tribal environmental self-determinati
been unduly compromised by the EPA's interpretation of section 518(e) of the CWA. It is
surprising that many tribes have looked beyond the environmental realm in their search fo
meaningful opportunities for tribal self-determination. It is also not surprising that some t
focused on the tribal cultural self-determination arena as the most appropriate forum for e
of their peoples' identities and interests. Can tribes realize cultural self-determination and
ethic of cultural heritage that will be respected and enforced by the federal courts?

E. Tribal Efforts to Build an Ethic of Cultural Heritage

Tribal cultural self-determination is the most recent forum of conflict between Indians
Indians for control of new statutorily-denominated cultural resources called "cultural patri
n190 and "traditional cultural properties." n191 The new conflicts range from competition
Indian recreational and Indian cultural uses of public lands to a ferocious battle for contro
ancient human remains between non-Indian scientists **[*940]** and culturally affiliated tribe

These new cultural preservation concepts represent a remarkable departure from past
preservation efforts that were largely directed at protecting American Indian cultural reso
because of their utility to non-Indian scientific and aesthetically-interested communities. r
of these earlier preservation laws provided for tribal participation in the identification, pla
administration of federal programs or projects that have significant impact on American In
cultural resources. n194

Only recently have public land managers come to grips with their obligations to work
consult with affected American Indian communities in carrying out project-related activiti
affecting American Indian historic and cultural resources. Tribal governments and Indian

groups had historically been marginalized in agency-sponsored projects or planning activi affecting their historic or cultural resources.

1. The Impact of the Bear Lodge Multiple Use Ass'n v. Babbitt n195 *Decision on America Cultural Resources Law*

Recent litigation has focused on a federal land manager's implementation of her newl statutory preservation duty to preserve the living cultures of contemporary American Indi

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Page 21

communities. n196 In February 1995, the National Park Service issued its Final Climbing Management Plan (FCMP) for Devils Tower in response to the tremendous increase in th recreational **[*941]** rock climbing and the corresponding need to protect the site's resourc degradation. The FCMP included the following provisions: no new bolts or fixed pitons w allowed on the tower; access trails are to be rehabilitated; camouflaged climbing equipme required; and certain routes will be closed seasonally to protect raptor nesting. It also disc the award of commercial climbing licenses for the month of June and encouraged recreati climbers to refrain from climbing during June due to the cultural importance of this mont northern plains Indian tribes. No restrictions were imposed on the general visiting public, continue to use the site even during the month of June. Only commercial climbers that hol revocable licenses granted by the Superintendent were mandatorily restricted during the m June under the FCMP. n197 Superintendent Deborah Liggett was the moving force behin FCMP, and not surprisingly, her action provoked legal challenge, n198 disrupting the clim management plan for Devils Tower one year into its operation.

This litigation, brought by several commercial and private rock climbing interests, ch the FCMP as a constitutionally barred governmental establishment of religion in favor of Indian religious users of Devils Tower. My analysis focuses on the district court proceedi which the court found for the plaintiffs and granted an injunction against the implementati June closure provision of the FCMP. n199 The plaintiffs claimed that the June commercia closure constituted a "subsidy of the Indian religion" and "an excessive governmental ent with religion" in violation of the Establishment Clause. Judge Downes agreed with the cli granting their requested injunction, ruling that the prohibition of commercial climbing du violated the Establishment Clause. Superintendent Liggett's expressed intention to close D

Tower to all rock climbing, private and commercial, if voluntary private compliance with failed to significantly reduce non-commercial climbing, in Judge Downes' opinion, amou **[*942]** government coercion of individual conduct in favor of American Indian religious n200

Because I have criticized elsewhere Judge Downes' reasoning in this matter, n201 I fc on the impact of his decision on the power of federal land managers to reasonably accom American Indians' cultural uses of public lands. By characterizing the American Indians' uses of Devils Tower as religious in character, and by distorting the religious accommoda principle expressed in Lyng v. Northwest Indian Cemetery Protection Ass'n, n202 Judge I construed the June closure of Devils Tower to commercial rock climbing as a violation of Establishment Clause. By equating all American Indian cultural activities as religiously m conduct, he effectively abolished land managers' authority to carry out their cultural prese duties expressed in statutes such as the National Historic Preservation Act (NHPA). n203

2. Tribal Cultural Self-Determination After the Bear Lodge *Decision*

Coupling Judge Downes' *Bear Lodge* decision, conflating all American Indian cultura into religiously motivated beliefs, **[*943]** with the Lyng Court's reduction of the religious accommodation command of the Free Exercise Clause to mere advisory guidance, leaves land managers with very little incentive or authority to preserve American Indians' cultura their sacred resources and sites on public lands. n204

Page 22

But "baby steps" toward cultural self-determination may be possible within the interst governing federal laws. For example, the 1992 "Indian" amendments to the National Hist Preservation Act (NHPA) require federal land management activities affecting "traditiona properties" to be "carried out in consultation with the affected tribes." n205 Federal courts that these procedural protections of American Indian cultural resources must be scrupulou observed by federal land managers. n206 No doubt the lives of public land managers are complicated by these new procedural duties, but faithful adherence to the tribal consultati requirements provides the Indian peoples with an opportunity to influence federal project that impact access to their traditional sacred sites. Only now are federal land managers co grips with their obligations to consult and work with affected American Indian communiti

preserving traditional cultural properties. n207

Consultation with affected tribes likewise drives the cultural preservation goals of the American Graves Protection and Repatriation Act (NAGPRA) n208. Federal museums mı inventory their American Indian collections and notify affected tribes of any human remai artifacts derived from an **[*944]** affiliated tribal culture. Affected tribes may request their for appropriate tribal administration. Likewise, NAGPRA provides for the repatriation of "discovered" American Indian remains and associated artifacts found on federal lands to t culturally affiliated tribe. n209

While these new federal cultural preservation duties do contribute to tribal cultural se determination, they do not forcefully establish an ethic of cultural heritage which will authoritatively resolve disputes between non-Indian and tribal interests in cultural resourc Understandably, some tribes have looked beyond the realm of tribal cultural self-determin an effort to locate entrepreneurial opportunities for the meaningful expression of their peo talents and resources. Can these entrepreneurial tribes lead their Indian peoples to the pror of economic self-determination?

F. Tribes As Entrepreneurs

Fundamental to the economic sovereignty of any self-determining people is the exclu to capture those economic rents that derive from business transactions within its territory. tribes' power to capture these economic rents has been recently confirmed by the Supreme 1982 decision in Merrion v. Jicarilla Apache Tribe. n211

A brief recounting of the facts and holdings of that decision displays its potential supp tribe as entrepreneur. The Jicarilla Apache Tribe imposed a severance tax on "any oil and gas severed, saved and removed from Tribal lands." n212 Non-Indian mineral lessees cha the tribe's authority to impose such a tax on their leasehold interests. The Jicarilla tribe res 742,315 acre executive order reservation in northwest New Mexico. That reservation was established for the tribe's exclusive use and occupancy. The tribe leased about 89% **[*945** reservation for mineral development purposes. Since 1953 various non-Indian mineral les: leased, with federal approval, those tribal lands.

> In exchange for a cash bonus, royalties, and rents, the typical lease grants the less "the exclusive right and privilege to drill for, mine, extract, remove and dispose o

> oil and natural gas deposits in or under" the leased land for as long as the mineral are produced in paying quantities. n213

In 1968, the Jicarilla tribe revised its tribal constitution to provide that "the tribal cour enact ordinances to govern the development of tribal lands and other resources." n214 The later enacted an ordinance imposing a severance tax on oil and gas production on tribal lai ordinance was approved by the BIA in December 1976.

The non-Indian mineral lessees argued that their leaseholds entitled them to enter the and exempted them from further tribal regulation. Justice Thurgood Marshall, writing for Court's majority, criticized that argument as failing to accord an appropriate sovereign rol Jicarilla tribe. Tribal governments, like other sovereigns, must unequivocally waive their t authority within the governing leases or contracts, and Justice Marshall found nothing in t challenged tribal mineral leases that demonstrated the Jicarilla tribe's intent to waive its sc taxing authority. He concluded that the Jicarilla Tribe had clearly retained its right to impc severance tax on the mineral leaseholds in question. n215

Capturing a share of those economic rents that derive from reservation-based business according to Justice Thurgood Marshall, is simply an incident of a tribe's inherent soverei authority recognized by the Court in its 1832 decision in Worcester v. Georgia. n216 Chie John Marshall had reasoned in his opinion in Worcester that the Cherokee peoples' right o exclusive use and occupancy of their reserved lands left no room for Georgia's exercise of regulatory authority within their territory. Justice Thurgood Marshall's opinion in Merrion sought to create a "growth space" for tribal economic development by confirming tribal ta authority over non-Indian **[*946]** economic activity within Indian Country. Absent the po exclusively capture reservation-generated economic rents, tribes that seek to follow the tra economic development path are likely doomed to failure. n217

But the Supreme Court's 1980 decision in Washington v. Confederated Tribes of Colv Reservation n218 has seemingly destroyed the tribe's right to capture a fair share of those rents that derive from economic activity within Indian Country. Instead of adhering to its doctrine barring state intrusion into tribal economic life, Justice White's opinion develope preemption-based analysis that allows a state to tax away virtually all reservation-generate economic rents unless the affected tribe can demonstrate that those rents derive from a trit produced value. n219 He conceded that the Colville tribe had an interest in generating rev essential government activities; nonetheless he required that the "revenues [be] derived fr generated on the reservation involving the Tribes ... [and that] the taxpayer [be] the recipi tribal services." n220

No doubt the Court's majority was influenced by the fact that the tribal economic rent derived largely from tribal sales of untaxed cigarettes to non-Indians who likely traveled t the Colville reservation to take advantage of those bargain prices. n221 But, as recognized dissent, empowering the state and tribe to both tax reservation-based economic activity nc

flies in the face of Worcester, but also renders problematic the future success of tribal entrepreneurial activity that involves substantial "cross-border" non-Indian involvement o participation. n222

The dissent's remarks have proven prophetic. Only one recent appeals court decision l disallowed state taxation of reservation-generated value because of its direct impact on tri

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Page 24

economic development opportunities. n223 In Crow Tribe v. Montana n224 an Indian trib challenged Montana's application of its 30% coal severance tax to non-Indian leaseholder minerals. In 1972 the tribe leased to Westmoreland Resources the right to mine tribally-re coal under the so-called ceded strip of tribal land. In 1975 Montana imposed two taxes on producers. The first was a state severance tax "imposed on each ton of coal produced in th n225 The rate varied from 3% to 30% of the coal's value, depending on the quality and wl mining was on the surface or underground. The second tax was a gross proceeds tax impo each person engaged in coal mining. The rate was determined by applying the relevant co property tax to the assessed value of the coal producer's gross yield from coal contract sal amount taxed varied by county and year. n226

Between 1975 and 1982, Westmoreland paid $ 53,800,000 in **[*948]** state severance t $ 8,100,000 in state gross proceeds taxes for its ceded strip mining operations. In 1976 the imposed its own severance tax of 25% for coal mined on the reservation. In 1982 it enacte similar tax for coal mined on the ceded strip. The Department of Interior rejected the latte because the tribal constitution had disclaimed tribal jurisdiction over the ceded area. That Westmoreland agreed to pay the tribal tax but received credit for the coal taxes paid to Mc Hence it has paid no severance tax to the tribe.

Montana relied on the Colville decision as warrant for its taxation of non-Indian tribal lessees, arguing that the Crow tribe, as in the earlier case, sought to "market an exemption state taxation to persons who would normally do their business elsewhere." n227 The Nin disagreed, concluding the "coal is the Tribe's property, a natural resource. Its lease brings that represents value generated by tribal activities ...." n228

However, it was the appeals court's analysis of the Crow tribe's economic impact stud state taxes' effect on the reservation's coal-based economy that raised troubling analytical That report concluded that the state taxes prevented Crow coal from competing with lowe Wyoming coal and resulted in far less Crow coal production than would otherwise have o

The court, over Montana's vehement objections, concluded that the state taxes had "at leas negative impact on the coal's marketability." n229 Further, even assuming Montana has a interest in taxing Crow coal, the court concluded that these "high taxes affect tribal revenu ... burdens the Tribe's interests in coal ...." n230 The court also cited the "federal policy of promoting tribal self-sufficiency and economic development" as the basis for its preempti that Montana's tax was so large that it could not be applied to tribal leases without interfer tribal economic development. n231

Thus, only when the state proves too greedy in its taxing efforts or the affected reserv resource is sufficiently disconnected from the surrounding non-Indian economy n232 will **[*949]** state's capture of reservation-generated economic rents be disallowed. Despite thes decisions, some legal commentators insist that engagement by entrepreneurial tribes with American marketplace will prove the economic salvation of the Indian peoples. They poir gaming revenues generated by American Indian casinos that now total over $ 8 billion an the product of this successful engagement. n233 They further argue that these gaming trib arguably leverage an additional $ 8 billion in indirect economic benefits to Indian Countr preferentially contracting with and employing Indian contractors and workers. n234

But neither the gaming, nor the entrepreneurial tribe will likely lead the way to the pr land of tribal economic self-determination. The 1988 enactment of the Indian Gaming Re

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Page 25

Act (IGRA) authorizes states to effectively dictate the terms of gaming compacts to the af *tribes and to undermine the utility of gaming for tribal economic development.* n235 Som tribes, it is true, have become fabulously wealthy. n236 But their critics contend that their cannot be realistically duplicated elsewhere in Indian Country. Relatively few tribes enjo favorable locations near wealthy population centers that are key to the development of luc tribal **[*950]** casinos and bingo palaces. n237 Furthermore, Congress' enactment of IGRA demonstrated by lower court interpretations of that Act, has effectively nullified the tribes won legal triumph in California v. Cabazon Band of Mission Indians. n238

Congress effectively extended state regulatory control over the nature, scope and size most lucrative form of Indian gaming, now known as Class III gaming. Few states, in this new world of cutthroat competition for the gaming dollar, are likely to agree to large-scal style tribal gaming within their borders unless the tribes are willing to share a substantial p their gaming revenues with them. Furthermore, many of the more conservative and traditi likewise question whether gaming is good for their own tribal members who may gamble

hard-earned money that they should use to support their families. n239

But even deeper legal and ethical difficulties are presented by the rise of the entrepren tribe. First, such entrepreneurship presupposes a tribal class who, functioning as tribal dev views their Indian peoples as "embodied" capital. Thus, the "tragedy of development" pla within Indian Country as tribal members are graded into hierarchical rankings that run unidimensionally from the worst to best workers. n240 Second, unless the entrepreneurial convinces the federal court that its revenues derive from its exploitation of a tribally-gene reservation value, the surrounding state may tax away much of the economic rents derive economic activity. n241 Third, state sovereign immunity likely bars the entrepreneurial tri suing the state for the redress of any injury from the state's **[*951]** exercise of government within Indian Country. n242 These factors combine to substantially limit the economic de within which the entrepreneurial tribe can operate in service of tribal self-determination.

G. Summary of Tribal Achievement via the Standard Development Model

The sum total result of the Indian peoples' efforts to realize self-determination via the development model of Indian Country has been to fritter away their passions and energies fruitless effort to escape their assigned tribal status. In bumping up, again and again, agair brick ceiling of their legally-assigned status, the Indian peoples have demonstrated their te and desire to survive. My suggestion in the next section is that they turn their passions anc to the very different task of internally reconstructing the tribe to meet the real human need members.

II

TRIBES AS RICH NATIONS: SKETCHING AN ALTERNATIVE MODEL OF TRIB/ DETERMINATION

A. Why the Standard Model of Tribal Self-Determination Has Failed Indian Cc

Page 26

Two rival interpretive processes must be reconciled if the Indian peoples are to realiz meaningful tribal self-determination. The first process constituted the "tribe" as the histori product of non-Indian interaction with the indigenous people of North America. The cons processes of non-Indian history - war, disease, trade, treaties, common law, and European and socio-cultural theory - created the tribe as a means to serve non-Indian ends. n243 Th process focuses on the ordinary experiences of Indian people as the contemporary source reconstructing **[*952]** the tribe. n244 The following discussion traces the failure of the for interpretive idea as a means for tribal self-determination; the latter interpretive idea is add the next section.

The first interpretive process hierarchically notched the tribe into American law and g as "domestic dependent nations." n245 It provided the structure for the channeling of Am values into Indian Country. n246 Its goal was to progressively remake the Indian peoples American image. Its failure to realize this goal by the 1880s counseled its abandonment in the Indian allotment policy. n247 Ironically, the "tribe" was revived in the 1930s by India Commissioner John Collier, and later strengthened in the 1970s and 1980s by Presidents I Reagan, as the express vehicle for indigenous self-determination. n248 **[*953]** Despite thi organizational refashioning of the tribe, it remains the means whereby American technolo financial interests, and commercial and social ideas are channeled into Indian Country. n2

Why this tribal self-determination strategy has failed Indian Country is evident from t practical counsel it offered to the would-be self-determining tribe. In paraphrase it tells th that:

> You must consciously remake yourself in a strategically minded, adaptively usefi and symbolically powerful way to become successfully self-determining. n250 Strategically, you must identify and mobilize those resources on your reservation that can serve as tools for self-determination. n251 Adaptively, you must retool y inherited traditions and cultural beliefs as means to successfully interact with the surrounding non-Indian economies and governments. n252 Symbolically, you mu recast your government and legal institutions so as to reasonably overlap with the American society's ruling notions of due process and equal protection. n253 In br you must become **[*954]** non-Indian governments and societies if you are to reali self-determination. n254

The only problem with this strategy is that it does not work! The Eastern Cherokees, l after their early interaction with American colonists, sought to follow this counsel by deve written tribal alphabet, constitution, courts, schools, as well as law and order codes, mode those extant in the surrounding American society. But their adaptive efforts did not save tl the other civilized eastern Indian tribes, from summary congressional removal in the 1830 the Mississippi River. n255 Likewise, the Suquamish Tribe's adoption in the 1970s of a tr criminal code guaranteeing fundamental due process to all criminal defendants did not sus assertion of inherent criminal jurisdiction over two, admittedly, very "bad" non-Indian me reservation. n256 It just did not matter, according to Justice Rehnquist's opinion, how suc adapted the Suquamish people had become, the Indian tribe had, early on, been divested h

adapted the Suquamish people had become, the Indian tribe had, early on, been divested o

Page 27

Marshall's Indian law opinions, of its inherent criminal jurisdiction over non-Indian defen n257

Viewing the tribe as an adaptive unit has likewise failed as a means of economic deve within Indian Country. Frustrated by the lack of observable economic growth within India Country, contemporary development experts have sought to identify those "break-away" t can serve as emulative models for tribes who are arguably adrift in a sea of self-determina opportunities. n258 Listless and becalmed tribes, too, can hum with entrepreneurial energ they would governmentally, technologically and commercially restructure themselves so a advantage of these opportunities. n259

Indian law experts have also resorted to this first interpretive process to diagnose and the root cause of the contemporary failure of tribal self-determination. The prescriptions tl as solutions focus on what the federal government should **[*955]** do to restore self-determ status to the tribe. First, the federal government should insulate the tribe from state intrusi its essential governmental, economic and regulatory activities. n260 Second, the federal g should provide sufficient economic infrastructure to the tribe so that it can pursue a reasor economic and social recovery strategy. n261 Third, the federal government should restore historic tradition of bilateral and transparent negotiation with the tribe as the basis for a ne government-to-government relationship. n262 Fourth, the federal government should emb new "sovereign trust duty" those security guarantees that are essential to tribal self-determ n263 Doubtless, the route to tribal self-determination would be smoothed if these prescrip adopted by the federal government. But, as both a practical and conceptual matter, federal acceptance of these prescriptions would amount to the overthrow of this governing interpr process.

These advocates on behalf of the Indian peoples are undoubtedly sincere in their desir address the many and real problems that exist within today's Indian reservations. They hoj better the Indian peoples' material conditions - upgrade their health status, increase their p income, increase their children's educational attainment levels, and generate more reserva employment opportunities. But the Indian peoples are aware, as are many non-Indian peo is not the deprivation of material options that has produced today's dispirited generation o both on-reservation and off-reservation. Lost Indian children, like some non-Indian childr

their identity through peer-governed rituals of gang membership, Indian-on-Indian violen substance abuse, flirtations with suicide, and other forms of antisocial behavior. These ph evidence a deeper crisis within contemporary Indian societies than cannot be encompasse handbook on tribal **[*956]** economic development. n264

Socio-biologists tell us that the creation of such "wolf-children" within Indian Countr expected product of systemically ill communities - communities unable to come to grips v pathologies such as fetal alcohol syndrome, child abuse, alcoholism, chronic unemployme domestic violence. n265 Authentic tribal self-determination will require the Indian people acknowledge and directly confront this painful reality. Current federal Indian policy exter responsibility for "doing something" about this reality to the BIA or IHS, as well as other agencies. So far, none of the federally-sponsored programs or grants have done much to a underlying generative processes that produce these societal pathologies within Indian Cou Only by reinternalizing these problems within the Indian communities themselves will las sustainable **[*957]** solutions to these difficulties be crafted and successfully implemented.

Page 28

B. Structuring the Transcendent Model of Tribal Self-Determination

Folding the tribe into non-Indian history has locked the Indian peoples into an unyielc interpretive process that, as told by my four-year-old daughter's pre-school song, is "too d under it, too wide to go around it, too high to go over it, so I guess we will have to go thro n268 That is exactly what the Indian peoples will have to do. But "going through" this vei Indian history will require the Indian peoples to expend much social and emotional energy interpolating the tribe into non-Indian history, federal policy makers sought to co-opt the I peoples' underlying cultures and traditions into America's melting pot. Only by creating di between this interpolated history through tactics of cultural and social resistance have the peoples survived. n269 This strategy is illustrated by the young Black Elk's vision:

> And as I looked and wept, I saw that there stood on the north side of the Starving camp a Sacred man who was painted red all over his body, and he held a spear as walked into the center of his people, and there he laid down and rolled. And **[*95** when he got up it was a fat bison standing there, and where the bison stood a Sacı herb sprang up right where the tree had been in the center of the nation's hoop. Tl herb grew and bore four blossoms on a single stem while I was looking - a blue, a

white, a scarlet and a yellow - and the bright rays of these flashed to the heavens. n270

Cultural survival requires much psychic and social energy and has not been accompli without significant damage to the Indian peoples. Psychologists have diagnosed a syndror have named "inter-generational post-traumatic stress disorder" to describe the long term e two hundred years of federal policy on the Indian peoples. n271 Some have characterized "spiritual injury" in these terms:

> It is apparent that the psyche of the community recognized the wounding of the community, and that this awareness in turn was perceived as a wounding of the psyche. Harmony had become discord and the community's unconscious percepti was that the world was unfriendly and hostile. The problems that were manifestec and verbalized were merely symptoms of a deeper wound - the soul wound. n272

Just as new therapeutic approaches have been developed that address the inter-genera transmission of Indian parental traumatic experiences and responses to their children, so t new theory of the tribe seek to support the Indian peoples' growing societal and cultural revitalization efforts. n273 Only by reconnecting the revitalizing sphere of Indian socio-c to the tribal governmental sphere of legitimate authority will tribal life-worlds be restored

C. Linking Tribal Self-Determination to the Restoration of Tribal Life-World.

Behind the positivistic legal formulation of the tribe - defined by federal Indian comr treaties and statutes - exists the real world of the Indian peoples' experiences. This world l interested those federal policy makers who fashioned decisional rules for resolving practic

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Page 29

conflicts between Indians and non-Indians over land, trade, water, economic activities, na **[*959]** resources, and crime. n274 Indeed, it was their studied lack of interest in the almos overwhelming diversity of Indian life-worlds that enabled the cultural survival of the cont Indian peoples. Restoring tribal life-worlds requires a new tribe, one that reconnects the Ir peoples with a newly-legitimized tribal sphere of governance. As A. K. Sen persuasively a

his new book, Development As Freedom, only by relinking democratic governance to a sc defining value orientations will the derived and surface political expressions legitimate governmental action. n275 Only by re-embedding the tribe, long detached from the underl tribal society by the IRA and similar positivistic legal initiatives, will tribal governmental accord with the real interest of the Indian peoples. n276

Sen structures societal governance as the primary means of realizing human freedom. three principles for the development of this type of democratic governance. First, full dev of human capabilities demands that any society accord to all its members the opportunity meaningful social and political participation. n277 Second, individuals and groups within society must be encouraged to conceptualize their needs and demands in a socially compr manner that can be politically expressed through their governing institutions. n278 Third, governing institutions must demonstrate that they "hear" these demands and respond to th through governmental action **[*960]** that demonstrates societal accountability. n279

By giving both a "thin" and "thick" account of how the application of Sen's model ma contribute to the restoration of tribal life-worlds, I hope to reconcile these two rival proces the thin level, I propose several background principles that are necessary, but not sufficier reconnecting the new tribe and the underlying tribal societies. At the thick level, I tell a st how real tribal people - the Mandan, Hidatsa and Arikara peoples of the Fort Berthold Re: may apply these principles to recover, socially and economically, from the devastating eff 1949 federal taking that virtually destroyed their reservation. My goal in telling this story reweave orienting tribal beliefs and values of these Indian peoples into a coherent pattern comprehensible governmental action. By combining these thin and thick accounts of triba restoration, I hope to reconcile these two rival interpretive views within the body of a new entity - the "new tribe."

D. Taking the First Steps Toward the New Tribe

Only the "new tribe" can restore the communicative power of the Indian peoples and give content to the now empty concept of tribal self-determination. The Supreme Court in decision in Santa Clara Pueblo v. Martinez n280 recognized that only the Indian peoples c to those basic constitutional issues, such as the eligibility criteria for tribal membership, th a distinct peoples. The Court's refusal to hear a female tribal member's challenge to the Pu ordinance that denied tribal membership to the children of those tribal women who choos outside of the tribe accorded "proper respect for tribal sovereignty" according to the majo

The Martinez decision permits the fundamental reworking of a tribe's relationship to i constituent societal elements, whether traditional or modern, without undue interference fi federal government. That decision wisely leaves it up to the respective Indian peoples to d when, if ever, they will fully adapt their institutions to accord with prevailing non-Indian

Page 30

wise societal governance. The contemporary Indian peoples **[*961]** are left to take the nex their own to realize the restoration of tribal life-worlds.

1. The "Thin" Theory of the New Tribe

For those Indian peoples who choose to take the next step, I offer the following "thin" an observations to guide them in this endeavor. At the thin level, I offer two background prin are necessary for creating the new tribe. First, these Indian peoples must be reasonably im what Professor Mary Midgley calls the "menace of fatalism." Many non-Indian people, as some Indian people, are deeply skeptical of the ability of today's Indian peoples to realize determination. That skepticism is sometimes expressed in terms of the Indian peoples' inn genetic, biological or cultural characteristics that will doom any real chance for tribal self- determination. n282 While the Indian peoples must realistically assess those dangers and hedge their opportunities for self-determination, they must not allow such fears to paralyz action by giving undue weight to a non-Indian view of history that has long since written peoples' epitaph. n283

Second, the Indian peoples must adopt the principle of "enoughness" as expressing th confidence that they can use their existing material and social resources effectively to re-d meet their pressing human development needs. This is a realistic presumption given that n Indian peoples have the available resources to meet the material subsistence needs of thei members. Such a base is the reasonable starting point for **[*962]** the Indian peoples to beg creation of the new tribe. n284

2. The "Thick" Theory of the New Tribe: A Case Study of the Mandan, Hidatsa and Arikar Peoples' Struggle for Social and Economic Recovery from the 1949 Garrison Taking

The removal of the Mandan, Hidatsa and Arikara peoples in 1953 from the Fort Berth Reservation to make way for the Garrison Dam was perhaps the most traumatic event they since the 1837 smallpox epidemic devastated their population, virtually wiping out the M people. Although the trauma imposed on these peoples played its way out in many destruc private and public displays - such as greatly increased welfare dependency, domestic viol alcoholism - I focus on its catalytic effect in spurring subsequent tribal action directed to s economic recovery of these Indian peoples from the debilitating effects of the Garrison tal

economic recovery of these Indian peoples from the debilitating effects of the Garrison tal

Historian Roy W. Meyer correctly assigns the bulk of the blame for the Garrison Dam "Congress and ... those segments of the public who brought pressure on their elected repre to have it built." n286 But it is the tribal people and their leaders who ultimately bear the responsibility to frame an adequate response so as to ensure their eventual recovery from made disaster. I evaluate two distinct tribal responses to this disaster and evaluate their po facilitating tribal collective **[*963]** action directed to the social and economic recovery of peoples from the 1949 Garrison taking.

Page 31

a. Response 1: The Tribal Decision to Spend the Entire $ 7.5 Million in Compensation for Garrison Taking as Per Capita Payments to Individual Tribal Members

Political in-fighting between two powerful tribal leaders - Martin Cross and Carl Whi focused on how to spend the $ 7.5 million payable to the tribal peoples as just compensati their economic losses stemming from the Garrison taking. Cross favored the per capita dis of virtually all of the monies to individual tribal members, while Whitman favored the ret most of these monies in tribal programs to address the long-term recovery needs of the pe

This issue dominated tribal politics from the 1950 tribal council election until 1957 w final distribution plan for these monies was approved by Congress. Cross used his pro per platform in the 1950 election to defeat Whitman. The BIA, in the throes of the terminatior sought to exploit this issue as grounds for proposing the termination of the tribe. Indian Commissioner Myer concluded that if the tribal government was competent to spend milli dollars, then it no longer needed the supervision of the BIA. n288 Cross and the tribal cou responded to Myer's proposed termination of their tribe in an artful manner: "We are not c the withdrawal by the government of any help that they give us .... We only oppose their interference with our management of our own property and money." n289 This artful dod tribal council worked to prevent the BIA's proposed termination of the Mandan, Hidatsa a Arikara peoples.

While Cross and Whitman battled over money and tribal power, the coming reality of destruction of the Fort Berthold Reservation was graphically depicted on the cover of the

Berthold Agency News Bulletin. Lake Sakakawea, the reservoir to be created by the Garri was portrayed as a sea serpent spreading its tentacles over a radically segmented and divic **[*964]** Fort Berthold Reservation. n290

The BIA - given the traumatized daze of the tribal people - struggled to formulate gov economic and social responses to this new reality. One BIA inspired remedy - relocation - move young Indian men and women from the reservation to urban areas such as Denver, (and Chicago. The hope was that their chances for employment, after the completion of a t craft apprenticeship, would materially improve their life chances. Many young people fro Berthold went through the "relocation" process in the 1950s and 1960s, but few, if any, ex any permanent improvement in their material circumstances. n291

The new agency superintendent, Ben Reifel, strongly supported the relocation progra that "[a] reservation is fast becoming just a place where some Indians were born. The Uni is the Indian citizen's 'reservation' today." n292 A later superintendent, Ralph Shane, simil asserted that the Indians would one day thank the United States because their removal is " means the end of the trail for any people, any culture, any way of life, nor an ascending ec n293 He believed that the Indians' removal, just like their evacuation from Like-A-Fishho in the 1880s would lead to their ultimate renewal if they could rise to meet the challenge.

The BIA's vision was to recreate Fort Berthold as new, dispersed tribal communities (residual high-plains of the reservation. These new communities - Mandaree, Twin Buttes Town - sought to fuse the three tribal groups into one new tribal identity. Indeed, the nam "Mandaree" is a composite of the syllables Mandans, Hidatsa and Arikaree. n295 But the physical separation on the desolate high plains imposed severe limits on the governmental

economic re-integration of the Fort Berthold Reservation. The deteriorating social welfare the Indians is reflected in the substantial decline of their income from farming and grazing While 39% of their income came from that source in the pre-dam era, only 10% of their ir derived from that source after the Garrison Dam. **[*965]** Welfare, which had been a negli source of income for the Indians prior to the dam, increased nine-fold after the Garrison D

The most telling effect of the Garrison Dam has been the absorption of the Indian peo the surrounding non-Indian institutions and economy. Their distinctive Indian schools dis and most Indian children either attended public school or made the long trek off-reservati BIA boarding schools. n297 Young Indian men and women began to see themselves as pr

wage-laborers, hiring out as help on non-Indian run ranches and farms or relocating off-re This fact is reflected in the increase in reservation wage income from 14% in the pre-dam 43% in the post-dam era. n298 While the scope of psychological damage cannot be fully summarized in statistics, the Mandan, Hidatsa and Arikara peoples clearly had to face sub adjustment challenges in adapting to their new reservation setting. n299

b. Response 2: The Mandan, Hidatsa and Arikara Peoples' Long Struggle to Recover Just Compensation for the 1949 Garrison Taking

In 1984 the Mandan, Hidatsa and Arikara peoples had the opportunity to renew their (just compensation for the 1949 Garrison taking. The Garrison Diversion Unit Commissio (GDUC), an eleven-member congressionally appointed body, concluded that these Indian borne a disproportionate share of the economic burden in having the Garrison Dam and re located on their tribal homelands. n300 It based this finding on its review of the legislativ the 1949 Takings Act. The GDUC was convinced by this review that the Indians had suff devastating economic, cultural and social losses due to the federal government's taking of productive agricultural lands. It also found that Congress may have failed to make the **[*9** Indian peoples whole for their economic losses arising from the 1949 taking. n301 It there directed the Indians' trustee - the Interior Secretary - to hold administrative hearings on th just compensation and related claims. n302

Interior Secretary Donald P. Hodel was directed by the GDUC to establish a secretari commission that would examine the Indians' just compensation and related claims. He wa directed to recommend appropriate implementing legislation if his commission concluded federal government had failed to justly compensate these Indians for their losses arising fr taking. Secretary Hodel established the Joint Tribal Advisory Committee (JTAC) by secre charter in 1985 to hear and evaluate the Indians' claims arising from the 1985 taking of th reservation. n303

c. The Mandan, Hidatsa and Arikara Indians Just Compensation Case Before the Joint Tr Advisory Commission (JTAC)

The hearings before the JTAC provided the organizational catalyst for these tribal pec join together and present personal testimony and other evidence regarding the devastating

the 1949 taking on their culture and economy. The JTAC construed its charter so as to allo Indian people to **[*967]** present relevant expert and lay testimony regarding their just compensation claim against the United States. n304 They urged the JTAC to review all th circumstances surrounding this federal taking. Such a comprehensive review was essentia commission's reliable inquiry into the fairness of the taking of the Fort Berthold Reservati

Whether the federal government had made a good faith effort to justly compensate the Hidatsa and Arikara peoples was the most significant issue confronted by the JTAC. That focused the JTAC's attention on the administrative and legislative record that ostensibly ju 1949 Garrison taking. n305

Testimony by natural resource economists and related experts aided the JTAC in its e of the Indians' claims. n306 They provided the JTAC with a valuation theory of Indian lar fulfilled the "make whole" command of the Just Compensation Clause. n307 Other expert provided the JTAC with historical and sociological evidence of the taking's devastating ef the social and cultural life of these Indian people. n308

But the Indians' claim for just compensation was strenuously opposed by the BIA. n3 Secretary Hodel eliminated the **[*968]** just compensation issue from the JTAC's charter de GDUC's explicit directive to the contrary. n310 However, the JTAC construed the "other portion of its charter so as to allow it to hear the Indians' just compensation claim. The BI that the Takings Act barred this claim. But the GDUC's express direction and its own secr charter persuaded the commission that it could examine the equity of the Indians' just com claim. n311

d. The Resolution of the Indians' Just Compensation Claim by the JTAC

The Indians argued before the JTAC that Senator Arthur V. Watkins' Senate Indian A Committee had demonstrably failed to justly compensate them for their taken lands. They that their lands should have been valued on the same basis as non-Indian lands that served comparable government and public welfare functions. n312 They contended that this valu standard would fulfill two important underlying goals of the Just Compensation Clause. F a valuation standard would ensure the continuing viability of the affected Indian peoples a recognized government consistent with the purpose of their 1886 agreement with the fede government. n313 Second, such a valuation standard would discourage future "rent seekin initiatives by Indian congressional committees that sought to exploit their plenary power c Indian lands for their non-Indian constituents' benefits. n314

The Indians' treaty-reserved lands formed the essential trust res that supported their governmental and economic infrastructure. As land, it was comprised of the 156,035 acre irrigable bottom lands that were taken by the federal government. Destruction of those lan

irrigable bottom lands that were taken by the federal government. Destruction of those lan imposed uncompensated economic **[*969]** losses on those Indians that could be measured the capitalized values of the expected future incomes that would have been generated by t lands. n315

The JTAC recognized that the federal government had a legal duty to make the Indian for their economic losses. Therefore the JTAC directed Dr. Ronald G. Cummings, a leadi

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resource economist, to do an assessment of the Indians' economic losses imposed by the 1 taking. n316 He was directed to use known and accepted 1949 valuation standards as the capitalize the stream of income the Indians would have received from those lands. Such a approach replicated Congress' 1946 valuation standard that required the War Department the Indians with the "in-kind" replacement value of their taken lands. The War Secretary h directed to provide the Indians with land comparable in quality and sufficient in area to cc the tribes for the land on the Fort Berthold Indian Reservation inundated by the constructi Garrison Dam. n317 The JTAC interpreted this congressional standard as holding that onl or substitute compensation would fairly compensate these Indian peoples for the loss of th n318

The JTAC's next task was to determine what amount of replacement or substitute valu adequately compensate the Indians for the taking of their lands. Such an alternate valuatio had been endorsed by the Supreme Court in the taking of lands that served essential gover or public welfare functions. That the Indians' taken lands provided the social welfare and governmental benefits described by the Court was evidenced by their use of those lands fc farming and ranching activities as contemplated by the 1886 agreement. Only the continu existence of these lands, or the just compensation equivalent, would enable the affected In fulfill those treaty-defined goals.

The JTAC issued its final report in 1986 and recommended that the Secretary of Inter propose federal legislation on behalf **[*970]** of the Mandan, Hidatsa and Arikara peoples t would award them just compensation for the 1949 taking of the Fort Berthold Reservation The JTAC recommended that the just compensation amount should range between $ 178. and $ 411.8 million. In calculating compensation, the JTAC had directed Dr. Cummings t alternative formulas. The JTAC's award range reflects the application of the alternative va formulas. n320

e. The Mandan, Hidatsa and Arikara Peoples Confront the Challenge of Social and Econ Recovery on the Fort Berthold Indian Reservation

Interior Secretary Hodel declined to accept the JTAC report or implement any of the commission's recommendations. Instead, the Senate Select Committee on Indian Affairs a House Interior Subcommittee on Water and Power initiated joint oversight hearings on th final report in 1986. n321 The JTAC's just compensation recommendation was referred b Select Committee to the General Accounting Office (GAO) for its analysis and response. report, issued in 1990, concluded that, although it somewhat disagreed with the economic methodology used by the JTAC, the JTAC's findings provided a substantial basis for Con consider an equitable award of just compensation to the Indians in the amount of $ 149.5 n322 Legislation to implement the JTAC's just compensation recommendation was introd Senator Kent Conrad from **[*971]** North Dakota. n323 It provided $ 149.5 million in just compensation to the Mandan, Hidatsa and Arikara peoples for the 1949 Fort Berthold taki BIA testified that it had no opposition to this legislation as long as it otherwise met the "p go" constraints of the controlling budget resolution. n324

The Indians, after lengthy discussion with various interested groups, including the Na Rural Electric Cooperative Association, were able to craft an agreement that would autho deposit of a specified amount of Pick-Sloan hydropower receipts into a Treasury account of the Mandan, Hidatsa and Arikara peoples. n325 The Indians were required to submit ar economic and social recovery plan to the Interior Secretary that would govern the future expenditure of the just compensation monies. The Indians would have access to the accu interest on that account once it reached the amount of $ 149.5 million. President Bush thr veto the legislation but, nonetheless, signed the Act into law in November 1992 as part of water resources development bill. n326

E. The "Disjunctive" Moment: How the Mandan, Hidatsa and Arikara Peoples May Achi and Economic Recovery on the Fort Berthold Reservation

The Mandan, Hidatsa and Arikara peoples have survived much over the past two hun since their first encounter with American power in the late fall of 1804 during their tribal meetings with the leaders of the American Corps of Discovery, Captains Meriwether Lew William Clark. They now confront a new "disjunctive" moment in their collective life as people. Can they effectively use the $ 149.5 million in just compensation to reverse histor recover socially and economically as a distinct people? Unlike the "one-shot" tribal decisi "per-cap" the entire $ 7.5 million in compensation in the 1957 tribal referendum, the "pay structure of the governing statute and the congressional constraints on the use of the **[*97** 149.5 million precludes any such self-interested solution to this disjunctive moment. Like the governing statute distributes only the accrued interest from this trust fund on an annua to the tribal people. They will therefore be forced again and again to collectively re-decid use of that distributed interest income for their economic and social recovery as a tribal pe n327

As "repeat players," the various tribal constituencies, who favor competing social and recovery projects, will be forced to build tribal coalitions and alliances so as to convince t Secretary that a majority of the Indian people support their particular approach to social a economic recovery on the Fort Berthold Reservation. There is some evidence that such a already underway among the Mandan, Hidatsa and Arikara peoples. Between 1992 and 1 accrued annual interest on this fund of $ 149.5 million accumulated $ 33 million. The pen secretarial distribution of this large sum of money has prompted much heated discussion various tribal constituencies as to the appropriate use of this money for social and econom recovery purposes. n328

The current tribal business council has proposed a plan for investing $ 30 million of t in a tribal endowment fund that would be managed by a private investment firm. It promi this investment will earn an expected annual interest rate of 10% compared to the 6.5% a of interest that they would earn if they are administered by the Office of Trust Funds Man (OTFM). Under the tribal council's plan, about 50% of the annual income would be made for tribal programs consistent with its proposed social and economic recovery plan. n329

[*973] But the proposed plan also authorizes the tribal business council to invade the corpus and use up to 25% of its principal as security for any borrowing authorized by the

council. This provision has been greeted with skepticism by many tribal members. They q whether stepping away from federal trust management of this major tribal resource is a go Some fear that this is a "power-grab" by a potentially corrupt tribal council that would mis tribal funds for personal benefit. Other tribal members fear that approval of such a plan w motivate individuals to "get on the council" so that they can invade proposed endowment their own pet projects. n330

This internal tribal controversy over the use of this $ 33 million, far from dismaying a should evidence the catalytic moment wherein the Mandan, Hidatsa and Arikara peoples s reclaim responsibility for their economic and social futures. It is a daunting task, but only Indian peoples can successfully re-internalize those values, needs and circumstances that l them together originally as the Three Affiliated Tribes. Indeed, this $ 149.5 million may s crude surrogate for those values as these Indian peoples seek to reconstitute their society s accomplish social and economic recovery. n331 No doubt, some of these funds will be mi foolishly invested by future tribal councils, but that is to be expected and absorbed as corr guidance for future collective action. The "social discount" rate governing the impact of su expected tribal mistakes lowers their cost to near zero over these Indian peoples' long-term n332

[*974]

1. How This Disjunctive Moment Will Support the Renewal of the Mandan, Hidatsa and A Peoples

Over the past two hundred years the Mandan, Hidatsa and Arikara peoples have beco enfolded into a non-Indian historical process from which they may now have the opportur escape. Moreover, their conscious assumption of their economic and social recovery task them outside of this historical process.

Because these Indian people have been enveloped for so long within a dependency-ge historical process, they will have to expend a great deal of collective social and emotional escape. They should perhaps listen to my young daughter's preschool song about successf confronting an obstacle that is "too deep to go under it, too wide to go around it, too high it, so I guess we'll have to go through it."

By penetrating this veil of a burdening American historical experience, the Mandan, H Arikara peoples can restore their distinctive character within a radically resituated Fort Be Reservation. By much expenditure of social and emotional energy, these Indian peoples c redefine their place within the evolving societal mosaic of America. Such conscious self-e marks the classic strategy of the Indian peoples in carving out a place for themselves with hostile American society. n333

The Mandan, Hidatsa and Arikara people, in embarking on their path of social and ec recovery, must confront the high psychic and social costs imposed on their peoples by the accumulated effects of their American historical experience. Cross-cultural psychologists characterize the "spiritual injury" caused by "inter-generational post traumatic stress disor "soul wound." n334

Page 37

Converting this $ 149.5 million into an effective therapy requires the development of that will directly address the **[*975]** assorted maladies that evidence the "soul wound" to t Mandan, Hidatsa and Arikara peoples. This will be the major task for collective action by Indian peoples as they pursue social and economic recovery on the Fort Berthold Indian Reservation. Can this money effectively catalyze the deliberative social action necessary t the inter-generational transmission of societal trauma within this Indian society? n335

2. Catalyzing the "New Constitution" for the Mandan, Hidatsa and Arikara Peoples

The repeated and necessary confrontations among powerful tribal constituencies in cc effective social action on the Fort Berthold Reservation will eventually result in a new co for the Three Affiliated Tribes. This new constitution will reconnect these contesting triba constituencies with a renewed understanding of their peoples' latent and emerging values. pragmatic and instrumental level, these confrontations will distill these values and unders into socially-accountable political expression requiring effective and responsive institutio governance. At a societal level, these confrontations will progressively re-embed the triba government within a renewed tribal identity. Only through such a reconstitutionalizing ef they reclaim their tribal institutions from their imposed, Americanized functions under Jo Collier's IRA and federal Indian common law. n336

I will offer only general guidelines for this task: to do more would unduly intrude int sovereign choice of these Indian peoples. My recommendations draw upon A. K. Sen's re constructive approach to social governance as the essential means for realizing human fre First, such a tribal constitution would consciously promote the full development of the hu capabilities of individual tribal members by according them appropriate opportunities for meaningful social and political participation. Second, such a tribal constitution would exp promote the growth of traditional tribal constituencies and **[*976]** encourage the articulati their interests and values in a socially-comprehensible manner. Third, such a tribal constit would require the ruling tribal leadership to demonstrate that it "hears" their peoples' dem needs by responding in a politically and socially accountable manner. n337

needs by responding in a politically and socially accountable manner. n337

Two additional background requirements provide the context for the "working-out" o tribal constitution. First, these Indian peoples must consciously reject what Professor Mar calls the paralyzing "menace of fatalism." n338 This fatalism is embodied in the prevailin American view that innate genetic, cultural or biological factors have doomed the contem Indian societies to decline and eventual disappearance. Many Indian people, including sor Fort Berthold Indian Reservation, have "bought into" this view. Only by consciously rejec fatalism about their future as an Indian people will the Mandan, Hidatsa and Arikara peop paralysis of the needed action. n339

Second, the Indian people must adopt the principle of "enoughness" as expressing the confidence that they can effectively use their existing material and social resources in defi meeting their pressing social and economic recovery needs. Only by presuming that $ 149 can be subdivided into enough societal resources - income, food, power, prestige and auth meet their peoples' needs in a socially accountable manner, will this reconstitutionalizing succeed on the Fort Berthold Reservation. This principle requires future tribal councils to

"grow" this $ 149.5 million in a manner that creates a sustainable "steady-state" tribal eco as to ensure the fair and equitable distribution of societal resources. n340

III

CONCLUSION: RECONCILIATION

Reconciling the past two hundred years of federal-Indian relations requires the Ameri Indian peoples to escape from a "history that no one wanted." n341 This history, embodie **[*977]** main engine - federal Indian law - still seeks to remake the Indian peoples by alteri somatic features, languages, territorial distributions, governmental institutions, as well as cultural and religious belief-systems. This history has damaged, and continues to damage, American and Indian peoples in fundamental ways. It has demeaned, and continues to den proud and accomplished people, the American people, who, to create this history, openly their most basic and cherished tenets of life, liberty and happiness for all Americans. It ha unduly destructive of the lives and resources of the Indian peoples, the American people's wards entitled to their solicitude and protection. It has proven to be a yahoo's history of th

wards entitled to their solicitude and protection. It has proven to be a yahoo's history of th American West and only yahoos would wish it to continue. n342

Why this unwanted history is so tenaciously and continually reproduced in federal Inc decisions requires us to look at its generative source. Freud viewed its generative source i manner:

> Men are not gentle creatures who want to be loved, and who at most can defend themselves if attacked; they are, on the contrary, creatures among whose instinctu endowments is to be reckoned a powerful share of aggressiveness. As a result, the neighbor is for them not only a potential helper or sexual object, but also someon who tempts them to satisfy their aggressiveness on him, to exploit his capacity fo work without compensation, to use him sexually without his consent, to seize his possessions, to humiliate him, to cause him pain, to torture and kill him, Homo homini lupus. Who in the face of all his experience of life and of history, will hav the courage to dispute this assertion? As a rule this cruel aggressiveness waits for some provocation or puts itself at the service of some other purpose, whose goal might also have been reached by milder measures. In circumstances that are favorable to it, when the mental counter-forces which ordinarily inhibit it are out action, it also manifests itself spontaneously and reveals man as a savage beast to whom consideration towards his own kind is something alien. Anyone who calls mind the atrocities **[*978]** committed during the racial migrations or the invasion the Huns, or by the people known as Mongols under [Genghis] Khan and Tamerl or at the capture of Jerusalem by the pious Crusaders, or even, indeed the horrors the recent World War - anyone who calls these things to mind will have to bow humbly before the truth of this view. n343

This unwanted history and its child, federal Indian law, were born out of such a crucil national aggression exalted by Teddy Roosevelt and others. This history remains fresh in of its adherents only through its constant re-enactment. Thus the new "Indian wars" are nc

legal struggles over Indian land, sovereignty and beliefs. These ritualized aggressions allo American generation to renew their mythic kinship ties, forged long ago in the heat, blood sweat of their remote ancestors' wars to dispossess the Indian peoples. Not surprisingly, F concluded that such a history of "ethnic nationalism" becomes the means by which law en

and re-enacts the aggressive instincts of its people so as to enable their identification and r their loyalty to the state:

> [The] state has forbidden the practice of wrong-doing, not because it desired to abolish it, but because it desires to monopolize it, like salt and tobacco. The warri state permits itself every such misdeed, every such act of violence, as would disgr the individual man. n344

This history renders, for me, banal the efforts of contemporary legal commentators to federal Indian law via critique. n345 Even if successful in its own terms, it reinforces wha Erikson calls the "pseudo-speciation" of a group: in this case, of Indian peoples as tribes. (new history, not the yahoo's history of the American West, created by the Indian peoples t will serve to rebuild their lives, cultures and economies. n346

Some argue that this old American history is already in eclipse and that a new Americ is waiting to be born. Some will mourn, like James Truslow Adams who published The Ej America in 1931, this passing of the old America. n347 He spoke of **[*979]** America as:

> That dream ... has evolved from the hearts and burdened souls of many millions, have come to us from all nations. If some of them have too great faith, we know r yet to what faith may attain, and may harken to the voice of one of them, Mary Antin, a young immigrant who comes to us from Russia.... Sitting on the steps of Boston Public Library, where the treasures of the whole of human thought had be opened to her, she wrote: "This is my latest home, and it invited me to a glad new life.... The past cannot hold me, because I have grown too big; just as the little ho in Polotzk, once my home, has now become a toy of memory, as I move about in wide spaces of this splendid palace.... America is the youngest of nations, and inherits all that went before it in history. And I am the youngest of America's children, and into my hands is given all her priceless heritage.... Mine is the whol majestic past, and mine is the shining future." n348

A noted Harvard sociologist, Nathan Glazer, characterizes this newborn American his one fraught with doubts, hesitancies and fears, just as its old history was characterized by confidence and a boundless sense of American power:

> This brings us up to date in considering America as epic. The epic of the frontier closed a long time ago. Many have worried about what succeeds it. Let us project America overseas, some have said, in imperialist conquest, or in fighting tyranny, in improving the life of other peoples. We have now withdrawn from the empire, though a few places remain. We face no great tyranny, and our will in facing ever small tyrannies is not strong. We are now doubtful about our capacity to improve lives of other peoples. The new frontier, we are told, must be education, or space,

> good group relations. How often have we heard it said: How come we can reach t moon and not improve our cities or race relations? Clearly it must be easier to rea the moon, and that does require heroes and is a subject of epic stature. I doubt whether the improving of group relations can replace the conquest of a continent the subject of an epic. Of course, we can live without an American epic. But that does diminish us, and it is easy to understand why some of our poets, artists, writ and historians keep on trying. n349

Any new American epic of history would be radically incomplete, in my mind, witho prominent place reserved for the Indian peoples. They are rich in those redemptive social cultural **[*980]** beliefs and practices that "hold societies together." n350 These are the pre affiliative resources that the American people have lost - families, small groups and netw interacting individuals cooperating in the pursuit of common goals. n351 Whereas Americ ages are actively encouraged to economically and socially embrace the increasingly abstr relations of the new "bio-cybernetic" society, n352 the Indian peoples - insulated by pove remoteness and by their legal status as tribes - have the opportunity to reinvigorate their "l blood" life-worlds.

Because there is no "off-ramp" from America's information society into Indian Count Federal Communication Commission (FCC) has been directed by Congress to build an int bridge into the Indian peoples' lives. n353 But the Indian peoples are not asking for such a information technology to enrich their lives. Instead they are simply asking for the freedo promised by the old America, a freedom not granted to the Indian peoples. Or, in respons new America's offer of information technologies, some of the older Indians may say, as K long ago, the only information that really matters for human use is already encoded in the "hieroglyphs of the heart." n354

FOOTNOTES:

* Professor of Law, School of Law, University of Montana. J.D., 1973, Yale Law School; 1989, Harvard University.

n1. J.C.F. Holderlin.

n2. 21 U.S. (8 Wheat.) 543 (1823). Justice Reed later described Marshall's opinion in rationalizing the subordinate legal status of the Indian peoples. See Tee-Hit-Ton Indians v States, 348 U.S. 272, 279-91 (1955). He candidly admitted in his opinion that America's n century dream of a manifest destiny would not have been realized but for the Johnson dec Justice Reed also bluntly acknowledged the spurious logic by which Marshall extended pı federal title over a vast expanse of Indian lands in the trans-Mississippi region that were o by numerous and powerful Indian peoples who were prepared to militarily contest the Uni claimed ownership of their lands. Tee-Hit-Ton Indians, 348 U.S. at 279.

n3. Professor Stephen Cornell argues that the "tribe" was created by those European a American negotiators "who searched for and often assumed comprehensive structures of ε or hierarchical political organization" among the Indian peoples. Stephen Cornell, The Re Native: American Indian Political Resurgence 78 (1988). Indeed, Cornell concludes that "comprehensive political organization at times was even made a prerequisite for [federal] negotiations" with the Indian peoples. Id. at 79.

Marshall's process of incorporating the Indian peoples and their lands within the Ame domestic sphere of control was accomplished over the course of his opinions in what is pc called Marshall's Indian Law Trilogy: Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (182: (incorporating aboriginal Indian land titles into federal ownership); Cherokee Nation v. G U.S. (5 Pet.) 1 (1831) (denominating Indian peoples as "domestic, dependent nations"); W v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (establishing an exclusive, bilateral relationship be federal government and the Indian peoples).

n4. Ernest Wallace and Adamson Hoebel likewise emphasize that the "tribe," as a dist or political entity, did not exist among the Indian peoples:

"Tribe" when applied to the Comanche is a word of sociological but not political significa Comanches had a strong consciousness of kind. A Comanche, whatever his band was a C By dress, by speech, by thoughts and actions the Comanches held a common bond of iden affinity that set them off from all other Indians - from all the rest of the world. In this sens

had meaning. The tribe consisted of a people who had a common way of life. But that wa did not include political institutions or social mechanisms by which they could act as a tril

Cornell, supra note 3, at 75 (quoting Ernest Wallace & E. Adamson Hoebel, The Comanc Lords of the South Plains 22 (1952)).

Nonetheless, no indigenous peoples of America, despite their long history as settled, a and civilized Indians, were immune from becoming "tribal" in character and thus subject t paramount federal control. The Pueblo Indians of the American southwest, once judicially civilized and beyond federal control, had by the early twentieth century sunk into a "tribal status that warranted federal control of their lands and members. The Supreme Court conc the "people of the pueblos, although sedentary rather than nomadic in their inclinations, a disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government." United States v. Sandoval, 231 U.S. 28, 39 (1913). Their "tribalism" was fu evidenced by their "primitive modes of life ... influenced by superstition and fetichism, an governed [by] ... crude customs inherited from their ancestors, they are a simple, uninform inferior people." Id. (extending exclusive federal control over the Pueblo peoples and thei

n5. Noted Indian historian Wilcomb E. Washburn asserts that Marshall recognized th the real estate of the nation," as well as the "economic and political demands of the millio non-Indians] who now populated the continent," hinged upon his opinion in Johnson. Wil Washburn, Red Man's Land/White Man's Law 65-66 (2d ed. 1995).

Equally noted Indian historian Francis Jennings explains the immense transformation America wrought by Johnson as evidencing the "transit of civilization." This civilization t with it European weeds - the ferns, thistles, plantain, nettles, nightshade sedge - and took

European use Indian foodstuffs - maize, potatoes, tomatoes, chilies, and yams. Francis Jer The Founders of America: From the Earliest Migrations to the Present 25-35 (1993).

n6. Ironically, President George Washington and War Secretary Henry Knox both em respect for the Indian peoples' aboriginal land titles and rights. President Thomas Jefferso described the federal government's preemptive right in the Indian peoples' lands:

not as amounting to any dominion or jurisdiction, or paramountship whatever, but merely

nature of a remainder after the extinguishment of the present right, which gave us no pres whatever, but of preventing other nations from taking possession, and so defeating our ex that the Indians had the full, undivided and independent sovereignty as long as they choos it, and that this might be forever.

1 Francis Paul Prucha, The Great Father: The United States Government and the Americ 59 (1984).

n7. The ambiguous legal status of individual Indians has occupied the federal courts' since the beginning of the federal-tribal relationship. Early federal court decisions interpre Fourteenth Amendment's blanket grant of citizenship to "all persons born or naturalized ir United States, and subject to the jurisdiction thereof" as excluding Indians. McKay v. Can F. Cas. 161, 165 (D. Or. 1871). The Supreme Court later adopted that reasoning, holding individual Indian could not free himself from his tribal status by self-help through his vol adoption of non-Indian ways of living. Elk v. Wilkins, 112 U.S. 94 (1884) (holding that Ir "not subject to the jurisdiction" of the United States nor citizens of the U.S. or the states w which they reside). Id. at 109.

n8. The poverty rate of the American Indians in 1980 was 40.5%, almost six times tha white population. A regional breakdown of the United States shows that in those regions proportion of reservation Indians is the highest, the Indian poverty rate is most severe. Kl Indian Reservations in the United States: Territory, Sovereignty and Socioeconomic Chan (1999).

n9. President Nixon's 1970 Indian Message emphasized that the "time has come to br decisively with the past and to create the conditions for a new era in which the Indian futu determined by Indian acts and Indian decisions." Message From The President of the Unit Transmitting Recommendations for Indian Policy, H.R. Doc. No. 91-363, at 1 (1970).

Nixon's message goes on to say "that we must make it clear that Indians can become independent of federal control without being cut off from federal concern and support." Id

n10. Professor Rob Williams excoriates Marshall's "actual state of things" as a trumpe historical explanation justifying total federal control over the Indian peoples and their lan A. Williams, Jr., Learning Not to Live with Eurocentric Myopia: A Reply to Professor La Learning to Live with the Plenary Power of Congress over the Indian Nations, 30 Ariz. L. 440-42 (1988).

n11. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). The Worcester decision - leading historian of the Marshall Court, Professor G. Edward White, points out - did not,

alter one iota the "plight" of the Cherokees or any of the other Eastern Indian peoples in A during the 1830s:

The Cherokees, and other Indian tribes, became in effect wards of the federal government officials of that government were acknowledged to have the power to do what Georgia ha place the Indians in the position of abandoning their cultural heritage - becoming "civilize being dispossessed of their land and forced to emigrate. Being wards of the federal goverr not mean the Indians in America would have more freedom or more respect. Their "plight ostensibly solved, remained essentially the same.

David Getches et al., Federal Indian Law 125 (4th ed. 1998), (citing G. Edward White, T Marshall Court and Cultural Change, 1815-35, at 732 (1988)).

n12. See Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). The Cherokee Natior in the opinion of Professor G. Edward White, represents the Marshall Court's stark awarer precarious practical status of the Eastern Indian peoples:

The policy of removal ... and the dire consequences for the [Eastern] Indian population pr a growing concern among a segment of educated nineteenth-century Americans for what termed the "plight" of the Indians ... caused by their inability to acculturate.... Most could to white customs and institutions: they lacked the inherent qualities of republican yeoman civilizing Indians was preferable to dispossessing them, for humanitarian and paternalistic the civilizing process did not take in most cases. The result was a "plight": dependency an or emigration and dispossession.

Getches et al., supra note 11, at 102-03.

n13. Marshall "contradistinguished [the Indian peoples] by a name appropriate to ther and that name is "tribe." Cherokee Nation, 30 U.S. (5 Pet.) at 18. Stephen Cornell suggest "tribalizing" the Indian peoples, Marshall may have been promoting their political matura

Tribalization could have advantages for Indians. They, too, had political agendas; they als pursuit of peace, secure borders, access to resources available only from their adversaries. Centralized political structures, often including new leadership positions, had advantages dealings with European and American governments and their representatives. As such dea came to play a larger role in Indian life, specialized political organization became increasi advantageous. It also offered opportunities to ambitious individuals or factions seeking to their influence or power.

Cornell, supra note 3, at 79.

n14. There are just Indians, no tribal nations, according to Justice Johnson in his conc opinion in Cherokee Nation, 30 U.S. (5 Pet.) at 25 (Johnson, J., concurring). These Indian concluded, are "nothing more than wandering hordes, held together by ties of blood and h having neither laws or government beyond what is required in a savage state." Id. at 27. H the Court that to recognize "every petty kraal of Indians, designating themselves a tribe or

would do great harm to the established political fabric of the United States. Id. at 25. The economic and political maturation of the Indian peoples and their "advance, from the hunt a more fixed state of society," would undermine both the federal and state governments' c Indian lands and status. Id. at 23.

n15. This mischief was already afoot, according to Justice Johnson, giving the federal "extending to [the Indian peoples] the means and inducement to become agricultural and Id. at 23. But he concluded that the ultimate project of organizing the Indian peoples into could not possibly be accomplished without "express authority from the states." Id. at 24.

On this point, Indian historian Francis Jennings would agree. Jennings argues that unc social and political conditions of the nineteenth century the "nation-state" grew by "dissol Indian peoples. Jennings, supra note 5, at 364.

n16. Justice Baldwin agreed with Justice Johnson's concurring opinion in Cherokee N regarding the mischief that would be created by recognizing any residual sovereignty in th peoples after their incorporation into the United States. "Within [Georgia's] boundaries th no other nation, community, or sovereign power, which this department can judicially rec Cherokee Nation, 30 U.S. (5 Pet.) at 47 (Baldwin, J., concurring).

Likewise, theorizing about Indian rights played little role in the thinking of the non-In settler or speculator of the eastern Indian lands. Prucha remarks that "they saw the rich lar Indians and they wanted them." Prucha, supra note 6, at 108.

n17. Marshall's task in Johnson was to:

Consider not only law but conscience and expediency as well. The "natural" rights of the had to be seen in terms of the "speculative" rights of the earlier European monarchs, the

had to be seen in terms of the "speculative" rights of the earlier European monarchs, the rights of their successor American states, and the "practical" economic and political dema millions who now populated the continent.

Washburn, supra note 5, at 66.

n18. Noted Marshall scholar, G. Edward White, describes Marshall's difficulty in Joh related Indian law opinions, as arising from the distinct legal principles that he applied to Indian peoples' legal status:

The Indians had been the initial possessors of the American continent: the land and, presu property rights emanating from it were theirs .... The Indian tribes had been recognized fr outset of white settlement as nations and had entered into legal relationships, such as treat contracts, with whites. Theoretically, then, Indian tribes holding land had not only rights sovereignty but a bundle of natural rights deserving of legal recognition, rights related to concepts of liberty, property, and self-determination that occupied so exalted a position in nineteenth-century jurisprudence.

G. Edward White, The Marshall Court And Cultural Change, 1815-1835, at 704 (abr. ed.

n19. The United States' ongoing commitment to the civilization and protection of the peoples is evident from its early proclamation in the Northwest Ordinance of 1787: "Relig

morality, and knowledge being necessary to good government and the happiness of manki schools, and the means of education shall be forever encouraged. The utmost good faith sl always be observed towards Indians." Northwest Ordinance of 1787, 1 Stat. 50, 52 (1789)

But consensus Indian historians agree that the federal government's "civilizing agend never carried out with any of the Indian peoples. See Clyde Ellis, "A Remedy for Barbaris Indian Schools, the Civilizing Program, and the Kiowa-Comanche-Apache Reservation, 1 18 Am. Indian Culture & Res. J. 85 (1994).

n20. Washington emphasized that "policy and [economy] point very strongly to the e of being upon good terms with the Indians." Letter from George Washington to James Du 7, 1783), Getches et al., supra note 11, at 84-85.

n21. Washington's Indian policy, which pledged to protect the Indians' homelands wh

n21. Washington's Indian policy, which pledged to protect the Indians' homelands wh to survey, sell and create non-Indian political institutions in those very same lands, "had n beyond contradiction, to schizophrenia," according to historian Elliot West. Robert V. Hir Mack Faragher, The American West: A New Interpretive History 121 (2000).

n22. Washington thought that "settlements will as certainly cause the Savage as the W retire, both being beasts of prey tho' they differ in shape." Getches et al., supra note 11, at

n23. Id.

n24. Ironically, Mark Twain's campaign to demolish the "Noble Savage" stereotype c James Fenimore Cooper and Francis Parkman is well known. He criticized these writers a "viewing him [the Indian] through the mellow moonshine of romance." Philip S. Foner, M Twain Social Critic 237 (1958).

Nonetheless, he scandalized the annual dinner of the New England Society in 1881 st first American ancestor, gentleman, was an Indian, an early Indian.... Your ancestors skin alive, and I am an orphan." Id.

n25. Leatherstocking, James Fenimore Cooper's fictional backwoodsman, speaking in already condemns the extension of American civilization in the wilderness of Indian Cour Cooper has him decry Judge Temple's vision of building in the forests, "towns, manufacto bridges, canals, mines, and all the other resources of an old country." Hine & Faragher, su 21, at 476. Leatherstocking argues against civilization saying, "The garden of the Lord wa forest" and was not patterned after the "miserable fashions of our times, thereby giving th what the world calls its civilizing ...." Id.

n26. John Sevier's natural liberties philosophy served to legitimate the aggressive attit the frontiersmen. He argued that the "law of nations ... agrees that no people shall be entit more land that they can cultivate." Prucha, supra note 6, at 108. His frontiersman's philosc triumphed because the federal government made only sporadic and feeble military efforts regulate the non-Indian pressure to settle Indian lands. Id. at 111-12.

n27. See generally Foner, supra note 24, at 236-38.

n28. The American frontier had spawned a subculture of a breed of lawless, sometim depraved, men who lived off clandestine trade with the Indians. The Indian fur trade litera created these men who went off with their packs for months on end into the wilderness. P

emphasizes that though they often took Indian wives, they nonetheless "mercilessly explo Indians, debauched them with whiskey, and robbed them of their furs." Prucha, supra note

By contrast, the authentic portrayal of the vanishing Indian way of life on the Great P what motivated painters such as Samuel Seymour, George Catlin and Karl Bodmer to mal dangerous trek into Indian Country. Seymour's goal was to paint portraits of Indians and r landscapes noted for their "beauty and grandeur." Catlin avowed that "nothing short of the my life shall prevent me from ... becoming [the Indians'] historian." Hine & Faragher, sup at 481. He had "flown to their rescue - not of their lives or of their race (for they are 'doom must perish), but to the rescue of their looks and their modes." Id. at 482. Bodmer, who accompanied Prince Maxmillian on his visits to the Mandan villages of the Upper Missou used his painting skills to provide an artistic accompaniment to his patron's ethnographic His paintings are used today in reconstructing the traditional clothing, rituals and life-way Indian subjects. Id. at 482-83.

n29. "[Slaves who lived near] the Indian nations ... frequently tempted fate by striking freedom." John Hope Franklin & Loren Schweninger, Runaway Slaves: Rebels on the Pla (1999). Professor Franklin asserts that these runaway slaves were "more likely to head for [Indian nations than] the [ostensibly free area of] Ohio." Id. at 121.

He also quotes a federal military officer stationed in south Georgia in the early ninete century who asserts that he "[has] ascertained beyond any doubt [that] a connection exists portion of the slave population and the Seminoles" so as to facilitate Indian raids on the pl Id. at 87.

n30. Teddy Roosevelt, after the death of his wife in childbirth, left his baby daughter of family members and headed to the Dakotas to live for three years on a cattle ranch. His was to feel the "beat of hearty life in our being ... the glory of work and the joy of living." Faragher, supra note 22, at 496.

Likewise Owen Wister, the famous writer, went west to regain his health and to "[free from what to him was a deadly life" as a Boston businessman. Id. at 497.

n31. Horses, either stolen by Indians from the Spaniards or re-domesticated by them f wild, appealed strongly to the Plains Indians. So strongly, in fact, that Professor Francis J concludes that the horse "stimulated revolutionary cultural change from sedentary horticu mobility of hunters and raiders of 'horse Indian' fame." Jennings, supra note 5, at 166.

n32. Professor Hine argues that the horse allowed the "Indian peoples to reclaim the American heartland" and become the "first settlers of the Great Plains...." Hine & Faraghe note 22, at 138.

Thus, the "mounted warrior of the plains - the ubiquitous and romantic symbol of nati America - was in fact not an aboriginal character at all but one born from the colonial coll cultures." Id.

n33. Killing the bison, Professor Jennings concluded, was seen by the non-Indians as way of getting rid of the Indians who were also conceived of as vermin." Jennings, supra

way of getting rid of the Indians who were also conceived of as vermin." Jennings, supra n 372.

Page 47

n34. Marshall's Indian law decisions and later federal Indian treaties confirmed the In people's exclusive use and occupancy rights in vast hunting and roaming reserves in the A West. Cornell, supra note 3, at 45-50.

n35. Few Indian peoples tried to adopt agriculture because, among other reasons, they "pushed into places where soil was poor and water was scarce." Jennings, supra note 5, at

n36. That the Indians who wiped out Custer's troops did so in defense of their familie clear to Professor Francis Jennings. "Bullheadedly disregarding warnings and defying ord Custer was "on the way to perpetrate another in a series of his own [Indian] massacres." I

n37. William T. Hagan, How The West Was Lost, Indians in American History 182 (I E. Hoxie ed., 1988).

n38. Id.

n39. Id. at 183.

n40. Id. at 184.

n41. Jennings, supra note 5, at 377.

n42. The military subjugation of the Apaches, Sioux and Nez Perce by the federal cav 1870s marked the effective end of armed Indian resistance on the Great Plains and in the I The collapse of Indian military might left the Indian peoples vulnerable to retributive con action and the pressures of treaty negotiators. Cornell cites the words of Shoshone Chief V in 1878 as the closing eulogy of this era: "Our fathers were steadily driven out, or killed, a their sons, but sorry remnants of tribes once mighty, are cornered in little spots of the eart by right - cornered like guilty prisoners and watched by men with guns." Cornell, supra n 50.

n43. The reportrayal of the Indian as killer was abetted by the writers of the dime nov produced an "objectified mass dream" that mapped the fixations of their readership on "sa redskins, vicious greasers and heathen Chinese" who were routinely "laid low" by conven

white heroes. Hine & Faragher, supra note 21, at 478.

But it was Teddy Roosevelt in his multi-volume work, Winning of the West, who offi legitimated this view of the Indian as unredeemably cruel and treacherous:

Not only were they very terrible in battle, but they were cruel beyond all belief in victory. hideous, unnameable, unthinkable tortures practiced by the red men on their captured foes their foes' tender women and helpless children, were such as we read of in no other strugg even the revolting pages that tell the deeds of the Holy Inquisition.

Nathan Glazer, American Epic: Then and Now, Pub. Interest, Winter 1998, at 12.

n44. By the 1880s the bloodthirsty Indian warrior had become a mere stage prop for f the American stage set of the "winning of the west." It was Buffalo Bill Cody's "Wild We of that era that embodied these "dime novel illusions in flesh and blood." Hine & Faraghe note 21, at 501. Cody shot, killed and scalped a Cheyenne warrior and added the Indian's s his show for his audience to feel and touch, thus converting melodrama into the flesh of re

Page 48

n45. By statute in 1834 Indian Country was defined as:

All that part of the United States west of the Mississippi, and not within the states of Miss Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which Indian title has not been extinguished, purpose of this act, [shall be] deemed to be Indian Country.

Regulation of Trade and Intercourse with the Indian Tribes Act, 4 Stat. 729 (1834).

Later, many Great Plains Indian peoples, in exchange for giving up expansive claims aboriginal territories, reserved, by treaty, vast hunting and roaming areas for their exclusiv occupancy. They were assured by the federal government that "as long as [the] rivers run" lands would be theirs. Getches et al., supra note 11, 140-41.

n46. Bishop Whipple, among other influential friends of the Indian, wanted President treat the Indian peoples as governmental wards, not as members of quasi-sovereign politic Prucha, supra note 6, at 470

Prucha, supra note 6, at 470.

n47. The reform-minded Board of Indian Commissioners had come to support the pri Indian allotment as a means of assimilating and civilizing the Indian peoples. At the famo Mohonk Conference in 1884, the Board endorsed "heartily" the allotment concept. Non-Ir settlers supported allotment because it would eventually release millions of acres of India "surplus lands" for non-Indian entry and settlement. Prucha, supra note 6, at 659-71.

n48. Marshall's Indian law decisions and related federal treaties confirmed the Indian exclusive use and occupancy rights in vast hunting and roaming reserves in the American Cornell, supra note 3, at 45-50.

n49. Article 12 of the 1867 treaty with the Kiowa and Comanche Tribes of Indians pr that:

No treaty for the cession of any portion or part of the reservation herein described, which held in common, shall be of any validity or force against the said Indians, unless executed signed by at least three-fourths of all the adult male Indians occupying the same, and no c the tribe shall be understood or construed in such manner as to deprive, without his conse individual member of the tribe of his rights to any tract of land selected by him as provide Article III (VI) of this treaty.

Treaty of Medicine Lodge Creek, Oct. 21, 1867, art. 12, 15 Stat. 581, 585.

n50. Prucha, supra note 6, at 659-71.

n51. Id.

n52. Id.

n53. General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 331-358, 381 (1994).

n54. Getches et al., supra note 11, at 165-75.

Page 49

n55. Id. at 166-67.

n56. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

n57. From Justice White's viewpoint, the Indian peoples' right of occupancy was not e to ownership of their lands. The federal government was owner of those lands and could e change in the Indians' use of those lands if it was necessary for the Indians' benefit. Id.

n58. 187 U.S. 553 (1903). Professor David Getches places Lone Wolf's struggle agair allotment of the Kiowa-Comanche reservation within the Indian pantheon of resistance ac resisted the placement of their peoples on "the white man's road." Getches et al., supra not 190.

n59. Professor Blue Clark places the Lone Wolf decision in the larger, international la when he analyzes Henry Cabot Lodge's reliance upon that decision, among other Indian la decisions, as the basis for the United States' assumption of guardianship over "domestic, d nations" during Senate debates over the federal government's assumption of guardianship "dark-skinned" peoples of the Philippines. Blue Clark, Lone Wolf v. Hitchcock: Treaty Ri Indian Law at the End of the Nineteenth Century 102-3 (1994).

n60. Getches et al., supra note 11, at 165-71.

n61. John Collier, Commissioner of Indian Affairs during the 1930s and early 1940s, before the Senate Indian Affairs Committee in 1934 regarding the adverse effects of allotr Indian land use and ownership and said:

Through the allotment system, more than 80 percent of the land value belonging to the Inc 1887 has been taken away from them; more than 85 percent of the land value of all allotte has been taken away. And the allotment system, working through the partitionment or sal land of deceased allottees, mathematically insures and practically requires that the remain allotted land shall pass to the whites. The allotment act contemplates total landlessness fo Indians of the third generation of each allotted tribe.

Getches et al., supra note 11, at 172.

n62. Commissioner Collier testified before the Senate Indian Affairs Committee in 19 allotment "precluded the integrated use of the land by [Indian] individuals or families, eve start." Id. at 171.

n63. Professor Virginia Peters stresses that "before the Europeans arrived the village t engaged in a centuries-old pattern of intertribal barter, using corn, raised by the women, a medium of exchange." Virginia B. Peters, Women of the Earth Lodges: Tribal Life on the 143-57 (1995).

n64. Id.

n65. Historian Fergus M. Bordewich speaks to federal ceremonies held on various Gr reservations in the 1880s designed to impress upon would-be Indian allottees the importar federal citizenship:

Page 50

An outdoor ceremony was staged at Timber Lake to impress the allottees with the importa citizenship. They stood resplendent in the feathers and fringed buckskin of a bygone age, Major James McLaughlin, a shrewd and hard man who was known to all Sioux as the Ind who had ordered the arrest of Sitting Bull in 1890. Ramrod-stiff, cigar in hand, McLaughl watched as each Indian solemnly stepped from a tepee and shot an arrow to signify that he leaving behind his Indian way of life. Moving forward, he then placed his hand on a plow demonstrate that he had chosen to live the farming life of a white man. He was next hande to remind him to save what he earned. Finally, holding the American flag, the Indian repe words: "Forasmuch as the President has said that I am worthy to be a citizen of the United now promise this flag that I will give my hands, my head, and my heart to the doing of all make me a true American citizen." It was the culminating, transformative moment of whi had dreamed.

Fergus M. Bordewich, Killing the White Man's Indian: Reinventing Native Americans at of the Twentieth Century 122-23 (1996).

n66. Id.

n67. Historian Bordewich concludes that the allotment process intended to "transform into yeoman farmers" but instead "sapped the vitality of traditional tribal government, and terminated the possibility that Indian societies might be able to evolve at their own pace a to their own standards." Id. at 124.

n68. "Blood fusion" between tribal Indians and non-Indians was a process that allotm accelerated as a means of assimilating the Indian people into American society. Id. at 328

n69. Indian education in off-reservation, federally-run, boarding schools was the brai 1879 of Captain Richard Henry Pratt. He considered Indian reservation life as a morally r form of segregation, but nonetheless advocated the physical separation of Indian children parents and families so as to promote their assimilation in a non-Indian way of life. He ar the Indian is "born a blank," and with neither "ideas of civilization nor savagery." Id. at 2

n70. Id.

n71. Id.

n72. The Mandan and Arikara women's historic relationship to the land represented a

interlacing of sexual, social and economic statuses within their village life along the Miss Professor Virginia Peters powerfully depicts this complicated relationship by writing:

Many young men and a few of the old helped pick the ears of ripe corn as they had during corn harvest. For this the women paid them by building fires near their piles of corn on wl placed kettles containing corn and meat. The men and girls were all painted and dressed i clothes. The prettiest girls always had the largest group of young men around their piles o the husking proceeded, any unripe ears were [placed] aside to become the property of the helpers. They either ate them or fed them to their ponies; the women did not want them b they would rot and spoil the ripe corn if placed in caches.

Although there was much rejoicing and jollity at harvest time, there was a serious un The village women felt a sacred duty to be sure that every ear of corn was gathered and u

Page 51

some purpose. A missionary told Wilson that an Arikara woman whom she knew dropped seed with a kind of prayer. The Arikara legend of the "Forgotten Ear" emphasizes the wo for their gardens and the food they produce. One day an Arikara woman thought she hear begging not to be left behind when she started to leave her field. She searched through he garden until at last she finally found one small ear of corn which she had overlooked. As she gathered in the corn, the crying stopped.

Peters, supra note 63, at 119-20.

n73. Getches et al., supra note 11, at 171-73.

n74. A brief case study of how allotment created and sustained class divisions among peoples on the Fort Berthold Indian Reservation, North Dakota, from the late 1880s to the provided by Professor Castle McLaughlin. See Castle McLaughlin, Nation, Tribe, and Cl Dynamics of Agrarian Transformation on the Fort Berthold Reservation, 22 Amer. Indian Res. J. 101 (1998).

He describes a relational model that was "generated over time by the 'structured conte [Fort Berthold] reservation['s] political economy and in response to the situated positions identities of others." Id. at 105.

McLaughlin emphasizes that Indian allotment on Fort Berthold and other Great Plain

reservations had as its goal the "dissolution of tribal organization and the assimilation of I individuals ... [via] the adoption of practices and values associated with a capitalist democ as the nuclear family organization, Christianity, the 'Protestant ethic,' and utilitarianism."]

He describes the application of the allotment process on Fort Berthold:

As on other reservations, agrarian enterprises - first farming, then livestock production - w as a vehicle for promoting individual "civilization" at Fort Berthold. Cattle were first distr part of a federal payment following an 1886 agreement (ratified in 1891) by which the Fo Berthold people relinquished 228,168 acres of their 1,193,788-acre reservation and agreed allotment of the remaining 965,620 acres. Between that year and 1902, the U.S. governme 140,000 of tribal funds on livestock, and the number of Indian-owned cattle rose from 40(head. Prior to a 1910 land cession, the sale of beef to the government and to markets such Chicago accounted for nearly half of the total income on the reservation. While "unearned from land sales and leases became the most significant income source after 1910, during t following decade the value of crops raised ($ 367,549) and the livestock sold ($ 419,984) Berthold far surpassed income from (primarily per diem) wage labor ($ 144,951).

Id. at 107.

n75. Allotment and related federal financial-assistance programs directed to foster Inc ranching enterprises on the Fort Berthold Reservation have resulted in class-based conflic the Indian landowning community and the ranching community. Here is how McLaughlin this conflict in the 1980s and 1990s on Fort Berthold:

Page 52

Class consciousness has developed from both opposing material interests and contrasting ideological and moral frameworks that guide interaction between people and the natural w Landowners have been led to assign commodity values to their lands and have constructe identity in part from their inability to control and realize "fair returns" for its use; they hav developed a keen sense of their position within the local political economy. Unequal relati exchange, not production per se, have engendered the construction of these class identities Ranchers are viewed as having repudiated the signs and practice of reciprocity, which bot

Ranchers are viewed as having repudiated the signs and practice of reciprocity, which bot functions as a material "safety net" and serves as metaphor for the commensal social orde us are starving, but they'd die before they'd give us a beef." Age, gender (most [Indian] la are tribal elders, and today many are women), internally perceived racial differences (man are of mixed heritage), and commitment to traditional values are all drawn on for the disc construction of materially reproduced differences. One young landowner characterized co between ranchers, landowners and the tribe as "spiritual warfare" and forecast, "Eventuall tribe will end up buying all the land, and then Uncle Sam will come and collect."

Id. at 124.

n76. McLaughlin graphically describes the rise of a new "ranching class," born of allc related federal policies, on the Fort Berthold Reservation:

The government "patronage system" rewarded this incipient private sector through the prc unsecured reimbursable loans and by utilizing proceeds from tribal land sales for the estat of demonstration farms and for the purchase of high-grade livestock. Such practices were protested by older traditional leaders, who regarded such use of tribal funds as inequitable whose formal influence and ability to redistribute goods were undermined by the emergen entrepreneurs. Initially, ranchers organized economic labor and galvanized support within indigenous social institutions such as kinship groups, using their skills and relative wealth become prominent leaders. Under pressure to assimilate and increasingly invested in mark exchange, by the 1920s and 1930s agrarian entrepreneurs had begun to disengage partially such social and moral networks and associated responsibilities. As the child of a successft Berthold rancher recalled, "My father wasn't much of a 'pow-wower'; he regarded dances aways as a waste of time and money."

Id. at 107-08.

n77. Id.

n78. Some of the successful Indian ranchers on Fort Berthold exploited the Burke Act BIA regulation of their grazing practices according to McLaughlin. They converted their t patent lands to fee-patent status and led the agency superintendent to charge that at least fi the more intelligent and thrifty Indians" were avoiding the reservation-wide cattle round-u working their stock without agency supervision. Id. at 108.

n79. Congress established so-called "competency commissions" to assess whether on blood or less Indian allottees were sufficiently assimilated to be required to accept a "forc patent." See 25 U.S.C. 349 (2001). Thousands of such patents were issued to Indians, and their allotted lands for non-payment of county or state property taxes. Getches et al., supra at 174.

Page 53

n80. Id.

n81. Section one of the Indian Reorganization Act states: "No land of any Indian rese shall be allotted in severalty to any Indian." 25 U.S.C. 461 (2001).

n82. 23 Stat. 385 (1885).

n83. Army Captain Richard Henry Pratt, a key architect of federal Indian education ir 1880s, advocated the "killing of the Indian, so as to save the man inside." David H. DeJon Promises of the Past: A History of Indian Education in the United States 116 (1993).

Mr. Thomas Morgan, Indian Commissioner from 1889 to 1893, was also convinced tl compulsory federal schooling would "turn the American Indian into the Indian American. Ellis, 'A Remedy for Barbarism': Indian Schools, The Civilizing Program and the Kiowa-Comanche-Apache Reservation, 1871-1915, 18 Amer. Indian Culture & Res. J. 85 (1994)

n84. Democracy was defined as a "caste system" organized by European conceptions late nineteenth-century America. Those Americans with virtually any degree of African o ancestry were defined by local law as "colored" and subjected to various legal disabilities their status. Not surprisingly, the federal government likewise began to "grade" Indian pe according to their degree of Indian blood. Jennings, supra note 5, at 309.

n85. Alexis de Tocqueville concluded in 1848 that "nevertheless, the Europeans have able to change the character of the Indians entirely." Id. at 310.

n86. Getches et al., supra note 11, at 192-94.

n87. John Collier was active from 1916 on in the National Community Center move Professor Kevin Mattson argues that the organization "always remained committed to con based democracy." Kevin Mattson, Creating A Democratic Public: The Struggle for Urba Participatory Democracy During the Progressive Era 67 (1998).

According to Professor Jennings, Collier, later president of the American Indian Defe Association, was "overwhelmed in a mystical way by the rituals of the Pueblo Indians fun in worship of nature." Jennings, supra note 5, at 388.

n88. Pub. L. No. 73-383, 48 Stat. 984 (1934).

n89. Jennings, supra note 5, at 388-89.

n90. Id.

n91. Id.

n92. The IRA's structure of tribal constitutions and elected tribal officials conflicted v

traditions of many, if not most, tribes in which government has been almost wholly heredi 388-89.

n93. Collier described this group of Indians as "mixed blood with a white-plus psych Graham D. Taylor, The New Deal and American Indian Tribalism 52 (1980). It is true tha Indian men of mixed-blood ancestry predominated on the new tribal councils. Id. at 51.

n94. Not surprisingly, non-Indian farmers and ranchers that leased Indian allotments r their displacement by the tribal land consolidation and cooperative efforts spurred by the l 125.

Page 54

n95. Id. at 39-62.

n96. Id.

n97. Id. at 149.

n98. Id. at 33, 128-29.

n99. Jennings, supra note 5, at 150.

n100. Id. at 39-62.

n101. Id.

n102. Morton v. Mancari, 417 U.S. 535 (1974). Professor David Williams has becom somewhat exercised over what he views as the potential hypocrisy of the Mancari decisio [employment] benefits to this kind of racial calibration [of one-fourth or more Indian bloo historically been associated with racism at its most despicable ...." Getches et al., supra no 243.

N103. Taylor, supra note 92, at 39-62.

n104. Id.

n105. Professor Getches dates this "dark age" of Indian law from 1945 to 1961. He de this era as follows:

A turnaround in congressional policy toward Indians resulted in the dramatic departure fr reforms spearheaded by John Collier that began in the early 1940s. There were calls from

Hill to repeal the IRA and to move away from the encouragement of tribal self-governmer official federal policy. Collier, Commissioner of the BIA since 1933, resigned in 1945.... I the Hoover Commission issued its Report on Indian Affairs, recommending an about-face policy: "complete integration" of the Indians should be the goal so that Indians would mo the population as full, taxpaying citizens."

Getches et al., supra note 11, at 204.

n106. Termination of tribal status was, for Senator Arthur V. Watkins who led the prc termination forces in 1953 in Congress, the means of "ending the status of Indians as warc government and granting them all the rights and prerogatives pertaining to American citiz Id. at 204-5.

n107. This federal jurisdictional transfer statute, enacted in 1953, sought to grant the I States' criminal and civil jurisdictional responsibilities within Indian Country to the states. Carole Goldberg-Ambrose, the leading scholar on Public Law 280, charitably characterizc statute's intent as a "compromise between wholly abandoning the Indians to the states and maintaining them as federally protected wards, subject to only federal or tribal jurisdictior 488. See also Pub. L. No. 280 (codified at 18 U.S.C. 1162 and 28 U.S.C. 1360).

n108. The BIA recognized the "economic carrying capacity" of the Indian reservation not provide suitable job opportunities for many young Indian men and women, especially trained in vocational and clerical skills at off-reservation boarding schools. The BIA deve

relocation program in the 1950s and 1960s as a means to get these Indian people to the su job opportunities within America's urban centers. Getches et al., supra note 11, at 204-24.

n109. Professor Getches credits the Supreme Court of the late 1960s and 1970s with t the "defender of Indian rights," and it was required to "decide the extent to which residual legislation from an earlier era of policy should be enforced and the degree to which conte policy should inform interpretation and application of law." Id. at 233-34.

n110. President Nixon's major goal in promoting tribal self-determination was "to stre Indian's sense of autonomy without threatening his sense of community." Id. at 227.

n111. Id. at 226-28.

n112. See Rebecca Tsosie, Tribal Environmental Policy in an Era of Self-Determinati L. Rev. 225 (1996).

n113. See Dean B. Suagee, Tribal Voices in Historic Preservation: Sacred Landscape: Cultural Bridges, and Common Ground, 21 Vt. L. Rev. 145 (1996).

n114. See Tadd M. Johnson & James Hamilton, Self-Governance for Indian Tribes: F Paternalism to Empowerment, 27 Conn. L. Rev. 1251 (1995).

n115. Professor James Anaya argues that "human beings, individually and as groups, in control of their own destiny and that structures of government should be devised accorc James Anaya, Indigenous Rights Norms in Contemporary International Law, 8 Ariz. J. Int Comp. L. 1 (1991).

n116. Id.

n117. Id.

n118. Id.

n119. George W. Shepard, Jr., The Power System and Basic Human Rights: From Tri Self-Reliance in Human Rights and Third World Development 13-25 (George W. Shepar P. Nanda eds., 1985).

n120. Kipling spoke of the Indian as "half savage and half child" - the former requirin civilization and the latter socialization. Ashis Nandy, Traditions, Tyranny and Utopias: Es Political Awareness 58 (1987).

n121. Id.

n122. Id.

n123. Tribes have naturally sought in the contemporary era, in Professor Getches' vie "increase the reach and sophistication of their own governmental powers over Indian Cou Getches et al., supra note 11, at 556. But their efforts to achieve reservation development sufficiency has brought them into direct conflict with the "states [who] continually seek tc their jurisdictional power over Indian Country." Id. at 556.

This tribal versus state battle over "which government entity gets to receive a stream revenues or apply its land use ordinance on the reservation" will hinge "on the jurisdictior principles of federal Indian law in an effort to resolve these intense, high-stakes cross-cult conflicts." Id. at 556-57.

n124. Stephen Cornell advocates for tribes to assert "de facto sovereignty" as their me achieving economic development within Indian Country. Id. at 721 (citing Stephen Corne Sovereignty, Prosperity and Policy in Indian Country Today, 5 Community Reinvestment (1997)).

His recommendation stems from a Harvard study of the marketplace performance of (seventy-five tribes with significant forest-based resources. This study's results lead Cornel conclude that sovereignty is the primary development resource a tribe possesses. But this sovereignty must be guided by institutional structures that ensure the separation of politics business, an effective professional tribal bureaucracy and the constitutional separation of t governmental powers. Id. at 723-25.

n125. In 1921, the Commissioner of Indian Affairs recommended the continuing supp traditional American Indian religious and cultural practices:

The sun-dance, and all other similar dances and so-called religious ceremonies are consid "Indian offences" under existing regulations, and corrective penalties are provided. I regar restriction as applicable to any dance ... which involves the reckless giving away of prope frequent or prolonged periods of any celebration ... in fact any disorderly or plainly excess performance that promotes superstitious cruelty, licentiousness, idleness, danger to health shiftless indifference to family welfare.

Getches et al., supra note 11, at 754 (citing Felix Cohen, Handbook of Federal Indian Law (1992)).

Contemporary Indian religious practitioners have invoked the Free Exercise Clause of Amendment as a means of preserving their cultural and ceremonial access to sacred sites (public lands. See Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (198

n126. See Getches et al., supra note 11, at 556-620.

n127. Id.

n128. Marshall's concept of the tribe as a "domestic, dependent nation" has been expl the modern Supreme Court to limit the governmental powers of Indian peoples within Ind Country. See Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

n129. Getches et al., supra note 11, at 531-55.

n130. Id.

n131. Id.

n132. The Seminole Tribe's suit against Florida to enforce the good faith negotiation p of the Indian Gaming Regulatory Act (IGRA) was dismissed on state sovereign immunity See Seminole Tribe v. Florida, 517 U.S. 44 (1996) (5-4 decision) (Stevens, J., dissenting). decision has crippled tribal efforts to develop gaming enterprises that require a negotiated

decision has crippled tribal efforts to develop gaming enterprises that require a negotiated state compact as a basis for commencing operations. Some constitutional scholars, such as Martha Field, mistakenly minimize the significance of this decision for tribal economic development:

Page 57

Seminole is probably not of major significance in regard to federal-Indian-state relations. designed to be, and is, a major decision about the meaning of the Eleventh Amendment ar federal-state relations, judicial and congressional. The decision obviously affect the IGRA scheme that replaces the one held unconstitutional in Seminole could prove more advanta Native Americans rather than less.

Getches et al., supra note 11, at 751 (citing Martha A. Field, The Seminole Case, Federal the Indian Common Cause, 29 Ariz. St. L.J. 3, 3-4 (1997)). Whatever "more advantageou Professor Field had in mind for Indian gaming has yet to materialize.

n133. Getches et al., supra note 11, at 531-55.

n134. Id. at 556-620.

n135. Id.

n136. Tribal efforts to assert criminal and civil jurisdiction over non-Indians within In country prompted the Supreme Court to substantially limit the circumstances under which asserted tribal police powers may be exercised. Id. at 531-55.

n137. 435 U.S. 191 (1978).

n138. Id. at 208-11.

n139. Id. at 194.

n140. Id. at 192-93.

n141. Id. at 208-10 (quoting United States v. Rogers, 45 U.S. (4 How.) 567, 571-72 (1

n142. Ex parte Crow Dog, 109 U.S. 556, 571 (1883).

n143. Oliphant v. Suquamish Tribe, 435 U.S. 191, 210-11 (quoting Ex parte Crow Dc U.S. 556, 571 (1883)).

n144. Id. at 193.

n145. Id. at 195.

n146. Id. at 196.

n147. Getches et al., supra note 11, at 542-43.

n148. Montana v. United States, 450 U.S. 544 (1981).

n149. Id. at 547.

n150. Id. at 550.

n151. Id. at 565.

n152. Id. at 548.

n153. Robert A. Williams, Jr., The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence, 1986 Wis. L. Re 273-74.

n154. 25 U.S.C. 450(a)-(n) (2001).

n155. Getches et al., supra note 11, at 226-230.

n156. Tadd Johnson describes the congressional intent motivating the 1988 amendme ISDA:

The new Title featured a planning grant phase for twenty tribes. The twenty tribes were th negotiate compacts with the Secretary of the Interior. The tribes were allowed to "plan, co consolidate, and administer programs, services, and functions" of the Interior Department "otherwise available to Indian tribes or Indians." Under the terms of the written agreemen were authorized to "redesign programs, activities, functions or services and reallocate fun programs, activities or services." The agreement was to specify the services to be provide the agreement and the procedures to be used to reallocate funds. In essence, the Self-Gove Demonstration Project allowed twenty Indian tribes to receive funds in a large block grant Secretary of the Interior. It allowed the Demonstration tribes to move money among progr well as the power to actually prioritize spending, as opposed to the shadow prioritizing pr

characterized the IPS. In general, Self-Governance gave tribes the power to make choices responsible for their choices.

Tadd M. Johnson & James Hamilton, Self-Governance for Indian Tribes: From Paternali Empowerment, 27 Conn. L. Rev. 1251, 1267-68 (1995).

He describes the 1994 amendments to the ISDA as "incremental self-governance" tha 'grandfathering' all of the Demonstration tribes ... provides for participation of only twenty tribes each year." Id. at 1270.

He describes the major changes wrought by the 1994 amendments as including annua negotiated "funding agreements" between the Interior Department and the Self-Governanc that contemplate that "all [DOI] programs are eligible for tribal administration under the f agreement ...." Id. at 1270-71. Tribes thus have the opportunity to assume control of "non- activities on or near their reservations." Id. at 1272.

n157. Id.

n158. Some legal commentators see the Indian Self-Determination Act of 1975 as init process of "tribalization." He describes it as follows:

"Tribalization," as coined herein, refers to the process by which resources dedicated to administering and implementing Indian programs are removed from the Bureau of Indian personnel and placed directly in the hands of tribal governments. The tribal governments t authority to perform tasks formerly reserved for the Federal trustee.

Id. at 1252.

n159. Id.

n160. Id.

n161. Id.

n162. Professor Getches cites efforts by some western congressmen to legislatively cu

tribes' inherent and treaty-reserved powers as evidence of a non-Indian backlash against tr determination efforts. Getches et al., supra note 11, at 152.

n163. Id. at 739-42.

n164. Johnson, supra note 113, at 1278-79.

n165. Congress amended several federal environmental statutes to enable the EPA to as states for the purposes of administering the following program functions: (1) Safe Drin Water Act, 42 U.S.C. 300f to 300j-26 (1988) (the EPA may treat tribes for all programs c in statute); (2) Comprehensive Environmental Response, Compensation and Liability Act, U.S.C. 9601-9675 (Supp. IV 1992) (the EPA may enter into cooperative agreements with carry out the Superfund's purposes); (3) Clean Water Act, 33 U.S.C. 1251-1387 (1988) (t may treat tribes as for most regulatory purposes); and, (4) Clean Air Act, 42 U.S.C. 7401- (1990) (the EPA may treat tribes as states for the purposes of the Act).

The Clean Water Act's TAS amendment enables tribes to assume regulatory control o reservation water sources for specific program purposes. See 33 U.S.C. 1377(e) (1988). T qualify for grants for pollution control programs or construction of treatment facilities. Th also act to establish water quality standards and assume the implementation of a permit sy enforce those standards. But the Act requires the applicant tribal government to possess a body that carries out substantial governmental duties and powers, and limits any tribe's as functions to the management of water resources "within the borders of an Indian reservati by, or held in trust for, a tribe or individual Indian. See John L. Williams, The Effect of E Designation of Tribes as States on the Five Civilized Tribes in Oklahoma, 29 Tulsa L.J. 3 (1993).

n166. Id. at 346.

n167. Id.

n168. Id.; see Federal, Tribal and State Roles in the Protection of the Reservation Env A Concept Paper Accompanying A Memorandum from Mr. William Reilly, Administrato (July 10, 1991).

n169. The Tenth Circuit Court of Appeals used this rationale to uphold an Indian pue ceremonial use designation of Rio Grande waters as against an Establishment Clause cha the city of Albuquerque. The court concluded the "EPA's purpose in approving the design unrelated to the Isleta Pueblo's religious reason for establishing it" and that such a designa "serves a clear secular purpose: promotion of the goals of the Clean Water Act." City of Albuquerque v. Browner, 97 F.3d 415, 428 (10th Cir. 1996).

n170. The EPA's statement is explicit in this regard:

The Agency will, in making decisions on program authorization and other matters where jurisdiction over reservation pollution sources is critical, apply federal law as found in the Constitution, applicable treaties, statutes and federal Indian law. Consistent with the EPA Policy and the interests of administrative clarity, the agency will view Indian reservations administrative units for regulatory purposes. Hence as a general rule, the agency will auth

tribal or state government to manage reservation programs only where that government ca

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Page 60

demonstrate adequate jurisdiction over pollution sources throughout the reservation. Whe however, a tribe cannot demonstrate jurisdiction over one or more reservation sources, the will retain enforcement primacy for those sources. Until EPA formally authorizes a state c program, the agency retains full responsibility for program management. Where EPA reta responsibility, it will carry out its duties in accordance with the principles set forth in the I Indian policy.

Raymond Cross, When Brendale Met Chevron: The Role of the Federal Courts in the Co of an Indian Environmental Law, 1 Great Plains Nat. Resources J. 1, 11 (1996) (on file wi

n171. Williams, supra note 165, at 346-47.

n172. The EPA's interpretive rule permits a tribal applicant to demonstrate that it has jurisdiction over non-members' activities on fee lands by showing that their activities on t may imperil the tribe's political integrity, economic security, or health and welfare in a se substantial manner. The EPA's rule further presumes that tribal applicants will generally b meet this standard. 40 C.F.R. 131.1-.8 (2001) [hereinafter "EPA Rule"].

n173. The EPA's interpretive rule inexplicably ignores the provision in section 518(e) points out that the purpose of TAS status is to protect those "water resources held by an In ... [or] ... held by the United States in trust for Indians." The statutorily recognized trust st these water resources should effectively preclude the EPA's adoption of its "territorial ana focuses on the scope of inherent tribal jurisdiction over non-Indians on fee status lands wi Indian Country. This federal trust duty to protect Indian waters from injury is, of course, a independent obligation of the EPA and does not depend on the nature and scope of inhere jurisdiction over non-Indians within Indian County. This statutory provision recognizing t status of these reservation waters is nowhere addressed in the EPA's rule making. Id.

n174. 492 U.S. 408 (1989) (holding that Yakima Nation has zoning authority as to lar by nonmembers of tribe in Yakima reservation's "closed area," but not as such lands in re "open area").

n175. Id. at 415.

n176. Id. at 416.

n177. Id. at 418.

n178. Id.

n179. Id. at 419.

n180. Id. at 441 (Stevens, J., concurring).

n181. Id. at 444.

n182. Id. at 444-45.

n183. Professor Joseph Singer has criticized the Brendale decision as establishing Ind disadvantaged "racial caste":

Page 61

The Supreme Court has assumed in recent years that although non-Indians have the right t from political control by Indian nations, American Indians can and should be subject to th sovereignty of non-Indians.

This [disparity] is not the result of neutral rules being applied in a manner that has a d impact. Rather, it is the result of formally unequal rules. Moreover, it can be explained on reference to perhaps unconscious racist assumptions about the nature and distribution of b property and power. This fact implies an uncomfortable truth: both property rights and po power in the United States are associated with a system of racial caste.

Joseph William Singer, Sovereignty and Property, 86 Nw. U. L. Rev. 1, 4-5 (1991).

n184. Raymond Cross, When Brendale Met Chevron: The Role of the Federal Courts Construction of an Indian Environmental Law, 1 Great Plains Nat. Res. J. 1 (1996).

n185. See Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998).

n186. The State of Montana opposed the EPA's granting of TAS status to the Confed Salish and Kootenai Tribes of the Flathead Reservation to the extent that such status woul to reservation land and surface waters owned in fee by non-members of the tribes. The EP approved the tribe's application after determining that the tribes possessed inherent author

approved the tribe's application after determining that the tribes possessed inherent author non-members on fee lands. Montana then sued the EPA over this allegedly illegal agency at 1140.

n187. Id.

n188. Id.

n189. Cross, supra note 184.

n190. Professor Dean Suagee characterizes cultural patrimony as "referring to objects have such cultural importance that they are considered the inalienable property of a tribe c not subject to ownership or alienation by individual members of the tribe or group." Dean Suagee, Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridge Common Ground, 21 Vt. L. Rev. 145, 204 (1996); see also Native American Graves Prote Repatriation Act (NAGPRA), Pub. L. No. 101-601, 104 Stat. 3048 (codified at 25 U.S.C. 3001(3)(D) (2001)).

n191. "In carrying out [its] responsibilities under [section 106], a Federal Agency sha with any Indian tribe or Native Hawaiian organization that attaches cultural or religious si to" a property that is listed on or eligible for the National Register. National Historic Pres Act of 1996 106(d)(6), 16 U.S.C. 470(d)(6) (2001). Professor Suagee points to the 1996 p rules requiring a federal agency to consult with the relevant tribe or Native Hawaiian orga in the identification of historic properties, assessment of adverse effects and resolution of effects, and, in the event of a failure to resolve adverse effects, the tribe or Native Hawaiia organization would have the same opportunities as the State Historic Preservation Officer to participate in the process through which the Advisory Council would provide comment agency. See Saugee, supra note 190, at 185.

n192. Bonnichsen v. United States, Dep't of Army, 969 F. Supp. 628 (D. Or. 1997).

Page 62

n193. Raymond Cross & Elizabeth Brenneman, Devils Tower At The Crossroads: Th Park Service and the Preservation of Native American Cultural Resources in the 21st Cen Pub. Land & Resources L. Rev. 5, 11-14 (1997).

n194. Id. at 17.

n195. 2 F. Supp. 2d 1448 (D. Wyo. 1998). Judge William Downes granted an injuncti

n195. 21 F. Supp. 2d 1448 (D. Wyo. 1998). Judge William Downes granted an injunct the National Park Service forcing it to issue commercial climbing permits.

n196. Devils Tower was determined eligible for the National Register of Historic Plac traditional cultural property for its American Indian relationships. A traditional cultural pr protected "because of its association with cultural practices or beliefs of a living communi are rooted in that community's history and (b) are important in maintaining the continuing identity of the community." Cross & Brenneman, supra note 193, at 9. The Superintenden Tower took action to list Devils Tower in compliance with Congress' mandate to preserve American cultural use of Devils Tower as a "historical, architectural or [site of] cultural si at the community, state or local level." Id. at 17 n.47 (alteration in original).

n197. Id. at 26.

n198. "Superintendent Liggett's action was taken in compliance with Congress' mand preserve American Indian cultural use of Devils Tower as a 'historic, architectural or [site cultural significance at the community, state or local level.'" Id. at 17 n.47 (alteration in or

n199. Bear Lodge Multiple Use Ass'n v. Babbit (D. Wyo. Jun. 1996) (order granting, Plaintiffs' motion for a preliminary injunction), at 11 (on file with author).

n200. The National Park Service revised its climbing management plan and excised it commercial climbing before trial was held before Judge Downes. Given that excision of tl commercial climbing, Judge Downes dismissed the climbers' lawsuit challenging the new "voluntary climbing ban" as coercive and an unconstitutional endorsement of Indian religi beliefs and practices. See Bear Lodge Multiple Use Ass'n v. Babbitt, 2 F. Supp. 2d 1448 (1998).

In a sad denouement of this matter, the Tenth Circuit Court of Appeals upheld the Par reliance on the climbers self-regulation, a new educational program to motivate climbers t and a sign that requests visitors to stay on the trail around the Tower. See Bear Lodge Mu Ass'n v. Babbitt, 173 F.3d 814, 819 (10th Cir. 1999).

n201. See Cross & Brenneman, supra note 193, at 25-26.

n202. 485 U.S. 439 (1988). Scott Hardt argues that the Lyng decision discriminates a Indian religious practitioners:

By focusing on the form of impact the challenged government action creates, rather than t impairment of religious exercise, the Court has drawn a line that discriminates against An Indian religious practitioners. As a result of the free exercise analysis developed by the Su Court, persons practicing Western religious traditions are protected from even relatively n burdens on their religious practices, while American Indians are not protected from goven action that essentially destroy religious traditions.

Scott Hardt, The Sacred Public Lands: Improper Line Drawing in the Supreme Court's Fi Exercise Analysis, 60 U. Colo. L. Rev. 601, 657 (1989).

n203. See Cross & Brenneman, supra note 193, at 33-39.

n204. Id. at 33-36

n205. Id. at 18-19.

n206. Stern and Slade describe the NHPA, as not an "action forcing" statute, but as in procedural duties on the National Park Service (NPS) and similarly situated federal agenc promote the preservation of identified cultural and historic resources. They conclude that courts have interpreted these duties as mandatory in nature. See Walter E. Stern & Lynn F Effects of Historic and Cultural Resources and Indian Religious Freedom on Public Lands Development: A Practical Primer, 35 Nat. Resources J. 133, 139-40 (1995).

n207. Public land management agencies, particularly the National Park Service and U Service, are seeking to develop genuine working relationships with affected Native Ameri communities to identify and protect traditional cultural properties. For example, Superinte Liggett created a Devils Tower working group that included affected Native American communities, representatives of the recreational climbing community, local government, economic interests. Her actions represent one public land manager's effort to comply with broadened consultation requirement of the NHPA. See Cross & Brenneman, supra note 19

n208. Pub. L. No. 101-601, 104 Stat. 3048 (codified at 25 U.S.C. 3001-3013 (1994)).

n209. Professor Suagee characterizes NAGPRA as "establishing a legal regime to pro human remains and other cultural items located on tribal lands and federal lands." Suagee, note 190, at 203

n210. A forceful ethic of cultural heritage would "view cultural heritage as an issue o ethnic, or in some cases minority rights, and as one of the keys to cultural preservation an determination." Sarah Harding, Value, Obligation and Cultural Heritage, 31 Az. St. L.J. 2 (1999). By that view, "the disposition of cultural heritage should be determined exclusivel source nations or culturally affiliated groups." Id.

n211. 455 U.S. 130 (1982).

n212. Id. at 136.

n213. Id. at 135.

n214. Id.

n215. Id. at 149-52.

n216. 31 U.S. 515 (1832).

n217. Professor Stephen Cornell considers the tribal exercise of de facto sovereignty i Indian Country as essential to the economic development of the Indian peoples:

In virtually every case that we have seen of sustained economic development on Americai reservations, the primary economic decisions are being made by the tribe, not by outsiders case, the tribe is in the driver's seat. In every case, the role of the Bureau of Indian Affairs

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Page 64

and other outsider agencies has shifted from decision-maker to resource, from the controll influence in decisions to advisor or provider of technical assistance.

The logic of this is clear. As long as the BIA or some other outside organization carri responsibility for economic conditions on Indian reservations, development decisions will the goals of those organizations, not the goals of the tribe. Furthermore, when outsiders m decisions, they don't pay the price, the tribe does.

Getches et al., supra note 11, at 721-22 (citing Stephen Cornell, Sovereignty, Prospering in Indian Country Today, 5 Community Reinvestment 5, 5-7, 9-13 (1997)).

n218. 447 U.S. 134 (1980) (holding valid the enforcement of Washington taxes as to : cigarettes to non-Indian on reservation in state, but imposition on Indian-owned vehicles l invalid).

n219. Id. at 156-57.

n220. Id.

n221. Id. at 155.

n222. The dissent cites three reasons why Indian economic development will be unde this decision:

First, it means that in this case the sharp drop in cigarette sales that would result from imp

state tax will reduce revenues not only of individual Indian retailers, but also of the Tribes themselves as governmental units. Second, it means that a decision permitting application state tax would place Indian goods at an actual competitive disadvantage as compared to r ones because the former would have to bear two tax burdens while the latter bore but one. third, it leads to an actual conflict of jurisdiction and sovereignty because imposition of th Washington tax would inject state law into an on-reservation transaction which the Indian chosen to subject to their own laws.

Id. at 170 (Brennan, J., dissenting).

n223. Crow Tribe v. Montana, 819 F.2d 895 (9th Cir. 1987), aff'd, 484 U.S. 997 (198:

n224. 819 F.2d at 895.

n225. Id. at 897.

n226. Id.

n227. Id. at 899.

n228. Id.

n229. Id. at 900.

n230. Id. at 903.

n231. Id. at 898 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 14 (1980)).

Page 65

n232. A unanimous Court emphasized the isolation of this reservation-based hunting : resource marketed to non-Indian customers as leaving no place for state regulation:

The State has failed to "identify any regulatory function or service ... that would justify" tl assertion of concurrent regulatory authority. The hunting and fishing permitted by the Tril entirely on the reservation. The fish and wildlife resources are either native to the reservat were created by the joint efforts of the Tribe and the Federal Government. New Mexico d contribute in any significant respect to the maintenance of these resources, and can point t "governmental functions it provides" ... in connection with hunting and fishing on the rese

non-members that would justify the assertion of its authority.

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 341-42 (1983).

n233. Kenneth E. Robbins, Casino Buying Power: Catalyst for Economic Developme Indian Rep. 20 (2000).

n234. Id.

n235. Judge William C. Canby, joined by three other Ninth Circuit judges, dissented f circuit's denial of a rehearing en banc of the Rumsey decision. See Rumsey Indian Ranche Wintun Indians v. Wilson, 64 F.3d 1250, 1253 (9th Cir. 1995), cert. denied, Sycuan Band Mission Indians v. Wilson, 521 U.S. 1118 (1997) ("But under Rumsey ... the State thus ha incentive to negotiate, and there is no system [due to the Seminole decision] to require ne IGRA is rendered toothless.").

n236. Getches et al., supra note 11, at 739-54.

n237. Id.

n238. 480 U.S. 202 (1987).

n239. Getches et al., supra note 11, at 739-54.

n240. Marshall Berman synthesizes Joseph Schumpeter's and Karl Marx's "creative d concept in describing the disruptive impact of economic development on the social bonds cultural ties of traditionally underdeveloped societies, such as those of the Indian peoples. quotes Marx as follows:

All fixed, fast-frozen relations, with their train of ancient and venerable prejudices and op swept away, all new-formed ones become antiquated before they can ossify. All that is sol into air, all that is holy is profaned, and men at last are forced to face ... the real condition lives and their relations with their fellow men.

Marshall Berman, All That Is Solid Melts Into Air 21 (1982).

n241. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S (1980).

n242. The Supreme Court has held that a state's Eleventh Amendment immunity to su precludes tribes from suing the state. Blatchford v. Native Village of Noatak, 501 U.S. 77.

n243. Professor Stephen Cornell argues that the "tribe" was created by those Europea American negotiators "who searched for and often assumed comprehensive structures of a or hierarchical political organization" among the Indian people. Cornell, supra note 3, at 7 Cornell concludes that "comprehensive political organization at times was even made a pr for [federal] negotiations" with the Indian peoples. Id. at 79.

n244. Professor Cornell believes that there is evidence of the Indian peoples' self-rene

The political resurgence of the last few decades has been a cultural resurgence as well. Tri languages are being taught in some reservation schools. Many young people are showing interest in their heritage. Indian writers and painters have immersed themselves in the trad their peoples, rearticulating them in new ways. The symbols of Indianness, from bumper-s slogans to religious fetishes, are becoming more visible, not less. Much of this trend reflec attempt by some individuals to locate their own roots, to touch base with some identity mo substantial than the dominant culture seems able to provide, an attempt to put a thicker fle bones of their self-concept. The question is whether this cultural resurgence will be realiz actual patterns of life and action or will remain simply a veneer, an overlay on lives shape large degree by the non-Indian world, a collection of icons that symbolize an identity and organize little of contemporary life.

Id. at 212.

n245. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

n246. Cornell contends that the Europeans and Americans consciously sought to trans Indian peoples into tribes in order to "reproduce the processes of interstate politics by whi own external relations were governed." Cornell, supra note 3, at 77.

n247. Cornell describes this process of "de-tribalization" via the Indian allotment legi these terms:

Allotment ... specified a new set of incorporative relationships .... Indians were able to reta significant control over land and related resources, but only via allotment. Every Indian ta allotment ... [became] a citizen of the United States ... [and the] act envisioned both the individualization of tribal property and the dissolution of tribal polity. Indians were to be incorporated as individuals into both the economic and political structures of the larger so was the ultimate form of control: the end of the tribe itself as a political and social entity.

Id. at 59.

n248. Indian Commissioner John Collier recognized in the 1930s, according to Profes Cornell, "the collapse of indigenous [Indian] political [institutions]." Id. at 95.

Collier's solution was to "insert individual Indians into the institutional structures of tl society, and those structures would be built into Indian communities themselves." Id. at 9

n249. Collier's hope was that "as Indian tribes voluntarily formed constitutional gove undertook the development of their own resources, and joined with the federal governmen assault on poverty and ignorance, assimilation would necessarily follow." Id. at 95.

Page 67

n250. Id.

n251. Such counsel invites tribes to look beyond "relying exclusively on federal fundi gaming to build tribal coffers ... [and use] tax exempt bonds as a means of ensuring their e independence and tribal sovereignty." Melissa L. Gedachian, Safeguarding Sovereignty w Free Bonds, 13 Indian Rep. 18 (1997). This article goes on to say that "experts agree that tribal members in finance is crucial for the future of tribal sovereignty." Id. at 20.

n252. Dale Rood, a Turtle Clan representative to the Oneida Nation and part-time spe projects technician in the Nation's management information services department, aspires t Internet as a means of extending tribal sovereignty and cultural renewal:

We're using the Internet to preserve our language and culture, but also to enhance our life think it's important to maintain that website because we see it as an opportunity to tell our story. Many times our website is the first impression people will have of the Oneidas.

Marguerite D. Carroll, Indians on the Internet: Link to a Legacy, Path to the Future, 13 In 12, 13 (1997).

n253. The integration of tribes into American society has been ongoing since the 193 contemplates, according to Stephen Cornell, "the reproduction of dominant-group institut values - in particular, elected representative government, market-oriented economic organ corporate business structures - within Indian communities." Cornell, supra note 3, at 152.

n254. Id.

n255. Getches et al., supra note 11, at 93-128.

n256. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210-11 (1978).

n257. Id.

n258. Stephen Cornell, Sovereignty, Prosperity and Policy in Indian Country Today, Community Reinvestment 5, 5-13 (1997).

n259. Id.

n260. Gloria Valencia-Weber, Shrinking Indian Country: A State Offensive to Divest Sovereignty, 27 Conn. L. Rev. 1281 (1995).

n261. Raymond Cross, Sovereign Bargains, Indian Takings, and the Preservation of I Country in the Twenty-first Century, 40 Ariz. L. Rev. 425 (1998) [hereinafter Cross, Sove Bargains].

n262. Charles Wilkinson, The Role of Bilateralism in Fulfilling the Federal-Tribal Re The Tribal Rights-Endangered Species Secretarial Order, 72 Wash. L. Rev. 1063, 1065 (1

n263. Mary Christina Wood, Protecting the Attributes of Native Sovereignty: A New Paradigm for Federal Actions Affecting Tribal Lands and Resources, 1995 Utah L. Rev. 1

n264. The success of Indian gaming enterprises on some reservations has brought nev addictions and new dangers to the Indian communities. It is not "uncommon at many gam facilities to see children roaming the halls, playing video games or swimming at the pool

Page 68

unsupervised - while their parents are gambling." See Marguerite D. Carroll, Who's Mind Kids?, 14 Indian Rep. 18 (1998). The most obvious community costs involve Indian "fam there anyway and casinos are forced to deal with things like children being left in cars for Id. at 19.

n265. Sociologist James L. Coleman explains such systemically ill communities as or "the social system comes to consist of individualistic solutions to individual problems; wi suffering at the hands of each as each carries out his acts unconstrained by their consequer others." James S. Coleman, Norms as Social Capital, in Economic Imperialism: Economic Outside the Field of Economics 153 (Gerard Radnitsky & Peter Bernholz eds., 1987).

1997 BIA statistics estimate that 375 gangs with about 4,650 members operate in or n Country. Tribes such as the Three Affiliated Tribes of the Fort Berthold Reservation in N Dakota are only now trying to get a handle on this issue. The principal of New Town High Spencer Wilkinson, says that "we have a lot of these problems - drug abuse, alcohol abuse

Spencer Wilkinson, says that "we have a lot of these problems - drug abuse, alcohol abuse cities have, but we're out here in the boondocks." See Melissa Goldblatt, Getting A Grip C 14 Indian Rep. 26 (1998).

This tribe has taken the first step among tribes to seek to coordinate their ordinances v of the BIA, city and county authorities in an effort to address gang-related violence. Id.

n266. The Justice Department's recent study regarding violent crime among America's races confirms this difficult reality. While violent crime rates have dropped significantly a other racial groups, the incidence of violent crime among American Indians remains distu high. Indians are twice as likely to be victims of violent crimes than blacks, whites or Asi women were victimized by their partners twice as often as black women. The study by the of Justice Statistics looked at statistics for rape, sexual assault, robbery, aggrevated assaul simple assault for the period 1993 through 1998. See Missoulian Newspaper, Mar. 19, 20(

n267. Id.

n268. Lyrics available upon request.

n269. The Indian people became "props" setting the stage for the American epic abou conquest of the West. Professor Nathan Glazer argues the Winning of the West, written o scale by Teddy Roosevelt, created the national text of "unabashed nationalism" for the dis and dispossession of the Indian people. The Indians in Roosevelt's text are unredeemably treacherous. He characterizes the Indians thus:

> Not only were they very terrible in battle, but they were cruel beyond all belief in victory hideous, unnameable, unthinkable tortures [practiced] by the red men on their captured [f tender women and helpless children, were such as we read of in no other struggle, hardly revolting pages that tell the deeds of the Holy Inquisition.

Glazer, supra note 43, at 12.

Given the unredeemable Indian character, Roosevelt feels no need for a retrospective apology for their destruction by federal military forces:

> Looking back, it is easy to say that much of the wrong-doing could have been prevented; l examine the facts to find out the truth, not to establish a theory, we are bound to admit tha struggle could not possibly have been avoided.... Unless we were willing that the whole c west of the Alleghenies should remain as unpeopled waste, the hunting ground of savages inevitable."

Id. at 12-13.

n270. Bonnie Duran et al., Native Americans and the Trauma of History 70 (Russell ed., 1998).

n271. Id.

n272. Id.

n273. Id.

n274. This lack of interest in the contemporary Indian world is quite understandable f non-Indian standpoint. Teddy Roosevelt in his multi-volume epic, Winning the West, vie Indian world as "finished" and sought to give "moral closure" to that outcome. The Indian had ended and the white world was beginning in America according to Roosevelt's histori narrative of the West. Thus, Roosevelt's lack of interest in the Indian peoples is part of a l fashioning of a new American narrative described by Professor White:

> The historical narrative ... reveals to us a world that is putatively "finished," done with .... historical stories can be completed, can be given narrative closure, can be shown to have h all along, they give to reality the odor of the ideal .... The demand for closure in the histor is a demand, I suggest, for moral meaning, a demand that sequences of real events be asse their significance as elements of a moral drama.

Dennis K. Mumby, Communication and Power in Organizations: Discourse, Ideology an Domination 110 (1988) (quoting H. White, Topics of Discourse: Essays in Cultural Critic (1980)).

n275. Amartya Komar Sen, Development As Freedom 145-59 (1999).

n276. Id.

n277. Id.

n278. Id.

n279. Id.

n280. 436 U.S. 49 (1978).

n281. Id. at 60.

n282. Teddy Roosevelt saw the demise of the Indian peoples as inevitable given that ' past three centuries, the spread of the English-speaking peoples across the world's waste s been not only the most striking feature in the world's history, but also the event of all othe

far-reaching in its effects and importance." Glazer, supra note 43, at 12.

Page 70

n283. Professor Clark Wissler asks "Did the Indians Live in Vain?":

When we look back over the spectacle of Indian annihilation, the ruthless advance of the f crushing out the lives of Indians on every hand, though sacrificing a lot of white blood to this end, we moved to ask: Did the Indian live in vain? Was all that he did, struggled for, t ten thousand years to be obliterated in three centuries? Was it misplaced charity on the pa victors to put their helpless victims on reservations, to be wasted by disease, hunger and p and later do everything possible to keep them alive merely to live as minorities? ... There satisfactory answers.

Clark Wissler, Indians of the United States 326 (1940).

n284. The starting point for authentic self-determination may well be the Indian peop recognition of this principle:

The shift to postmaterialist values calls into question the distribution of power: deep shifts existing structures are needed to make and execute the kind of choices that will lead to sustainability. Therefore sustainability is inseparable from personal and collective empow revitalized democratic spirit, expressed in a myriad of forms, indicates the viability of a participatory political culture .... Individuals in an expansive democratic system do not so discover the common good as create it, by interacting with each other and constructing sh purposes ... self-governance in the public sphere helps transform conflicting interests into ones while at the same time promoting individual autonomy and freedom. Personal transf and social transformation are thus reciprocally related.

Stephen Woolpert, The Practice of Transformational Politics: An Overview 172-73 (Step Woolpert et al. eds., 1998).

n285. See Cross, Sovereign Bargains, supra note 261, at 477-509.

n286. Roy W. Meyer, The Village Indians of the Upper Missouri: The Mandan, Hidat Arikara 233 (1977).

n287. Id. at 230.

n288. Id. at 231.

n289. Id.

n290. Id. at 233.

n291. Id. at 226.

n292. Meyer, supra note 286, at 226.

n293. Id. at 228.

n294. Id.

n295. Id.

n296. Id.

Page 71

n297. Meyer, supra note 286, at 228.

n298. Id.

n299. Id.

n300. This was the finding of the Garrison Diversion Unit Commission (GDUC), an e member congressional commission that was created in 1984 to assess the impacts of the C Project on the peoples of North Dakota. See Recommendations of the Garrison Diversion Commission on H.R. 1116, A Bill to Implement Certain Recommendations Made Pursuar L. 98-360: Hearings on H.R. 1116 Before the Subcommittee on Water and Power Resour Cong. 114 (1985).

n301. Id. at 114.

n302. It recommended that the Interior Secretary establish a five-member commissior and report on the steps necessary to "complete the indemnification of the Indian communi North Dakota that were disrupted by construction of Pick-Sloan Missouri Basin Program reservoirs." Id. at 74.

The GDUC recommended that the Interior Secretary appoint the commission no later

January 31, 1984, to address the following issues on the Fort Berthold Indian Reservation

[tdi2m,m'm.',qc [tcg1n,mp1,ql,vu1] a.Full potential for irrigation.

b.Financial assistance for on-farm development costs.

c.Replacement of infrastructure lost by the creation of the Garrison Dam.

d.Preferential rights to Pick-Sloan Missouri River Basin power.

e.Development of shoreline recreational potential.

f.Return of excess lands.

g.Additional financial compensation.

h.Protection of reserved water rights.

i.Other items the five-member commission may deem appropriate.

j.Funding of all items from Garrison Diversion Unit funds, if authorized.

Id. at 187.

n303. Interior Secretary Donald P. Hodel created the JTAC on May 10, 1985, and the submitted its final report to him on May 23, 1986. See S. Rep. No. 102-250 (1992).

n304. The GDUC's finding that the "tribes of the ... Fort Berthold Indian Reservation inordinate share of the cost of implementing Pick-Sloan Missouri River Basin Program m reservoirs," and its direction to the Secretary that he "find ways to resolve inequities borne tribes" were interpreted by the JTAC as a warrant for hearing the Indians' just compensati See S. Rep. No. 102-250, at 3 (1991).

n305. Id.

Page 72

n306. Dr. Cummings valued tribal lands that were taken by estimating the "flow of th earnings or income that was attributable to that resource." He then "capitalized [the expec income flows] at 3.5% which was then the Congressionally-mandated rate in 1950, and th raised that [amount] to 1986 dollars. At the time of the filing of the JTAC report, this total

178.4 million for the Fort Berthold Reservation." See Ronald G. Cummings, Valuing the I Base Lost by the Three Affiliated Tribes as Result of Lands Taken from Them for the Gar Project 47 (Feb. 13, 1986) (unpublished report prepared for the JTAC, on file with the aut

n307. The JTAC chairman, General Murry, testified at the hearings on S. 168, the Equ Compensation Act for the Three Affiliated Tribes, that the enactment of just compensatio legislation on behalf of these tribes would serve as a means for helping the tribes re-establ viable economic base "that was destroyed by the construction of the [Garrison Dam and Reservoir]." Id. at 2.

n308. Id.

n309. The Senate report accompanying S. 168 recounts that the BIA's testimony was ' opposed to S. 168 [because] the United States is under no continuing legal liability to prov additional compensation to [the tribes]." S. Rep. No. 102-250, at 3 (1985).

n310. Id.

n311. See Hearings on S. 168, at 30-1 (1985).

n312. Cummings concluded the Fort Berthold Indian Reservation represented a dedic entity whose land possessed a value to the tribal community that far transcended its fair m value. Cummings, supra note 306, at 14-15.

n313. Cummings points to the Indian congressional committees' keen awareness, in li MRBI reports, that the Fort Berthold Indians would lose the vast majority of their arable a irrigable land base essential for carrying out the purpose of the 1886 agreement. Id. at 23-

n314. The Supreme Court enunciated the equivalent value or standard for just compen Monongahela Navigation Co. v. United States, 148 U.S. 312, 326, 341 (1893).

n315. Id.

n316. Three Affiliated Tribes and Standing Rock Sioux Tribal Equitable Compensati 1991: Hearings on S. 168 Before the Select Comm. on Ind. Affairs, 102d Cong. 16-19 (19 [hereinafter Hearings on S. 168] (statement of Kent Conrad, U.S. Senator).

n317. North Dakota History 251-52 (Ray H. Mattison ed., 1968).

n318. S. Rep. No. 102-250, at 3 (1992).

n319. Id.

n320. Id.

n321. The Senate report accompanying S. 168 notes that the Senate Select Committee Affairs held three oversight hearings on the JTAC recommendations beginning on March with a joint oversight hearing with the Senate Energy and Natural Resources Committee a Water and Power Subcommittee of the House Committee on Interior and Insular Affairs. ' hearing examined the need for legislation to implement the recommendations of the JTAC

Page 73

The second hearing was held on November 19, 1987, wherein the committees "urged" the provide "further justification for the level of additional financial compensation to which th they were entitled" and "explore a budget neutral means to finance the compensation need carry out the recommendations." The third hearing was held regarding S. 168 wherein the "expressed their overall support for the bill" and the GAO "expressed its approval of the compensation figures set forth in [S. 168]." Id.

n322. See Government Accounting Office (GAO), Report to the Chairman, Select Co on Indian Affairs, U.S. Senate Indian Issues: Compensation Claims Analysis Overstates E Losses (1991).

n323. See Hearings on S. 168, supra note 316, at 13-15.

n324. The BIA representative testified that if the "Budget Enforcement Act provision: complied with ... the administration would look at that and give consideration to the additi compensation." Id. at 32 (statement of Patrick A. Hayes, Bureau of Indian Affairs represe

n325. Id.

n326. Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 1 106 Stat. 4600.

n327. Section 3504(a)(4) of the Act provides that "such interest shall be available [to Affiliated Tribes] ... for use for educational, social welfare, economic development, and o programs, subject to the approval of the Secretary." Section 3506 provides that "no part o moneys in any fund, under this title shall be distributed to any member of the Three Affili Tribes ... on a per capita basis."

n328. An opinion letter by Mr. Jerry Nagel, a tribal member and vice-chairman of the Berthold Land Owners Association, challenged the proposed tribal investment plan. His l that "the council wants a dowery for themselves not an endowment for [the tribal member continues, saying that the proposed tribal referendum on this plan presents the tribal mem an option to "vote to get 25% of nothing or 50% of nothing and the council gets 100% to will." (on file with author).

n329. Id.

n330. Ms. Phyllis Old Dog Cross articulates some of these concerns in her letters to S Byron Dorgan (D. N.D.). She asks the Senator to investigate the proposed "referendum el now being held by the Tribal Council of the Three Affiliated Tribes." She believes the pla

wise move" and asks whether the "funds, principle [sic] and interest [are] being protected invested right now?" (on file with author.)

n331. Other Indian peoples, such as the Makah people along the Puget Sound in Wasl focus more directly on the restoration of ancient cultural and economic practices, such as hunting and harpooning of five to six grey whales annually, as the means of re-engaging t people with the central reality of their people's heritage.

n332. Many Indian peoples seek to evaluate a present choice from the standpoint of th "Seventh Generation." This practice impresses on the minds of today's Indian leaders that of their actions may well irredeemably mark the remote futures of, as yet, unborn Indian c

Page 74

n333. Regaining what Anthony Giddens calls the "human agency of control" over one experiences has fueled Indian peoples' resistance to the hegemonic influence of federal In over their collective and individual lives. Federal Indian law is, among other things, a "sy order" that has long sought to "dominate ... the everyday context of [Indians'] lived experi disrupting the federal government's effort to "connect signification and legitimation" of su hegemonic efforts, the Indian peoples' have been able to survive federal Indian law. Mum note 274, at 82-83.

n334. See, supra notes 271-72 and accompanying text.

n335. Id.

n336. By restoring "narrative capacity" to the Indian peoples, they are removed from "strategies of containment" evidenced in federal Indian law decisions. Federal Indian law accomplishes its goal by imposing a "sense of determinacy on the [Indian] social actor's w simultaneously obscuring ways in which reality is over determined; that is, structured by t underlying relations of power that place material limitations on how social reality is frame Mumby, supra note 274, at 106.

n337. See Sen, supra note 275, at 145-59.

n338. Mary Midgley, Wickedness: A Philosophical Essay 93-98 (1984).

n339. Id.

n340. Id.

n340. Id.

n341. Dennis M. Wrong, The Problem of Order: What Unites and Divides Society 23 (1994).

n342. Nathan Glazer quotes the historical musing of one such yahoo, Teddy Roosevel concludes in his history of The Winning of the West that:

Looking back, it is easy to say that much of the wrong-doing could have been prevented; l examine the facts to find out the truth, not to establish a theory, we are bound to admit tha struggle could not possibly have been avoided ... Unless we were willing that the whole c west of the Alleghenies should remain an unpeopled waste, the hunting ground of savages inevitable.

Glazer, supra note 43, at 12-13.

n343. Wrong, supra note 341, at 141.

n344. Id. at 174.

n345. See Robert A. Williams, Jr., Columbus's Legacy: The Rehnquist Court's Perpet European Cultural Racism Against American Indian Tribes, 39 Fed. B. News & J. 6 (199

n346. Wrong, supra note 341, at 181.

n347. Glazer, supra note 43, at 16.

n348. Id. at 18.

n349. Id. at 20.

Page 75

n350. Wrong, supra note 341, at 242.

n351. Id.

n352. Anthony Giddens clearly distinguishes between "social integration" and "syster integration":

With the development of abstract systems, trust in impersonal principles, as well as in ano others, becomes indispensable to social existence. Nonpersonalized trust of this sort is dis

from basic trust. There is a strong psychological need to find others to trust, but institutior organized personal connections are lacking, relative to pre-modern social situations.... Roi which were previously part of everyday life or the "lifeworld" become drawn off and inco into abstract systems .... Routines which are structured by abstract systems have an empty unmoralised character - this much is valid in the idea that the impersonal increasingly swa personal.

Wrong, supra note 341, at 233-34.

n353. But the FCC's order of June 20, 2000, seeking to promote universal service witl Country, will likely fail because of the threshold requirement that Indian tribes demonstra authority to designate and regulate communication carriers serving tribal lands has been p by federal law. Jennifer L. King, Increasing Telephone Penetration Rates and Promoting I Development on Tribal Lands: A Proposal to Solve the Tribal and State Jurisdictional Pro Fed. Comm. L.J. 137, 140-41 (2000).

n354. John Durham Peters, Speaking Into the Air: A History of the Idea of Communi (1999).