

# TEACHING DECOLONIZATION: REACQUISITION OF INDIAN LANDS WITHIN AND WITHOUT THE BOX—AN ESSAY

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Article 26 of the Draft Declaration on the Rights of Indigenous Peoples provides:

1. [Indian] peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. [Indian] peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. [The United States] shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the [Indian] peoples concerned.<sup>1</sup>

It has always been about the land.

We, all of us, have been indoctrinated into the mythology by which the Euro-American settlers of the western hemisphere during the “age of discovery” granted themselves license to seize the land and dispossess the

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1. Report of the Human Rights Council on its First Session to the 61st Session of the General Assembly of the United Nations (19-30 June 2006), *United Nations Declaration on the Rights of Indigenous Peoples*, Part II, Art. 26, U.N. Doc. A/HRC/1/L.L (June 23, 2006) [hereinafter 2006 U.N. Draft Declaration]. The Human Rights Council adopts, and recommends that the General Assembly adopt, the Draft Declaration on the Rights of Indigenous Peoples. *Id.* There has never been doubt that Indian tribes within the United States are “Indigenous peoples” as that term is used in the Draft Declaration and other United Nations documents and studies relative to the rights of Indigenous peoples. The author has, therefore, substituted the term “Indian” for the term “Indigenous” throughout this piece in an effort to assist in the understanding of how these developing norms of international law would apply within the context of Indian law. Likewise, the term “State” as used in the context of international documents related to Indigenous peoples refers to the United States and not the constituent states of the federal union. The term “United States” has therefore been substituted throughout for the term “State” in quotations from these international documents without further explanation or attribution. It should be noted that the Declaration is an aspirational document except to the extent it or some of its provisions may become customary law or *jus cogens*.

indigenous owners of their property.<sup>2</sup> Within that myth, Columbus was a pious heroic figure, steeped in love of church and sovereign, interested only in establishing a free trade route to merchants in the far flung dominions in Asia who were willing and able to freely trade their goods for European wares.<sup>3</sup> To save the souls of these heathen savages, Columbus “sailed the ocean blue” toward Asia, and accidentally discovered the new world (that happened to be inhabited by several millions of people).<sup>4</sup> Following in the explorer’s<sup>5</sup> footsteps, intrepid colonists sought religious freedom, and populated the vacant<sup>6</sup> and inhospitable new world (fed by the native people

2. See generally 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 3-20 (1833).

3. 2 WILLIAM H. PRESCOTT, THE HISTORY OF THE REIGN OF FERDINAND AND ISABELLA THE CATHOLIC (1962), available at <http://www.fullbooks.com/The-History-of-the-Reign-of-Ferdinand-and-Isabella.html> (referring generally to chapter two); FILSON YOUNG, CHRISTOPHER COLUMBUS (1906), available at <http://www.fullbooks.com/Christopher-Columbus-by-Filson-Young.html>. See Columbus in History, <http://xroads.virginia.edu/~CAP/COLUMBUS/col3.html>, and the works cited therein.

4. Wikipedia, [http://en.wikipedia.org/wiki/Population\\_history\\_of\\_American\\_indigenous\\_peoples](http://en.wikipedia.org/wiki/Population_history_of_American_indigenous_peoples) (last visited Sept. 27, 2006). “Estimates of how many people were living in the Americas when Columbus arrived have varied tremendously; 20th century scholarly estimates ranged from a low of 8.4 million to a high of 112.5 million persons.” *Id.* (citing RUSSELL THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492 (Univ. of Okla. Press 1987)).

5. English explorer John Cabot sailed to what became North America under letters patent from King Henry VII in 1498, authorizing Cabot

[t]o seeke [sic] out, discover [sic], and finde [sic] whatsoever isles, countreys [sic], regions or prouinces [sic] of the heathen and infidels whatsoever [sic] they be, and in what part of the world soeuer [sic] they be, which before this time haue [sic] bene [sic] vnknown [sic] to all Christians . . . , and haue [sic] giuen [sic] them licence to set vp [sic] our banners and ensignes in euery [sic] village, towns, castle, isle, or maine [sic] land of them newly found.

The Avalon Project at Yale Law School, *The Letters Patents of King Henry the Seventh Granted unto John Cabot and his Three Sonnes, Lewis, Sebastian and Sancius for the Discoverie of New and Unknown Lands*, <http://www.yale.edu/lawweb/avalon/cabot01.htm> (last visited Jan. 2, 2007) (citing RICHARD A. RIDDLE, MEMOIR OF SEBASTIAN CABOT 74-75 (1831)). In return, Cabot was granted the exclusive right to “[a]ll the fruits, profits, gaines, and commodities growing of such navigation” less a fifth of the “capital gains” to the king. *Id.* In 1584, Sir Walter Raleigh was granted

free libertie [sic] and licence [sic] from time to time, and at all times for ever [sic] hereafter, to discover, search, finde [sic] out, and view such remote, heathen and barbarous lands, countries, and territories, not actually possessed of any Christian Prince, nor inhabited by Christian People, as to him, his heires and assignee, and to every or any of them shall seeme [sic] good, and the same to haue [sic], horde, occupie [sic] and enjoy to him, his heires and assignee for euer [sic], with all prerogatives, commodities, jurisdictions, royalties, privileges, franchises, and preheminences, thereto or thereabouts both by sea and land, whatsoever we by our letters patents may graunt [sic]. . . .

The Avalon Project at Yale Law School, *Charter to Sir Walter Raleigh: 1584*, <http://www.yale.edu/lawweb/avalon/raleigh.htm> (last visited Jan. 2, 2007).

6. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 142 (1810) (holding that “fee title” being in the State of Georgia was not inconsistent with “Indian title” being in an Indian Nation).

during their first winters).<sup>7</sup> The innocent descendants of the colonists exercised their manifest ancestral license to conquer the continent from sea-to-shining-sea by invading the Indian country in a series of just wars to take the land from the Indians who were not using it properly and refused to sell it until forced to do so by brave and honorable federal troops.<sup>8</sup>

According to the American myth, the governments of the various Indian Nations made several hundred treaties of peace and friendship with the United States at the end of those wars, were conquered, and then disappeared.<sup>9</sup> The Indians disappeared from history during the last half of the nineteenth century and were thereafter governed by Congress.<sup>10</sup> Indians have no legitimate claims to land or treaty rights because the treaties are old,<sup>11</sup> because all Indians get a government check,<sup>12</sup> and because grandpa stole their land fair and square.<sup>13</sup> Indians somehow lost their right to their own nations “back then,” and are rich from Casino checks. Besides, it is morally evil for an Indian or a tribe to be rich and not dependant on the United States, and it is even less comprehensible that an Indian government should have any right to tell an American citizen what to do.<sup>14</sup> Of course

7. Cotton Mather, D.D., *The Story of Squanto*, MAGNALIA CHRISTI AMERICANA, available at <http://personal.pitnet.net/primarysources/squanto.html> (last visited Sept. 27, 2006). See also *Jamestown Colony*, Encyclopedia Britannica Online, <http://www.britannica.com/eb/article-247837/Jamestown-Colony> (last visited Jan. 23, 2006).

8. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 288-90 (1955).

9. *United States v. Kagama*, 118 U.S. 375, 379-80 (1886); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 31 (1831) (Baldwin, J., concurring).

10. *Antoine v. Washington*, 420 U.S. 194, 203 (1975); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

11. At least eleven Indian Nations were party to seven treaties with the United States prior to the entry into force of the Constitution of the United States. See *Treaty with the Shawnees*, Jan. 31, 1786, 7 Stat. 26 (at the Mouth of the Great Miami); *Treaty with the Chickasaws*, Jan. 19, 1786, 7 Stat. 24 (at Hopewell); *Treaty with the Choctaw*, Jan. 3, 1786, 7 Stat. 21 (at Hopewell); *Treaty with the Cherokees*, Nov. 28, 1785, 7 Stat. 18 (at Hopewell); *Treaty with the Wyandots, Chippewas, Delawares, and Ottawas*, Jan. 21, 1785, 7 Stat. 16 (at Fort M'Intosh); *Treaty with the Six Nations (Mohawk, Seneca, Onondaga, Oneida, Cayuga, Tuscarora)*, Oct. 22, 1784, 7 Stat. 15 (at Fort Stanwix); *Treaty with the Delawares*, Sept. 17, 1778, 7 Stat. 13 (at Fort Pitt). The Supremacy Clause of the United States Constitution makes “all treaties made, or which shall be made, under the authority of the United States” the supreme law of the land. The several hundred additional treaties between the United States and the Indian Nations are younger than the Constitution of the United States—and we law professors do not ignore that document as “too old to teach.”

12. *Tee-Hit-Ton Indians*, 348 U.S. at 273-74.

13. *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005). See G. William Rice, *Federal Indian Law Cases in the Supreme Court's 2004-2005 Term*, 41 TULSA L. REV. 341 (2005).

14. See generally *City of Sherrill*, 544 U.S. 197; *Nevada v. Hicks*, 533 U.S. 353 (2001); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Montana v. United States*, 450 U.S. 544 (1981); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (Univ. Minn. Press 2005).

the United States has the right to boss Indian nations around without their consent. After all, America belongs to the Americans.

From the time Christopher Columbus contracted with Ferdinand and Isabella to receive a “fair share” of any plunder he could seize on his voyages,<sup>15</sup> to the contra-constitutional plunder of the lands of the Oneida Nation last year by the United States Supreme Court, it has been about the land and its resources. According to the myth, whatever lands, resources, and rights have been retained by the tribes are really owned by the United States who “allows” the tribes to share in their use, and whatever is held by the United States is owned by the United States not to be shared with the Indian nations.

This mythology, and the politics fueled by self-interests which support it, are inextricably intertwined with federal Indian law. Others have described the implementation of the colonial regime with respect to the Indian Nations by the United States and its predecessors, and have sometimes suggested ways to address the fallout from that process.<sup>16</sup> The development

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15. The *Capitulations of Santa Fe*, signed by Queen Isabella on April 17, 1492, belies the claim that Columbus was sailing for the noble aim of spreading Christianity to the peoples of the Indian subcontinent in Asia that he hoped to govern (although that may have been part of the equation). The payment Columbus was to receive is set out as follows:

The things prayed for, and which Your Highness give and grant to Don Cristobal Colon as some recompense for what he is to discover in the Oceans, and for the voyages which now, with the help of God, he has engaged to make therein in the service of your Highnesses, are the following:

Firstly, that Your Highnesses, as actual Lords of the said Oceans, appoint from this date the said Don Cristobal Colon to be your Admiral in all those islands and mainlands which by his activity and industry shall be discovered or acquired in the said oceans, during his lifetime, and likewise, after his death, his heirs and successors one after another in perpetuity, with all the preeminences and prerogatives appertaining to the said office . . . .

Likewise, that Your Highnesses appoint the said Don Cristobal Colon to be your Viceroy and Governor General in all the said island and mainlands . . . .

Item, that of all and every kind of merchandise, whether pearls, precious stones, gold, silver, spices, and other objects and merchandise whatsoever, of whatever kind, name and sort, which may be bought, bartered, discovered, acquired and obtained within the limits of the said Admiralty, Your Highnesses grant from now henceforth to the said Don Cristobal, and will that he may have and take for himself, the tenth part of the whole . . . .

Panel Three, *Audience at the Court of Ferdinand and Isabella*, <http://xroads.virginia.edu/~CAP/COLUMBUS/door3.html>. His claim was to have military command, to personally govern, and to receive his tithe of all the plunder or trade that could be generated as a result of his voyages. It has been suggested that “[h]is excessive demands for titles, revenues, and other rewards” was the real cause for the delay in obtaining the approval of Ferdinand and Isabella for his initial voyage. Panel Two, *Departure from the Convent of La Rabida*, <http://xroads.virginia.edu/~CAP/COLUMBUS/door2.html>.

16. Some of the interesting works in this field include: Carrie A. Martell & Sarah Deer, *Heeding the Voice of Native Women: Toward an Ethic of Decolonization*, 81 N.D. L. REV. 807 (2005); Robert B. Porter, *Decolonizing Indigenous Governance: Observations on Restoring Greater Faith and Legitimacy in the Government of the Seneca Nation*, 8-WTR KAN. J.L. & PUB.

of the international law with respect to Indigenous peoples, a term which includes Indian Nations within the western hemisphere, has also been the subject of several works.<sup>17</sup> Both scholars of federal Indian law and the international community have raised serious questions which render the American attempt to “domesticate” the international rights of Indian Nations suspect.<sup>18</sup> This paper will attempt to bring these concepts into focus in the context of considering the result which should be obtained when an Indian tribe seeks to regain ownership and control over lands and resources which have been lost as a result of federal Indian law and policy.

Too many of our students display an acceptance of these myths, and, at least initially, fail to think critically about its substance, and its consequences. Those familiar with the principles of federal Indian law understand that the source of America’s claim of title to the lands of the Indian Nations is rooted in the voyages of Columbus, Cabot, Raleigh, and the others who sailed with the warrant of the English sovereign. This claim was put into execution by the planting of “colonies” upon the shores of the western hemisphere by the English, Dutch, Spanish, and French,<sup>19</sup> and their eventual consolidation into English hands. Over the course of approximately two and one-half centuries, the thirteen English colonies which would form the original United States were created, often through the purchase of lands from the Indian Nations bordering the colonies.<sup>20</sup> After

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POL’Y 97 (1999); Robert B. Porter, *Decolonizing, and Modernizing New York State’s Indian Law*, 63 ALB. L. REV. 125 (1999); Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 U. MICH. J.L. REFORM 899 (1998); Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133 (1994); Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77 (1993); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219. Dealing with similar issues in Africa: Joel Ngugi, *The Decolonization-Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa*, 20 WIS. INT’L L.J. 297 (2002).

17. ANGELA WILSON & MICHAEL YELLOW BIRD, *FOR INDIGENOUS EYES ONLY: A DECOLONIZATION HANDBOOK* (2005); S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2d ed. 2004); SHARON HELEN VENNE, *OUR ELDERS UNDERSTAND OUR RIGHTS: EVOLVING INTERNATIONAL LAW REGARDING INDIGENOUS PEOPLES* (1998); MAIVÂN CLECH LÂM, *AT THE EDGE OF THE STATE: INDIGENOUS PEOPLES AND SELF-DETERMINATION* (2000); *HUMAN RIGHTS OF INDIGENOUS PEOPLES* (Cynthia Price Cohen ed., 1998); *INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS* (Sarah Pritchard ed., 1998).

18. Miguel Alfonso Martinez, Special Rapporteur, “HUMAN RIGHTS OF INDIGENOUS PEOPLES: Study on treaties, agreements and other constructive arrangements between States and indigenous populations” at Part III, paragraphs 168-244, UN Doc. E/CN.4/Sub.2/1999/20 (1999). See generally Clinton, *supra* note 16.

19. See STORY, *supra* note 3.

20. See, e.g., *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812).

the rebellion against their King began, the colonies would attempt to deal with the Indian Nations that were on their de facto borders.

As early as 1778, the Continental Congress, in its bid for independence from Great Britain, gained the formal support of the Delaware Nation. The parties to that treaty pledged perpetual peace and friendship;<sup>21</sup> the Delawares granted colonial troops free passage through their lands and the aid of “a number of their best and most expeart [sic] warriors as they can spare, consistent with their own safety” for the purpose of attacking British forts on the Great Lakes,<sup>22</sup> while the United States promised material support<sup>23</sup> and guaranteed the Delawares “all their teritoreal [sic] rights in the fullest and most ample manner.”<sup>24</sup> The parties also agreed to a mechanism where representatives of both parties would try “all infractions . . . by the citizens of either party, to the prejudice of the other” to their mutual satisfaction.<sup>25</sup> This treaty explicitly recognized the boundary of the Delaware that had been established by former treaties,<sup>26</sup> by providing:

Whereas the enemies of the United States have endeavoured [sic], by every artifice in their power, to possess the Indians in general with an opinion, that it is the design of the States aforesaid, to extirpate the Indians and take possession of their country: to obviate such false suggestion, the United States do engage to guarantee to the aforesaid nation of Delawares, and their heirs, all their teritoreal [sic] rights in the fullest and most ample manner, as it hath been bounded by former treaties, as long as they the said Delaware nation shall abide by, and hold fast the chain of friendship now entered into.<sup>27</sup>

In 1784, the newly independent United States gained peace from the Six Nations which had divided on the question of whether to support the British, the colonists, or remain neutral.<sup>28</sup> Article 2 of this Treaty “secured in the possession of the lands on which they are settled” the Oneida and Tuscarora who had actively supported the Americans.<sup>29</sup> This Treaty also “secured in the peaceful possession of the lands they inhabit east and north

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21. Treaty with the Delawares, art. 2, Sept. 17, 1778, 7 Stat. 13.

22. *Id.* at art. 3.

23. *Id.* at art. 5.

24. *Id.* at art. 6.

25. *Id.* at art. 4.

26. *Id.* at art. 6.

27. *Id.*

28. See generally GREGORY SCHAAF, WAMPUM BELTS AND PEACE TREES: GEORGE MORGAN, NATIVE AMERICANS AND REVOLUTIONARY DIPLOMACY (1990).

29. Treaty with the Six Nations, art. 2, Oct. 22, 1784, 7 Stat. 15.

of” the boundary line between the parties established by Article 3 of that Treaty.<sup>30</sup> In 1785, a Treaty drew a “boundary line between” the United States and the lands of the “Wiandot, Delaware, Chippawa and Ottawa Nations”<sup>31</sup> and prohibited citizens of either party from settling on the lands of the other,<sup>32</sup> with certain limited exceptions.

At about the same time, a series of treaties at Hopewell on the Keowee drew boundary lines between the United States and the Cherokee,<sup>33</sup> Choctaw,<sup>34</sup> and Chickasaw<sup>35</sup> nations. Other treaties during this period established boundaries between the fledgling United States and the “Shawanoë nation”<sup>36</sup> and reconfirmed the boundary established by the 1785 treaty mentioned above “to the end that the same may remain as a division line between the lands of the United States of America, and the lands of said nations, forever,”<sup>37</sup> and the parties mutually relinquished and quit claimed any rights within the territory of the other.<sup>38</sup>

As the federal Constitution was ratified and entered into force, the United States continued its practice of agreeing to boundary lines between itself and the Indian Nations. In 1789, a treaty between the United States and the Six Nations renewed and confirmed the boundary between them as established in 1784.<sup>39</sup> The language of this treaty provided in part:

The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States;

30. Treaty with the Six Nations, art. 3, Oct. 22, 1784, 7 Stat. 15.

31. Treaty with the Wyandots, Etc., art. 3, Jan. 21, 1785, 7 Stat. 16.

32. *Id.* at art. 5, 6.

33. Treaty with the Cherokees, art. 4, Nov. 28, 1785, 7 Stat. 18.

34. Treaty with the Choctaws, art. 2, 3, Jan. 3, 1786, 7 Stat. 21.

35. Treaty with the Chickasaws, art. 3, Jan. 10, 1786, 7 Stat. 24.

36. Treaty with the Shawnees, art. 6, Jan. 31, 1786, 7 Stat. 26.

37. Treaty with the Wyandots, Etc., art. 2, Jan. 9, 1789, Proclamation Sept. 27, 1789, 7 Stat. 28 (providing that the Treaty applied to the Wiandot, Delaware, Ottawa, Chippewa, Pattawatima, and Sac Nations).

38. *Id.* at art. 2, 3.

39. The purpose of this treaty was to “renew and confirm the said boundary line in the words beforementioned, to the end that it may be and remain as a division line between the lands of the said Six Nations and the territory of the United States, forever” and to reconfirm the other provisions of the 1784 treaty. Treaty with the Six Nations, art. 1, Jan. 9, 1789, 7 Stat. 33. The United States also confirmed in the Six Nations’ lands that New York had agreed belonged to them. Treaty with the Six Nations, Nov. 11, 1794, Proclamation Jan. 21, 1795, 7 Stat. 44.

nor ever disturb the people of the United States in the free use and enjoyment thereof.<sup>40</sup>

Further boundary lines were confirmed or renewed with the Creek,<sup>41</sup> Cherokee,<sup>42</sup> Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-river, Wea's, Kickapoos, Piankashaws, and Kaskaskias.<sup>43</sup> Representative of these treaties was the treaty at Fort Harmar:

Article 2. . . . [The Indian tribal parties] do by these presents renew and confirm the said boundary line; to the end that the same may remain as a division line between the lands of the United States of America, and the lands of said nations, forever. And the undersigned Indians do hereby in their own names, and the names of their respective nations and tribes, their heirs and descendants, for the consideration above-mentioned, release, quit claim, relinquish and cede to the said United States, all the land east, south and west of the lines above described, so far as the said Indians formerly claimed the same; for them the said United States to have and to hold the same in true and absolute propriety forever.

Article 3. The United States of America do by these presents relinquish and quit claim to the said nations respectively, all the lands lying between the limits above described, for them the said Indians to live and hunt upon, and otherwise to occupy as they shall see fit: But the said nations, or either of them, shall not be at liberty to sell or dispose of the same, or any part thereof, to any sovereign power, except the United States; nor to the subjects or citizens of any other sovereign power, nor to the subjects or citizens of the United States.<sup>44</sup>

This practice was continued as other Indian Nations came in contact with the United States.<sup>45</sup>

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40. Treaty with the Six Nations, art. 4, Nov. 11, 1794, Proclamation Jan. 21, 1795, 7 Stat. 44.

41. Treaty with the Creeks, art. 4, Aug. 7, 1790, Proclamation Aug. 13, 1790, 7 Stat. 35.

42. Treaty with the Cherokees, art. 4, 7 Stat. 39, Proclamation Feb. 7, 1792, July 2, 1791. *See also* Treaty with the Cherokees, art. 2, June 26, 1794, Proclamation Jan. 21, 1795, 7 Stat. 43.

43. Treaty with the Wyandots, Etc., art. 3, Aug. 3, 1795, Proclamation Dec. 2, 1795, 7 Stat. 49.

44. Treaty with the Wyandots, Etc., art. 2, 3, Jan. 9, 1789, Proclamation Sept. 27, 1789, 7 Stat. 28.

45. *See, e.g.*, Treaty with the Delawares, Etc., June 7, 1803, Proclamation Dec. 26, 1803, 7 Stat. 74; Treaty with the Saks and Foxes, art. 2, Nov. 3, 1804, Ratified Jan. 25, 1805, Proclamation Feb. 21, 1805, 7 Stat. 84; Treaty with the Osages, art. 6, Nov. 10, 1808, Ratified Apr. 28, 1810, 7 Stat. 107; Treaty with the Ottoes, Etc., art. 1, Oct. 15, 1836, Proclamation Feb. 15, 1837, 7 Stat. 524. It is interesting to note that the United States even entered into a treaty with

Putting aside, then, for the moment, any understandings, claims, or obligations which might have existed between the European potentates and the newly independent former colonies, it could be fairly said that, while Europe had planted its plantations and colonies in North America, most Indian Nations were not colonized. First, Indian Nations did not consent to the doctrine of discovery as propounded by the Europeans and their successors, and so cannot in equity and good conscience be bound by its claims.<sup>46</sup> Justice Marshall agreed:

[The discovery doctrine] regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.<sup>47</sup>

The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by [the King's charters to the colonies] to govern the [native] people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more.<sup>48</sup>

Secondly, the English claimed that they acquired their rights from the Indian Nations to the specific territory they actually occupied by purchase, or by the sword, not through any claim of discovery. In other words, while the English claim of discovery may have been used to deny the right of the French, Dutch, Spanish or other European sovereign to accept transferred lands from an Indian Nation, as between the British and the Indian Nation, lands were transferred from the Indian Nations to the British only by

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Indian Nations in Canada. Treaty with the Seven Nations of Canada, May 31, 1796, Proclamation Jan. 1, 1797, 7 Stat. 55.

46. No apology is intended for the racist attitudes that invented this theory or denied complete Indian dominion and ownership of Indian lands, because Europeans (and then the Americans) believed themselves to be entitled to take whatever others had if they could, but define that other as inferior.

47. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 544 (1832). From the viewpoint of the Indian Nations, the doctrine of discovery first used by the European colonizers, and then incorporated into American law by the Supreme Court in the early cases of *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester* is inapplicable and inadmissible.

48. *Worcester*, 31 U.S. at 544-45.

purchase or war—not through a claim of discovery. In his *Commentaries on the Laws of England*, Blackstone stated:

[I]t is held, that if an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force. . . . But in conquered or ceded countries, that have already laws of their own, the king may indeed alter or change those laws, but, till he does actually change them, the antient [sic] laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.

Our American Plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives, (with what natural justice I shall not at present inquire,) or by treaties. And, therefore, the common law of England, as such, has no allowance or authority there; they being no part of the mother country, but distinct, though dependent dominions.<sup>49</sup>

Third, as shown by the various treaties referred to above, the demarcation of the lands of the United States from those of the Indian Nations were repeatedly and conclusively stated as the establishment of boundaries between the lands of the two sovereigns.<sup>50</sup> Repeated declarations of boundaries of division, coupled with solemn guarantees of territorial integrity, and disclaimers of right to the lands of the Indian Nations seems conclusive in law as between the United States and the Indian Nations. Finally, some fifty years on, the Supreme Court would state with assurance that Indian Nations constituted States (in the International law sense) which are separate and distinct from the United States and its several constituent states:

. . . . So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their

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49. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 104-05 (1765) (citations omitted). Justice Sir William Blackstone, QC, was the Vinerian Professor of Law at Oxford, member of the English Parliament, and Solicitor General to the Queen. *Id.*

50. See *supra* notes 23-47 and accompanying text.

engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

....

The counsel have shown conclusively that they are not a state of the union, and have insisted that individually they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a state must, they say, be a foreign state; each individual being foreign, the whole must be foreign.<sup>51</sup>

Finally, the Court would rule within the year that:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term “nation,” so generally applied to them, means “a people distinct from others.” The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words “treaty” and “nation” are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.<sup>52</sup>

And that:

The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the

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51. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

52. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559-60 (1832).

Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.<sup>53</sup>

So here we are Anno Domini 1832. About two hundred fifty years after the first English colonies were planted in the western hemisphere, and fifty years after the American Revolution, Indian Nations are explicitly recognized as separate States (nations) in the international law sense in which that term is used. They are recognized as having the right and power to engage in international relations like any other State.<sup>54</sup> Their citizens, in their individual capacity, are considered aliens to the United States.<sup>55</sup> In their political capacity, they constitute “a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself . . . .”<sup>56</sup> Finally, they occupy their own territory whose integrity is guaranteed by the United States, with boundaries set by treaty, and in which the laws of foreign political entities do not seem to apply, with limited exceptions, such as laws which would apply to a sovereign’s subject when they were outside the sovereign’s domain.<sup>57</sup>

Thus while England had established plantations and colonies on lands it had purchased or acquired from the Indian Nations by war, and the United States had succeeded to those rights and claims, Indian Nations met all the qualifications of members of the international community—including recognition of their international capacity. This is the sense in

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53. *Worcester*, 31 U.S. at 561.

54. It is in the interests of the United States to recognize the capacity of Indian Nations to enter into treaties and international agreements, as one of the two primary mechanisms by which the United States claims a rightful interest in its territory is through purchases from the Indian Nations. The other, of course, would have been territory seized in a just war—a form of seizure which is apparently no longer acceptable to the international community.

55. Even after the ratification of the Fourteenth Amendment to the Constitution of the United States, individual Indians are still not accorded natural born citizenship in the United States. *Elk v. Wilkins*, 112 U.S. 94, 109 (1884). Some individual Indians became citizens through treaty provisions allowing naturalization. *See, e.g.*, Treaty with the Seneca, Mixed Seneca and Shawnee, Quapaw, Etc., art. 17, Feb. 23, 1867, Ratified June 18, 1868, Proclamation Oct. 14, 1868, 15 Stat. 513 (providing that this treaty also applied to: Confederated Peorias, Kaskaskias, Weas, Piankeshaws, Ottawas of Blanchard’s Fork and Roche de Boeuf, and certain Wyandottes). Others gained citizenship through allotment and other special procedures. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, P.L. 49-119. *See also* Indian Citizenship Act of 1924, June 2, 1924, ch. 233, 43 Stat. 253 (1923-1925) (codified at 8 U.S.C. § 1401(b) (2002)) (providing for the naturalization of all Indians born in the United States at birth). For a listing of mechanisms by which Indians have become naturalized citizens of the United States instead of, or in addition to, their citizenship in their Indian Nation, see CHARLES J. KAPPLER, IV INDIAN AFFAIRS LAWS AND TREATIES 1, 1165 (1929).

56. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

57. *See, e.g.*, *Am. Fur Co. v. United States*, 27 U.S. (2 Pet.) 358, 365 (1829); *Worcester*, 31 U.S. 561.

which I suggest that while colonies had been established on these shores, that as of 1832 when the last case in the Marshall trilogy<sup>58</sup> had been decided, Indian Nations had not been colonized, but rather continued to exercise their inherent right of self-determination through the free pursuit of their own social, cultural, and economic development, and the free development of their own legal and political systems<sup>59</sup> subject only to the considerations that would obtain with any nation on whose borders a powerful, belligerent, and imperialistic society threatened the peace and safety of the people.

The distinction here is a fine one, but one which is important for a vision of Indian Nations in a world which may yet see a declaration by the General Assembly of the United Nations that Indigenous peoples, including Indians, have the right of self-determination and to the integrity of their territories.<sup>60</sup> As late as 1832, Indian Nations satisfied the four conditions for recognition as a State that would be codified by the International community in the Convention on Rights and Duties of States signed at Montevideo a little over one hundred years later on December 26, 1933.<sup>61</sup> These conditions include: “a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.”<sup>62</sup> The question is: since Indian Nations had international legal

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58. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

59. *See* *United States ex rel Mackey v. Cox*, 59 U.S. (18 How.) 100, 102 (1855) (explaining that the Cherokee Nation developed tribal courts and formalized property and inheritance laws); *Talton v. Mayes*, 163 U.S. 376 (1896) (providing that the United States Constitution does not apply to the Cherokee Nation’s governmental actions).

60. The right of self-determination in the International sense has little to do with self-determination contracts entered into between tribes and the United States pursuant to the Indian Self-Determination Act. 25 U.S.C. § 450 (2000). These federal contracts are basically glorified program management tools by which Indian tribes are allowed to operate—programs themselves which would otherwise have been provided by the federal government. In contrast, the right of self-determination in International law is expressed in Article 3 of the Draft Declaration on the Rights of Indigenous Peoples in the following form: “Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” U.N. Draft Declaration, Part II, Art. 26, U.N. Doc. A/HRC/1/L.L (June 23, 2006). This right to “freely determine” and “freely pursue” includes the concepts of political autonomy and territorial integrity, and is inconsistent with the imposition of government by others. *Id.*

61. Convention between the United States of America and Other Republics on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097 [hereinafter *Montevideo Convention*] (Senate advice and consent to ratification, with a reservation, June 15, 1934; Ratified by the President of the United States, with a reservation, June 29, 1934; Ratification of the United States deposited with the Pan American Union July 13, 1934; Entered into force December 26, 1934; Proclaimed by the President of the United States January 18, 1935; Article 8 reaffirmed by protocol of December 23, 1936; 49 Stat. 3097; Treaty Series 881).

62. *Id.* at art. I.

capacity as States during the first third of the nineteenth century,<sup>63</sup> how, precisely, did each of them lose it between 1832 and 1933?<sup>64</sup>

It would seem that three of the four factors set out in the first Article of the Montevideo Convention as indicators of statehood would be accepted as retained by the Indian Nations to the present day with little, if any, controversy. Therefore, we shall deal in an admittedly summary fashion with the issues respecting population, government, and contractual capacity.

As to whether the Indian Nations have a “permanent population” it is an open and notorious fact the every federally recognized Indian tribe, band, or nation, has a roll upon which is subscribed the names and identifying information regarding its permanent population, or has specific alternative methods of determining whether a given individual is a “member” or “citizen” of that Nation.<sup>65</sup> Although the United States has

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63. I would suggest that nothing suggested here is inconsistent with the decision of the Supreme Court in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). While that case declared that the Cherokee Nation was not a “foreign” state as that term is used in Article III of the United States Constitution, that Court clearly held that the Cherokee Nation constituted a State in the international sense, albeit a State which occupied a territory surrounded by the United States, and against which the United States claimed as to other European colonial powers the exclusive right to purchase from the Cherokee Nation.

64. Montevideo Convention, art. 4-5, 8, 11, Dec. 26, 1933, 49 Stat. 3097. In 1933, the United States, as party to this treaty, agreed to the following Articles in the Montevideo Convention which would seem to thereafter preclude any claim of right to unilaterally extinguish the international status of an Indian State:

ARTICLE 4

States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.

ARTICLE 5

The fundamental rights of states are not susceptible of being affected in any manner whatsoever.

ARTICLE 8

No state has the right to intervene in the internal or external affairs of another.

ARTICLE 11

The contracting states definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure. The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily.

*Id.*, available at <http://www.yale.edu/lawweb/avalon/intdip/interam/intam03.htm>. Of course, the Charter of the United Nations would prohibit such acts after it came into force in 1945. Charter of the United Nations, <http://www.un.org/aboutun/charter/index.html> (last visited Sept. 29, 2006). To the extent that these provisions were a codification of the existing International norms, they were, of course, in effect before 1933.

65. *Mississippi Band of Choctaw v. Holyfield*, 490 U.S. 30 (1989); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

sometimes claimed unto itself the right to decide who comprises the tribal membership—most always for the purpose of deciding to whom the United States will make payment of certain debts it owes to the citizens of the Indian Nation<sup>66</sup>—it is not generally disputed that the Indian Nations have always had, and retain, the right to determine for themselves who their citizens are.<sup>67</sup> American law distinctly separates Indian citizens from non-Indians who are citizens pursuant to the Fourteenth Amendment of the American Constitution by virtue of being born or naturalized within the United States and subject to the jurisdiction thereof.<sup>68</sup> That division is seen as a legal and political division—not a racial one—thus clearly contradistinguishing Indian Nations from minority groups of American citizens.<sup>69</sup>

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66. 25 U.S.C. §§ 133, 163 (2000). “[I]n absence of express legislation by Congress to the contrary, a tribe has the complete authority to determine all questions of its own membership, as a political entity[.]” except where the question involved is distribution of tribal funds and other property under supervision and control of the federal government. *Martinez v. S. Ute Tribe of S. Ute Reservation*, 249 F.2d 915, 920 (10th Cir. 1957) *cert. den.* 356 U.S. 960, *reh. den.* 357 U.S. 924.

67. *Red Bird v. United States*, 203 U.S. 76, 92 (1906); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

68. *Elk v. Wilkins*, 112 U.S. 94, 101-02 (1884).

69. *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974). Because of tribal Constitutional provisions and laws regarding eligibility for citizenship, it is possible for one to be a “full-blooded” Indian as a racial matter, yet not be eligible to be a citizen of any Indian Nation. It has also been repeatedly recognized that persons who have no blood of the Indian race may be admitted to naturalized citizenship in an Indian Nation, and thereby become entitled to such rights and responsibilities as are extended by the Indian Nation to persons obtaining such status, and that citizens of one Indian Nation may become naturalized citizens of another if the laws of the receiving Indian Nation so allow. *See Red Bird v. United States*, 203 U.S. 76 (1906) (discussing inter-married white persons); *Allen v. Cherokee Nation Tribal Council*, JAT-04-09, Judicial Appeals Tribunal of the Cherokee Nation of Oklahoma, *available at* <http://www.cherokeecourts.org/Portals/5/JAT-04-09%2054-Opinion%203-7-06.pdf> (holding descendants of the black freedmen are eligible for membership in the Cherokee Nation of Oklahoma although they have no Indian blood). This case also recognizes that some persons of Delaware and Shawnee Indian blood are citizens of the Cherokee Nation of Oklahoma. *Id.* *See also* Treaty with the Cherokees, art. 9, July 19, 1866, 14 Stat. 799 (Ratified July 27, 1866, Proclaimed August 11, 1866); Treaty with the Choctaws and Chickasaws, art. 3, 26, 30, Apr. 2, 1866, 14 Stat. 769 (Ratified June 28, 1866, Proclaimed July 10, 1866); Treaty with the Seminoles, art. 2, Mar. 21, 1866, 14 Stat. 755 (Ratified July 19, 1866, Proclaimed August 16, 1866). Indians are now naturalized citizens of the United States at birth. 8 U.S.C. § 1401(b) (2000).

In a similar way, the fact that Indian Nations retain functioning governments<sup>70</sup> which are effectual is not open to serious dispute.<sup>71</sup> In 1994<sup>72</sup> and again in 2000,<sup>73</sup> Congress found that:

(1) the tribal right of self-government flows from the inherent sovereignty of Indian tribes and nations;

(2) the United States recognizes a special government-to-government relationship with Indian tribes, including the right of the tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian tribes.<sup>74</sup>

The Executive Branch has also recognized the government-to-government relationship between the United States and the Indian Nations.<sup>75</sup> For the United States to maintain a “government-to-government” relationship with each federally recognized tribe requires, of course, that the tribe have a government that is capable of entering into relations with other governments.

Of course, the choice made by an Indian Nation to accept the protection of the United States, or any other more powerful sovereign, does

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70. See 25 U.S.C. § 476 (a) (2000) (acknowledging that all Indian Nations retain the inherent sovereign authority to adopt constitutions and laws according to their own processes and procedures). One should also note that the United States Supreme Court has repeatedly held that the Constitution of the United States does not operate of its own force upon the governments of the Indian Nations. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *Talton v. Mayes*, 163 U.S. 376, 384 (1896).

71. The Secretary of the United States Department of the Interior is required by federal law to maintain a list of all Indian Nations recognized (i.e., maintaining a government-to-government relationship) by the United States. 25 U.S.C. § 479(a)(1) (2000). In adopting this section, Congress found that:

(1) the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs;

(2) ancillary to that authority, the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes;

(3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated “Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;” or by a decision of a United States court.

*Id.*

72. Tribal Self-Governance Amendments of 2000, Act of Aug. 18, 2000, Pub. L. No. 106-260, § 2, 114 Stat. 711.

73. Tribal Self-Governance Amendments of 1994, Act of Oct. 25, 1994, Pub. L. No. 103-413, § 202, 108 Stat. 4250.

74. Tribal Self-Governance Amendments of 2000, Act of Aug. 18, 2000, Pub. L. No. 106-260, § 2, 114 Stat. 711.

75. See 65 F.R. 67249 (Nov. 6, 2000); 59 F.R. 22951 (Apr. 29, 1994), *reprinted in* 25 U.S.C. § 450, at 432-33 (2000).

nothing to diminish the capacity of the Indian Nation to enter into, and fulfill, agreements with other sovereigns.<sup>76</sup> Likewise, the choice of the United States to change its method of ratification of its contracts or agreements with Indian Nations in no way diminishes the capacity of Indian Nations to enter into international agreements.<sup>77</sup> Long after the end of the classical “treaty period,”<sup>78</sup> Indian Nations continued to make agreements with the United States,<sup>79</sup> and this practice has continued to the present day.<sup>80</sup> In addition, Congress has recently recognized that Indian Nations

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76. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-61 (1832), the Court said:

The very fact of repeated treaties with them recognizes [their capacity as a State in international law]; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. “Tributary and feudatory states,” says Vattel, “do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state.” At the present day, more than one state may be considered as holding its right of self government under the guarantee and protection of one or more allies.

*Worcester*, 31 U.S. at 560-61 (1832) (citations omitted).

77. In 1871, the United States chose to change the method of ratification of its agreements with Indian Tribes, and no longer ratified them according to the treaty clause of the United States Constitution. Act of Mar. 3, 1871, ch. 120, § 3, 16 Stat. 544, 570 (codified at 25 U.S.C. § 71 (2000)). That act did not claim to have any effect upon the capacity of an Indian Nation to contract by treaty or otherwise with any sovereign other than the United States. Further, the constitutionality of that statute is suspect. See G. William Rice, *Indian Rights: 25 U.S.C. § 71: The End of Indian Sovereignty or a Self-limitation of Contractual Ability?*, 5 AM. INDIAN L. REV. 239 (1977); Robert N. Clinton, *There Is No Federal Supremacy Clause For Indian Tribes*, 34 ARIZ. ST. L.J. 113, 167 (2002).

78. After 1871, agreements between the United States and the Indian Nations were ratified by Congressional action instead of by the Senate when the House of Representatives won a political power struggle with the Senate by refusing to pay for the expenses of treaties ratified by the Senate. See Clinton, *supra* note 77, at 167-68.

79. See, e.g., Act of June 6, 1900, ch. 813, § 1, 31 Stat. 672 (ratifying agreements with the Indians of the Fort Hall Indian Reservation in Idaho and the Comanche, Kiowa and Apache Indians of Oklahoma); Act of Mar. 3, 1891, ch. 543, 26 Stat. 989 (ratifying agreements with the Citizen Band Potawatomi, Cheyenne and Arapaho, Coeur d’Alene, the Tribes at Fort Berthold, Sisseton and Wahpeton Sioux, and the Crow Tribe); Act of Mar. 3, 1893, ch. 209, 27 Stat. 612, (ratifying agreements with the Yakima and confederated tribes and bands, Cherokee, Tonkawas, and Pawnees).

80. See, e.g., Act of Sept. 30, 1978, Pub. L. No. 95-395, 92 Stat. 813 (1978) (codified at 25 U.S.C. §§ 1701-1715) (ratifying an agreement settling Indian land claims in the State of Rhode Island); Act of Oct. 10, 1980, Pub. L. No. 96-420, 94 Stat. 1785 (codified at 25 U.S.C. §§ 1721-1735) (ratifying an agreement settling Indian land claims by the Passamaquoddy Tribe, the Penobscot Nation, and the Maliseet Tribe within the State of Maine); Act of Dec. 31, 1982, Pub. L. No. 97-399, 96 Stat. 2012 (codified at 25 U.S.C. §§ 1741-1749) (ratifying an agreement settling Indian land claims of the Miccosukee Indian Tribe in the State of Florida); Act of Oct. 18, 1983, Pub. L. No. 98-134, 97 Stat. 851 (codified at 25 U.S.C. §§ 1751-1760) (ratifying an agreement settling Indian land claims in the State of Connecticut); Act of Aug. 18, 1987, Pub. L. No. 100-95, 101 Stat. 704 (codified at 25 U.S.C. § 1771-1771-(a)-(j)) (ratifying an agreement settling Indian land claims in the State of Massachusetts). Of course, the United States and Indian Nations have made numerous contracts and agreements pursuant to the Indian Self-Determination and

retain the authority to “enter into contracts and agreements to trade freely, and seek enforcement of treaty and trade rights,” and has directed the Secretary of Commerce to provide assistance to Indian Nations in doing so:

(a) FINDINGS.—Congress finds that—

(4) consistent with the principles of inherent tribal sovereignty and the special relationship between Indian tribes and the United States, Indian tribes retain the right to enter into contracts and agreements to trade freely, and seek enforcement of treaty and trade rights;

....

(b) PURPOSES.—The purposes of this Act are as follows:

(5) To encourage intertribal, regional, and international trade and business development in order to assist in increasing productivity and the standard of living of members of Indian tribes and improving the economic self-sufficiency of the governing bodies of Indian tribes.

(6) To promote economic self-sufficiency and political self-determination for Indian tribes and members of Indian tribes.<sup>81</sup>

Finally, the United Nations has studied the circumstances and effect of treaties and agreements between States and Indigenous peoples (Indian Nations) and has concluded that such treaties and agreements are matters of international concern,<sup>82</sup> that they are enforceable according to their terms subject to any defenses recognized by International law,<sup>83</sup> and that they may provide a useful tool for improving relations between Indigenous peoples and member states of the United Nations.<sup>84</sup> In that regard, Article 37 of the Draft Declaration on the Rights of Indigenous Peoples calls on States to recognize, observe, and enforce those treaties, agreements, and other

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Education Assistance Act, 25 U.S.C. 450-450(a)-(n), and the Indian Self-Governance Acts which are enforceable contracts as between the Parties. *Cherokee Nation of Okla. v. Leavitt*, 534 U.S. 631 (2005).

81. Native American Business Development, Trade Promotion, and Tourism Act of 2000, Pub. L. No. 106-464, § 2, 114 Stat 2012, 2012-2013 (2000) (codified at 25 U.S.C. § 4301(2000)).

82. 2006 U.N. Draft Declaration, *supra* note 1, at 4 PP 13.

83. *Id.* at PP6.

84. *See, e.g.*, U.N. Econ & Soc. Council [ECOSOC] Sub-Comm. on Prevention of Discrimination & Protection of Minorities, *Final Report: Human Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1999/20 (June 22, 1999) (*prepared by* Special Rapporteur Miguel Alfonso Martinez); 2006 U.N. Draft Declaration, *supra* note 1, at 5.

constructive arrangements, and to honor and respect those agreements.<sup>85</sup> The provisions of the Draft Declaration contain at least seven additional articles that require the free, prior, and informed consent of Indigenous peoples to various State actions with respect to their lands, or provide for Indigenous peoples taking action or entering into social, cultural, economic, and political relationships with others across the current borders of member States of the United Nations.<sup>86</sup> Thus, the international community also contemplates future treaties and agreements by Indian Nations, and that they will have international significance.

We are left, then, with the issue of territory, land, and resources. This issue has not gone unnoticed, but has also been the subject of rather intense study by the appropriate organs of the United Nations. In a 2001 report, Special Rapporteur Mrs. Erica-Irene Daes recognized the distinctive spiritual and physical relationship between Indigenous peoples and the land, and identified some of the reasons for the “urgent need to find solutions to the long-standing problems that exist between Governments and indigenous peoples”<sup>87</sup> with respect to their land and resources:

122. Historically, [Indian] peoples in most parts of the world have been deprived of their lands and resources in whole or in part through many unjust processes, including military force, unlawful settlements, forcible removal and relocation, legal fraud and illegal expropriation by the Government.

124. One of the most widespread contemporary problems is the failure of States to recognize the existence of [Indian] land use, occupancy and ownership, and the failure to accord appropriate legal status and legal rights to protect that use, occupancy or ownership.

128. Such discriminatory doctrines include the doctrine of *terra nullius*, the doctrine that [Indian] land title can be extinguished without due process or compensation, the doctrine of ‘plenary power’ and the doctrine that treaties with [Indian] peoples can be violated or abrogated without any remedy.

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85. 2006 U.N. Draft Declaration, *supra* note 1, at 16.

86. *Id.* at 8, 11, 13, 14, 16.

87. Erica-Irene A. Daes, U.N. Economic & Soc. Council, *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: <Indigenous Peoples and their relationship to land>*, U.N. Doc. E/CN.4/Sub.2/1999/20 (June 11, 1999).

131. Claims processes that are improper, grossly unfair or fraudulent have been a severe problem for [Indian] peoples in certain countries.

134. Other significant problems that have been identified are: programmes to allot [Indian] lands to individuals; settlement programmes on [Indian] lands; the practice of requiring that [Indian] land be held in trust by the State; programmes that use [Indian] lands as collateral for loans; adverse management of sacred and cultural sites by States; the failure of States and others to protect the environmental integrity of [Indian] lands and resources; and failure to accord [Indian] peoples an appropriate right to manage, use and control development of their lands and resources.<sup>88</sup>

The application of these indictments to the situation of Indian Nations within the United States is obvious. How came this to pass?

The germ of the American issue with regard to the territorial integrity of Indian Nations is contained in the same early decisions which acknowledged the treaties drawing boundaries between the Indian Nations and the United States. In the 1810 case of *Fletcher v. Peck*,<sup>89</sup> the Court for the first time faced an issue affected by Indian rights to land. In 1803, Peck had conveyed to Fletcher a tract of land in Georgia. Among the warranties of the deed were that the State, at the time of its initial conveyance to the grantor's predecessor in 1795, had the right to convey the fee-simple title to the property, subject only to the Indians' rights to occupancy of the land.<sup>90</sup> After extensive analysis of non-Indian law issues raised by the demurrers to the plaintiffs statements of his claims, the Court disposed of the question that these two non-Indian parties had raised as follows: "The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state."<sup>91</sup> Foreshadowing things to come, Justice Johnson dissented. Justice Johnson suggested both that Georgia's claim of title, and the conceptual nature of the "Indian title," were too vague to arrive at a reasoned decision as to whether a "fee-simple" title existed prior to purchase of the property from the Indian Nations:

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88. *Id.* at 38-39.

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

90. *Id.* at 88.

91. *Id.* at 142-43.

A fee-simple interest may be held in reversion, but our law will not admit the idea of its being limited after a fee-simple. In fact, if the Indian nations be the absolute proprietors of their soil, no other nation can be said to have the same interest in it. What, then, practically, is the interest of the states in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest, or of purchase, exclusively of all competitors within certain defined limits.<sup>92</sup>

In *Johnson v. M'Intosh*, Justice Marshall first set out the doctrine of discovery, approved its application to an inhabited place, and attempted to convert the "discovery" of a place already inhabited into a lawful conquest of the inhabitants.<sup>93</sup> In *Cherokee Nation*, the Court declared that, although the Cherokee Nation constituted a State in the international sense, politically and legally distinct and separate from both the United States and the several states of the federal union, the Cherokee Nation was not a foreign state entitled to bring an original action in the Supreme Court of the United States under Article III of the Constitution of the United States because the United States also asserted a "title" to the lands of the Cherokee Nation arising under the doctrine of discovery.<sup>94</sup> In *Worcester*<sup>95</sup> Justice Marshall

92. *Id.* at 146-47.

93. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). When reading this portion of the opinion, one wonders whether Marshall had any intellectual confidence in the theory he was propounding. It is noteworthy that he provided an alternative holding to support the result not based upon discovery:

By the treaties concluded between the United States and the Indian nations, whose title the plaintiffs claim, the country comprehending the lands in controversy has been ceded to the United States, without any reservation of [the plaintiff's] title. These nations had been at war with the United States, and had an unquestionable right to annul any grant they had made to American citizens. Their cession of the country, without a reservation of this land, affords a fair presumption, that they considered it as of no validity.

*Id.* at 593-94.

94. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). Again, Justice Marshall was careful to provide a completely separate and distinct holding to support the outcome of the case, namely that (regardless of the sufficiency of the theory or justice of the discovery doctrine):

"Foreign nations" is a general term, the application of which to Indian tribes, when used in the American constitution, is, at best, extremely questionable. In one article, in which a power is given to be exercised in regard to foreign nations generally, and to the Indian tribes particularly, they are mentioned as separate, in terms clearly contradicting them from each other [the Commerce Clause of Art. I, § 8, cl. 3]. We perceive plainly, that the constitution, in this article, does not comprehend Indian tribes in the general term "foreign nations;" not, we presume, because a tribe may not be a nation, but because it is not foreign to the United States.

*Id.* at 19.

95. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542-43 (1832).

vividly expressed the doctrine of discovery in terms of the English common law as a title to the land and territories discovered as against other European sovereigns:

The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object was too immense for any one of them to grasp the whole; and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was, “that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession.”

This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.<sup>96</sup>

As the doctrine of Manifest Destiny<sup>97</sup> gained ground beginning shortly after the “Marshall trilogy,” and the military power of the United States

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America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

*Id.* at 542-43.

<sup>96.</sup> *Id.* at 543-44 (citations omitted).

<sup>97.</sup> Wikipedia, The Free Encyclopedia. Manifest Destiny, [http://en.wikipedia.org/wiki/Manifest\\_Destiny](http://en.wikipedia.org/wiki/Manifest_Destiny) (last visited Sept. 30, 2006).

gained the ascendancy over the ability of Indian Nations to defend their territories by resort to arms, the confounding of the concept of the private fee-simple title of feudal tenure systems with the territorial dominion of government resulted in confusion. For instance, one would think that an individual who has purchased “the fee” from a state having the right of preemption from a tribe would, after making a lawful purchase of the tribe’s occupancy right with the authority of the federal government, be entitled to maintain an action in ejectment for possession of the property against an individual tribal member. One would be wrong.<sup>98</sup> One would think that a state, having conveyed its “fee-simple” subject to the Indians’ rights of occupancy as was approved in *Fletcher v. Peck*, could thereafter levy and collect a tax upon the right held by the “fee-title” holders. One would again be wrong.<sup>99</sup> One would think that if an Indian Nation acquired the “fee” claimed by the original states or the United States by virtue of the discovery doctrine (either directly or through those to whom the original possessor of “the fee” had conveyed), then the right of the Indian Nation would again be complete and all claims of ownership, right, and dominion would be vested in the Indian Nation. One would again be wrong.<sup>100</sup>

Given this confusion, and the language of Marshall’s *Cherokee Nation* opinion describing the relationship between the Indian Nations and the United States as resembling the relation between a ward and a guardian,<sup>101</sup> and the declining military power of many Indian Nations, it is not surprising

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The phrase ‘Manifest Destiny’ was first used primarily by Jackson Democrats in the 1840s to promote the annexation of much of what is now the Western United States (the Oregon Territory, the Texas Annexation, and the Mexican Cession). The term was revived in the 1890s, this time with Republican supporters, as a theoretical justification for U.S. expansion outside of North America. The term fell out of usage by U.S. policy makers early in the 20th century, but some commentators believe that aspects of Manifest Destiny, particularly the belief in an American “mission” to promote and defend democracy throughout the world, continued to have an influence on American political ideology.

*Id.*

98. *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366 (1856).

99. *In re New York Indians*, 72 U.S. (5 Wall.) 761 (1866). It was also held that the authority of the state to tax was inapplicable to individual Indian citizens of a tribe who held their land in fee under the terms of a treaty with the United States. *In re Kansas Indians*, 72 U.S. (5 Wall.) 737, (1866).

100. Under Articles 2 and 3 of the Treaty with the Cherokees, 7 Stat. 478, Proclamation May 23, 1836, the United States sold the fee simple and ceded by patent the lands conveyed to the Cherokee Nation pursuant to several treaties. Although a cession of lands from a tribe to the United States eliminates all claims by the tribe, a cession from the United States to a tribe apparently has no such effect according to the United States Supreme Court. *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846); *United States ex rel Mackey v. Cox*, 59 U.S. (18 How.) 100 (1855); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870). In the modern context, see *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005).

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

that the words of the treaties and court decisions seized more and more upon the language of trust titles and dependency, and less of dividing lines and borders. Thus, a few of the treaties during the latter portion of the classical treaty era begin to speak of the United States holding land “in trust” for the Indian Nations or their citizens.<sup>102</sup> Notions that the United States really “owned” the land, and only “allowed” the Indians to live upon it became more acceptable as the United States began to consider further expansion of its claims of governance into the territory of the Indian Nation after cases like the *Cherokee Tobacco*.<sup>103</sup> Most treaties, however, still did not speak of the United States holding lands “in trust” for Indian Nations, but in the “reservation” or “setting apart” of lands for the use of the Indian Nations. The language of “trust” status during the treaty era seems to be reserved mainly to monies received for the sale of tribal lands, and of the United States holding lands “in trust” for individual allottees, non-Indians who were granted land by the terms of a treaty, and lands which were to be sold by the United States to settlers with the money being finally paid to the United States for the benefit of the Tribe.

When Crow Dog killed Spotted Tail within the territory of the Great Sioux Nation, the Lakota people resolved the matter according to their own laws as they had always done. Spotted Tail was, however, a favorite of the Americans, and the United States Attorney filed murder charges against Crow Dog in the territory of Dakota. When the United States Supreme Court decided that Crow Dog could not be hung by the federal government,<sup>104</sup> Congress immediately responded by enacting the Major Crimes Act.<sup>105</sup> This act, approved by the Court in *United States v. Kagama*,<sup>106</sup> regardless of the inability of the Court to find a constitutional basis for the authority of Congress to enact it, marks the beginning of the colonization of the territory of the Indian tribes—i.e., the first significant attempt by the

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102. Treaty with the Senecas, Mixed Senecas and Shawnees, Quapaws, arts. 16, 20, Feb. 23, 1867, 15 Stat. 513; Treaty with the Delawares, July 2, 1861, 12 Stat. 1177 (requiring that if purchase money was not paid, land had to be returned to United States in trust for the tribe); Treaty with the Senecas, Tonawanda Band, art. 3, 11 Stat. 735; 12 Stat. 991, November 5, 1857 (authority to repurchase lands from the holder of “the fee” who had previously purchased the Indian title).

103. 78 U.S. (11 Wall.) 616 (1870).

104. *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

105. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362 (codified as amended at 818 U.S.C. § 1153 (2000)).

106. *United States v. Kagama*, 118 U.S. 375 (1886). The Court expressly disclaimed the Fourteenth Amendment and the Commerce Clause as the font of Congressional power to enact the Major Crimes Act. *Id.* at 378. Instead, the Court simply asserted a broad political sovereignty over the Indian Nations and their territory. *Id.* at 378-84.

United States to subvert the authority of the Indian Nations in their own territory by application of federal laws without their consent.<sup>107</sup>

Congress was not slow to follow up on the Court's invitation to directly govern Indian Nations and their territories, thereby expanding the treatment of the Indian territory as internal colonies of the United States whose resources were to be expropriated for the benefit of Americans.<sup>108</sup> In 1887, Congress adopted the General Allotment Act which, for the first time, demanded the substitution of American real property and inheritance<sup>109</sup> law for that of the Indian Nations, authorized the President of the United States to unilaterally divide the tribal domain amongst the individual citizens of the Tribe, and thereby create a "surplus" of tribal land that the tribe could be pressured to sell.<sup>110</sup> The United States used this Act to present the tribes with a stark choice—be allotted under the act without your consent, or enter into an "agreement" with the United States and receive slightly larger allotments (i.e. save a little more land before the balance is sold).<sup>111</sup> By 1903, even this possibility was effectively eliminated when the United States Supreme Court announced that the authority of Congress over tribal property had become "plenary" and that there was no need for Congress to obtain a tribe's consent before their land and resources were seized by the United States to be given to non-Indians.<sup>112</sup>

The results were devastating.<sup>113</sup> As a result of the General Allotment Act and federal policy of allotment, Indian land holdings plunged from 138 million acres in 1887 to 48 millions acres by 1934. Fractionation of Indian interests as individual allotments were inherited by the decedents of the allottees pursuant to state inheritance laws resulted in tracts of land that were unusable by the owners.<sup>114</sup> Colonialist treatment of Indian Nations and their territories became ingrained into the "normal" relationship between the federal government and the Indian Nations. With few

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107. Clinton, *supra* note 16, at 83-98.

108. *See generally* Clinton, *supra* note 16.

109. United States *ex rel* Mackey v. Cox, 59 U.S. (18 How.) 100 (1855); Jones v. Meehan, 175 U.S. 1 (1899).

110. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388.

111. *See, e.g.*, Act of Mar. 3, 1891, § 13, ch. 543, 26 Stat. 989 (Cheyenne-Arapaho Allotment Agreement); Act of Feb. 13, 1891, art. II, ch. 165, 26 Stat. 749 (Sac and Fox).

112. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). The only limitation imposed by the Court's opinion was that contained in the Fifth Amendment to the United States Constitution – that the Congress could not confiscate the land, but must pay its reasonable value. However, the Court left the determination of the reasonable value of the property to Congress, and, Congress held the payment "in trust" for the tribe in the treasury of the United States.

113. *See generally* E. CAHN, OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA (1969).

114. *Id.* *See also*, Allotment: Frequently Asked Questions, How Many Tribes, <http://www.indianlandtenure.org/ILTFallotment/FAQs/faqsI.htm#> (last visited Sept. 20, 2006).

exceptions,<sup>115</sup> Congress claimed the authority to govern the Indian country without even a nod toward securing the consent of the governed—even to the extent of allowing states to exercise authority over Indians and their territories, unilaterally terminating the political relationship with some Indian Nations,<sup>116</sup> and unilaterally limiting tribal powers of self-government.<sup>117</sup> Eventually, the Supreme Court held that the “aboriginal title,” that early cases described as superior to any claim by the United States, could be confiscated by the United States without even the semblance of compensation.<sup>118</sup>

Since this nadir, some things have begun to improve. The Congress has rejected the allotment policy<sup>119</sup> and the termination era in no uncertain terms. Congress has replaced these failed policies with a policy promoting tribal self-determination<sup>120</sup> and self-governance.<sup>121</sup> For the first time in almost a hundred years, the Congress has acted to expressly reject a Supreme Court Indian law decision promoting colonial treatment of Indian governments, and the theory upon which it was based.<sup>122</sup> The Supreme Court, however, seems determined to continue to impose these now discredited theories of allotment, assimilation, and domination, and has actively set out to limit tribal powers of self-determination, and the territory for the exercise

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115. Two important exceptions were the Wheeler-Howard Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 984 (IRA); and the Thomas-Rodgers Oklahoma Indian Welfare Act of June 26, 1936, ch. 831, 49 Stat. 1967 (OIWA), both of which required tribal consent before all or some of their provisions were applicable to any particular tribe. This feature would not again be seen for decades.

116. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (codified in part as amended at 18 U.S.C. § 1162 and 28 U.S.C. § 1360 (2000)); Act of Aug. 13, 1954, ch. 732, 68 Stat. 718 (Klamath, Modoc, and the Yahooskin Band of Snake Indians) (now restored as Act of Aug. 27, 1986, Pub. L. No. 99-398, § 2, 100 Stat. 849).

117. Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified at 25 U.S.C. § 1301 (2000))

118. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

119. General Allotment Act, ch. 119, 24 Stat. 388 (1887), *repealed by* Act of Nov. 7, 2000, Pub. L. No. 106-462, Title I, § 106(a)(1), 114 Stat. 2007. Sections 1 and 2 of the Wheeler-Howard Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 984, had prohibited further allotment of tribal lands, and extended indefinitely the periods of protection (trust status) of the allotted lands of individuals of the tribes who chose to have that act apply.

120. 25 U.S.C. § 450 (2000).

121. Act of Oct. 25, 1994, Pub. L. No. 103-413, § 202, 108 Stat. 4250; Act of Aug. 18, 2000, Pub. L. No. 106-260, § 2, 114 Stat. 711.

122. *See United States v. Lara*, 541 U.S. 193 (2004) (recognizing that Congress had “changed the applicable law” of its prior decision in *Duro v. Reina*, 495 U.S. 676 (1990) by the Act of Oct. 28, 1991, 105 Stat. 646 (now codified at 25 U.S.C. § 1301(2)). The significance of the Congressional rejection of the Court’s practice of imposing judicially created limits upon tribal rights of self-determination because the Court viewed those rights as “inconsistent with the status” of the Indian Nations seems to have been lost upon the Court. This is the first such action by Congress since the Court’s reasoning in *In Re Heff*, 197 U.S. 488 (1905) was rejected by statute. *See United States v. Nice*, 241 U.S. 591 (1916).

of tribal self-determination.<sup>123</sup> One wonders if the Court will get the message from Congress.

That the treatment of Indian territories as internal colonies of the United States continues—primarily by action of the Court—is well recognized by the commentators.<sup>124</sup> However, as one scholar has noted, there is no Supremacy Clause applicable to the Indian Nations.<sup>125</sup> The United States Constitution does not limit the powers of government of the Indian Nations.<sup>126</sup> The application of federal law to Indian Nations absent their continuing consent remains a naked imposition of power, and is violative of every American principal of legitimate government, and currently effective international principals of relations between States. It matters not from the perspective of the recipient whether that power is exerted by uniforms of the military, the police, or the judiciary. That such treatment is unjust and violative of the International law expressed by Justice Marshall's early decisions, the principles of which were codified in the plain text of the Montevideo Convention, the Charter of the United Nations, and various international human rights instruments is patently obvious.<sup>127</sup>

123. *See, e.g.*, *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992); *Duro v. Reina*, 495 U.S. 676 (1990); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Montana v. United States*, 450 U.S. 544 (1981); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

124. *See supra* notes 18 and 19. *See also* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31 (1996); Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641 (2003); Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993); Robert Laurence, *Unseemly Nature of Reservation Diminishment by Judicial, As Opposed to Legislative, Fiat and the Ironic Role of the Indian Civil Rights Act in Limiting Both*, 71 N.D. L. REV. 393 (1995); Clinton, *supra* note 16, at 83, 98; L. Scott Gould, *Tough Love For Tribes: Rethinking Sovereignty After Atkinson and Hicks*, 37 NEW ENG. L. REV. 669 (2003) (advocating that Indian Tribes abandon their reliance on inherent sovereignty and the treaty promises of the United States and accept the domination of the United States as limitations on their right of self-determination in order to survive.)

125. Clinton, *supra* note 77, at 167.

126. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 30 (1831) (Johnson, J., concurring); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 544 (1832); *Talton v. Mayes*, 163 U.S. 376, 384 (1895); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

127. ORGANIZATION OF AM. STATES, INTER-AMERICAN COMM'N ON HUMAN RIGHTS: No. 113/01, Case No. 11.140, *Dann v. United States* (2000), available at [http://www.utulsa.edu/law/classes/rice/INTERAMER\\_COMM\\_HUMAN\\_RTS\\_Dann\\_Sisters\\_US.htm](http://www.utulsa.edu/law/classes/rice/INTERAMER_COMM_HUMAN_RTS_Dann_Sisters_US.htm) (discussing wrongful extinguishment of western Shoshone aboriginal title). *See also* *Mabo and Others v. Queensland* (No. 2) [1992] HCA 23; (1992) 175 CLR 1 F.C. 92/014 (3 June 1992) (Australia), available at <http://www.austlii.edu.au/au/cases/cth/HCA/1992/23.html> (on file with the author).

Through it all, most Indian Nations have retained the treaty boundaries of their reserved lands and territories intact even under these tender ministrations of the federal government.<sup>128</sup> Those Indian Nations where the United States claims to have extinguished<sup>129</sup> or diminished<sup>130</sup> their reservations since their last treaty with the United States generally retain an area (often a “diminished reservation” or the “former reservation”) which is formally recognized by the federal administration as the area within which their governmental authorities, programs, and services function.<sup>131</sup> There are, however, a few Indian Nations who do not have any territorial area recognized by the United States as their own. Almost all suffer from the legacy of allotment which has resulted in individual citizens of the Indian Nation as well as outsiders holding lands within the tribal territory rights to which are governed by American law.<sup>132</sup> Only a few have not suffered the devastation of allotment.

If we are to move forward past the process of accusation and denial toward achievement in practice of the lofty ideals contemplated by the founders of America, the United Nations, and those who promote and defend human rights, we must recognize that we have now a unique opportunity to begin the resolution of America’s colonial situation. We exist in a time when the United States Congress, the President, the United Nations, and the leadership in the Indian Nations uniformly state that they intend for the Indian Nations to have and exercise their rights of self-determination and self-governance—even if they all mean slightly different things by these words. Consider then the possibilities. If the Draft Declaration is approved by the General Assembly, the Declaration will become a gauge against which the actual state of things in the Indian

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128. See *Mattz v. Arnett*, 412 U.S. 481, 506 (1973); *Seymour v. Superintendent*, 368 U.S. 351, 357-58 (1962); *United States v. Celestine*, 215 U.S. 278, 284 (1909); *United States v. Nice*, 241 U.S. 591, 601 (1916) (discussing allottees).

129. See, e.g., *DeCoteau v. District Court*, 420 U.S. 425, 428 (1975).

130. See, e.g., *Hagen v. Utah*, 510 U.S. 399, 421 (1994).

131. See, e.g., 12 U.S.C. § 4702(11) (2000) (Community Development Banking and Financial Institutions); 16 U.S.C. § 1722(6)(C) (2000) (Public Lands Corps); 23 U.S.C. § 202(d)(2)(G)(ii)(IV) (2000) (Indian Reservation Roads); Act of July 7, 1998, Pub. L. No. 105-188, 112 Stat. 620, as amended by Act of Oct. 6, 1999, Pub. L. No. 106-67, § 1(2), 113 Stat. 979 (“Former Indian Reservations in Oklahoma” included in definition of “Indian land” subject to mineral leasing); 25 U.S.C. § 1452(d) (2000) (Financing Economic Development of Indians and Indian Organizations); 25 U.S.C. § 2010(d) (2000) (Bureau of Indian Affairs Education Funding); 25 U.S.C. § 3103(12) (2000) (National Indian Forest Resources Management); 25 U.S.C. § 3202(9) (2000) (Indian Child Protection and Family Violence Prevention); 25 U.S.C. § 3653(2) (2000) (Indian Tribal Justice Technical and Legal Assistance).

132. *Judith V. Royster, The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 17-18 (1995); Mark D. Poindexter, *Of Dinosaurs and Indefinite Land Trusts: A Review of Individual American Indian Property Rights Amidst the Legacy of Allotment*, 14 B.C. THIRD WORLD L.J. 53 (1994).

Country may be compared. The United States has the opportunity to once again move into the forefront as a champion of human rights by actively putting the principles of the Declaration into practice, thus showing the way to the rest of the international community.<sup>133</sup> Given the nature of the Declaration and the situation of the Indian Nations in the United States, this could be done as a process without significant disruption of private rights.

It has been suggested that the heart of the Declaration is contained in Article 3, which recognizes the right of self-determination. Contained within the right of self-determination is the right to have a place in which the people of the Indian Nation may “freely determine their political status and freely pursue their economic, social and cultural development.”<sup>134</sup> In other words, the first principle that they must obtain in order to rectify the historical suppression of the rights of the Indian Nations is that they are, each of them, entitled to a homeland. For most Indian Nations, the boundaries of their homeland are set out in treaties between their Nation and the United States, or in other governmental action which recognizes the territorial area which they have traditionally occupied and used.<sup>135</sup>

In the circumstances of Indian Nations having treaties, agreements, or other constructive arrangements with the United States, the Draft Declaration on the Rights of Indigenous Peoples provides:

Article 37

1. [Indian] peoples have the right to the recognition, observance and enforcement of Treaties, Agreements and Other Constructive Arrangements concluded with [the United] States or their successors and to have [the United] States honour and respect such Treaties, Agreements and other Constructive Arrangements.

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133. It does not really matter in this context whether the United States “supports” the Declaration or would ratify a subsequent Convention incorporating all or some of the principles of the Declaration. The only relevant question for our purposes is whether the United States will actually abide by those principles with respect to the Indian Nations existing as enclaves within its borders.

134. 2006 U.N. Draft Declaration, *supra* note 1, at 6.

135. For those to whom United States law ascribes no home, it is suggested that the proper solution would be a negotiated agreement whereby the Indian Nation would purchase from the U.S. (\$1.00 per acre being the usual historical price) public lands of the United States within the aboriginal homeland of the Indian Nation. The parties could also stipulate for an area within which the Indian Nation would be authorized to acquire private lands from private owners, and upon payment of the purchase price, those lands would attach to and become a part of the homeland of the Indian Nation.

2. Nothing in this Declaration may be interpreted as to diminish or eliminate the rights of [Indian] Peoples contained in Treaties, Agreements and Constructive Arrangements.<sup>136</sup>

In many cases, the terms of such documents will, to the satisfaction of both parties, set out the territorial area for the exercise of the Indian Nation's rights once they are agreed to be recognized, observed, and enforced. However, it is useful here to mention a point, and that is the action to take upon the development of a controversy regarding the validity or interpretation of any such treaty, agreement, or constructive arrangement. Certainly, it should be that neither party should be heard to retain the benefits of such contracts, and yet deny the other party the benefit of their bargain. Likewise, it is a principle too ingrained in fundamental fairness at both the domestic and international level to need mention that one is not a valid judge of their own cause. Therefore, a second principle that must be laid down is that in the event of a disagreement concerning the validity, interpretation, or implementation of a contract between the parties, the matter must be referred to a neutral third party decision maker and a fair process.<sup>137</sup>

If this resolution mechanism is instituted with the consent of both parties, then neither party to the controversy may have continuing cause for complaint after the negotiated resolution of the matter, the rendition of a judgment, or whatever agreed resolution is forthcoming. Unless the United States agrees to submit its rights under treaties and agreements to the dispute resolution forums of the Indian Nation(s) interested in that treaty or agreement to abide the result, how can it demand that the Indian Nations submit their rights under those documents to a court of the United States? Of course my courts, staffed by my officers, and applying my laws will do justice to you.

Let us find a mutually agreeable solution to the interpretation of these contracts so that these contractual obligations can be fulfilled in an honest and transparent manner. Many models exist from which to chose. There are, of course, the traditional international forums such as the International Court of Justice,<sup>138</sup> the Inter-American Court of Human Rights and others.

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136. 2006 U.N. Draft Declaration, *supra* note 1, at 16.

137. For instance, some tribes view attempts by the United States to pay compensation to tribes through mechanisms such as the Indian Claims Commission as, at best, an interim payment of rent for lands wrongfully taken, and, at worst, another method of confiscation since the tribes involved never had the option to regain their land. See section 70, of the Act of August 13, 1946, ch. 959, § 1, 60 Stat. 1049, which established the Indian Claims Commission. The Commission terminated on Sept. 30, 1978.

138. Created by Chapter 14 of the Charter of the United Nations.

In addition, there are various arbitration models, such as that provided by the World Bank for investors in developing countries, as well as institutions such as the Permanent Forum on Indigenous Issues of ECOSOC,<sup>139</sup> which could, perhaps, serve as a model for the development of an agreed dispute resolution mechanism that would be satisfactory to both parties. There also now exist a number of internationally known experts with human rights and indigenous peoples experience who could serve as facilitators, mediators, or arbitrators in their personal capacities. Regardless of the choices made, if Indian Nations and the United States are ever going to resolve the issues regarding the treaty commitments between them, a good faith dispute resolution process must be developed that is transparent, satisfactory to both parties, and controlled by neither.

Of course, an additional consideration would be the negotiation and ratification of new treaties. The provision by which the United States ended the classical treaty era is constitutionally suspect,<sup>140</sup> but that is not the most compelling reason to revitalize treaty making with the Indian Nations. It would seem that the natural process for Indian Nations to give free, prior, and informed consent to State action, and by which the United States would accept such consent or give consent to Tribal action (as is done, for instance with reallocation of funds under self-governance compacts), would generally be in the form of a contract between the sovereigns, or as a diplomatic note in furtherance of an agreement already made. In order to avoid the issues provided by the *Lone Wolf* decision and the legacy that the plenary power doctrine has left to us, it would seem useful to make sure that agreements respecting agreed resolutions of issues respecting former treaties and agreements, as well as mutually beneficial agreements for the future, should be carefully conceived and structured so as to guarantee that they are mutually acceptable before they are considered binding. One way to go about this is by compliance with the internationally known and respected rules of treaties. The concerns of the House of Representatives that led to the statutory ban on treaty making could be addressed by having the funding for each treaty be approved by an act of Congress prior to its negotiation. Alternatively, agreements could be denominated as a “convention,” or by some other term for an instrument which requires mutual consent for its validity, but it must clearly not be done in a unilateral manner which will return to the troubles of the past.

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139. The Economic and Social Council, created by Chapter 10 of the Charter of the United Nations.

140. 25 U.S.C. § 71 (2000). How can the legislative branch prohibit the treaty-making branch from exercising its constitutional function?

Once agreement is reached concerning the boundary between the United States and an Indian Nation by negotiation or a dispute resolution process, the next issue of moment will be the consolidation of the lands within that territory into Indian title.<sup>141</sup> The United States has passed several statutes for the purpose of Indian land consolidation, but it is apparent that the federal government has something different in mind than do tribal leaders. Reviewing the land consolidation acts adopted by the federal government reveals that by and large they are designed to reduce fractionated heirship of allotted trust and restricted properties to the point that each such property may be beneficially used or to return such lands to tribal ownership.<sup>142</sup> Tribal leaders who think about Indian land consolidation, however, usually are thinking about how to reacquire ownership of all lands within the reservation—and primarily those which are held by non-Indians. Thus, there seems to be a disconnect between the goals of the Interior Department and the goals of tribal leadership. Neither goal is necessarily bad, but they are different.

Again, the Draft Declaration can be looked to for guidance. At Article 28, it provides:

Article 28

1. [Indian] peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.<sup>143</sup>

By the provisions of this article, three principles emerge. First, there is a right of redress, for all lands confiscated, taken, occupied, used or damaged

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141. It should be noted that within the Indian Land Consolidation Act, the concept of an approved land consolidation plan could also be modified to provide a useful tool for the agreed establishment of a territorial base for tribes which have none, tribes whose territorial base is demonstrably too small for their reasonable development, and circumstances where a tribe needs to obtain access to sites in its traditional homeland for religious, ceremonial, or other purposes due to its removal to a different location, or in the situation where a tribe desires to remove from its present location for the purpose of returning to the original homeland from which it has been removed. 25 U.S.C. § 2203 (2000).

142. 25 U.S.C. §§ 2201-2307 (2000).

143. 2006 U.N. Draft Declaration, *supra* note 1, at 13.

without the free, prior and informed consent of the Indian Nation concerned. Second, that redress should include restitution of the land taken to the greatest extent possible. For many Indian tribes, land is not a fungible resource to be acquired and disposed of for the purpose of profit. Third, barring the free, prior, and informed consent of the Indian Nation to the contrary, the right of compensation should take the form of replacement lands, territories, and resources of equal quality, size, and legal status of the lands which cannot be returned, or for damages that cannot otherwise be remedied. In other words, if the United States or one of its political subdivisions is going to condemn lands of an Indian Nation, then “just compensation” as that term is used in the Fifth Amendment, should be interpreted to mean equivalent lands which the acquiring governmental entity should condemn from its own citizens (with full payment in money, of course) in order to make restitution to the tribe in land. Only in a circumstance where this “exchange” of land is made freely available as an option for the tribe, would a payment of money in lieu of land be ethically satisfactory as a freely chosen option by the Indian Nation.

These considerations take our discussion back to the land consolidation issue—from the tribal perspective. Regardless of the merits of the various arguments concerning the legitimacy of the allotment process *in toto*, its application in particular, or the agreements negotiated in lieu of allotment under the General Allotment Act, tribal leaders seek a method of reacquisition of lands within their tribe’s territorial areas that is transparent, reasonably simple, and not subject to inordinate delays through withholding or denial of administrative action. The free development and redevelopment of tribal economies, social, and cultural systems all depend primarily upon having a land base within the tribe’s exclusive jurisdiction.

Tribes to whom the Indian Reorganization Act applies, and who have obtained a federal charter of incorporation including the right to “purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of”<sup>144</sup> lands may, of course, do so, and it appears from the fourth paragraph of Section 5 of the Indian Reorganization Act (IRA)<sup>145</sup> that all such lands shall be taken (by the tribe’s approval process) in the name of the United States in trust for the tribe,<sup>146</sup> and that such land shall be exempt from state and local taxation.<sup>147</sup> The authorizing statute states:

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144. 25 U.S.C. § 477 (2000).

145. 25 U.S.C. § 465 (2000).

146. This is similar to the authority vested in the Tennessee Valley Authority, another federally chartered corporation, to acquire land which will then be held by the United States for the TVA and operated subject to the authority of the TVA. 16 U.S.C. § 831c(h).

147. *Id.*; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: Provided, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefore interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.<sup>148</sup>

This provision, once activated in a charter, if it is accepted at face value by the courts,<sup>149</sup> authorizes tribal land acquisition without further approval by the Interior Department subject to any limitations expressed in the Charter, authorizes the acquisition of trust and restricted Indian lands, and authorizes the tribe to issue “interests in corporate property” in exchange for land. Presumptively, a tribe could revive or create its own land tenure system, and the patent to be issued under tribal law would be the “interest in corporate property” which would be exchanged for the title to the property acquired. Lands within the reservation, once acquired, could not be sold (presumptively absent consent of Congress in a later statute) in any manner which was cognizable in state or federal law, although conveyances pursuant to tribal law would be unaffected.

Such an acquisition would also, apparently, render such properties Indian Country as they would have been acquired with the approbation of Congress and the Executive branch.<sup>150</sup> However, these provisions may not be available to tribes who excluded themselves from the IRA pursuant to that Act,<sup>151</sup> and the Osage, who are expressly precluded from both the IRA and the Oklahoma Indian Welfare Act (OIWA).<sup>152</sup> This is also an

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148. 25 U.S.C. § 477 (2000).

149. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

150. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991).

151. The Act of June 18, 1934, ch. 576, § 18, 48 Stat. 988 (codified at 25 U.S.C. § 478 (2000)), allowed tribes to exclude themselves from the Act. The election was to be called within two years after enactment of the statute, and there does not appear to be any mechanism for a tribe who voted against the Act to accept its application now.

152. *See Act of June 18, 1934, ch. 576, § 13*, 48 Stat. 986 (amended by the Act of May 24, 1990, Pub. L. No. 101-301, § 3(b), 104 Stat. 207, codified at 25 U.S.C. § 473 (2000)). Although

extremely important provision given the anecdotal reluctance of the Secretary of the Interior to accept additional lands into trust for Indian tribes and individuals due to the Cobell litigation.<sup>153</sup> This case, which has been pending for many years, requests an accounting for years of federal mismanagement of Indian trust assets, both real and personal. Of course, if the Secretary holds, or chooses to acquire trust properties pursuant to the first paragraph of section 5 of the IRA,<sup>154</sup> his/her trust responsibilities are extensive. On the other hand, when the tribe places property in trust pursuant to its authority under section 17 of the IRA<sup>155</sup> and its charter, the trust responsibility of the United States is extremely limited as set out in that section.

All tribes should have the authority to reacquire the lands within their territorial boundaries,<sup>156</sup> they should thereafter have exclusive jurisdiction to tax such lands and to control the laws pursuant to which such lands are to be used. Application of these provisions to all tribes could begin the process by which a partial right of redress is extended to all tribes pursuant to Article 27 of the Draft Declaration. Express recognition of the authority of all tribes to acquire lost lands within their territorial boundaries in the open market, that such lands are exempt from state and local taxation, that private interests and the income earned from those lands would be exempt from state and local taxation (as are allotted lands), that all interests in such lands thereafter would be governed exclusively by the laws of the tribe, and that all conveyances, leases, probates and other matters respecting such lands would be matters of exclusive tribal concern to be resolved exclusively in the tribal forums, could be a form of redress under Article 28 of the Draft Declaration that could be attractive to the United States, the Indian Nations, and individual landowners within the territories of tribal interest. Since the

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this section provided that certain named sections of the IRA (including 25 U.S.C. § 477, but not including 25 U.S.C. § 465) did not apply to a list of named tribes in Oklahoma, the Act of June 26, 1936, ch. 831, § 3, 49 Stat. 1967 (codified at 25 U.S.C. § 503), authorized the Secretary of the Interior to issue a charter to those same tribes in Oklahoma, which charter could convey to that tribe all the powers which § 13 of the IRA denied. *See* *Sac and Fox Nation v. Norton*, No. CIV-05-1234-R, Slip Op. (W.D. Okla., Sept. 15, 2006). However, the Osage tribe was precluded from obtaining a charter under said § 503 by § 8 of the OIWA, 25 U.S.C. § 508 (2000).

153. *Cobell v. Kempthorne*, No. 1:96CV01285 (D.D.C.) (pending).

154. 25 U.S.C. § 465 (2000).

155. 25 U.S.C. § 477 (2000).

156. The United States has long recognized the right of tribes to exercise the power of condemnation over Indian property within the tribal territory whether a tribal assignment of land, or an allotment held by the United States for an individual Indian. Sol. Op. M-27810, December 13, 1934, reprinted in *I Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974*, 484 (Question 9) (USGPO). Although this opinion assumes that Indian Nations cannot condemn the property of non-Indians, no rational reason is presented in support of that assumption. Given a payment of just compensation, no reasoned exception seems to be justified.

state and local governments would no longer be responsible for provision of services on such lands, it would seem that any claim they continued to promote respecting taxation or jurisdiction over such lands would be without merit. Finally, there would be nothing which would preclude a tribe entering into appropriate agreements either to provide or receive services relative to other governments, and to pay or receive compensation for the same. Treating the restitution of tribal lands as a process seems to be a method of resolving some of the issues of land rights to the satisfaction of all relevant parties.

Epilogue:

At the General Assembly of the United Nations this fall, the representative of the Island State of Tuvalu made the following statement:

Joining the United Nations at the dawn of the new century for my small island nation is a statement of hope. Hope that by the noble ideals and principles of this Great Body, and despite our physical remoteness and insignificance, Tuvalu will be allowed to paddle its canoe in harmony along with super-tankers and share the common future of a world of larger freedom: a world in which every State regardless of its size is recognized of its sovereignty, independence, and human rights.<sup>157</sup>

The fifteen smallest countries in the world are:<sup>158</sup>

<b>Rank</b>	<b>Country</b>	<b>Sq. Miles</b>	<b>Population</b>
1.	Vatican City	0.2	770
2.	Monaco	0.7	30,000
3.	Nauru	8.5	10,000
4.	Tuvalu	10	12,100
5.	San Marino	24	25,000
6.	Liechtenstein	62	29,000
7.	Marshall Islands	70	52,000
8.	St. Kitts & Nevis	104	41,000
9.	Seychelles	107	69,000
10.	Maldives	115	181,000
11.	Malta	122	362,000
12.	Grenada	133	98,000
13.	St. Vincent & the Grenadines	133	109,000
14.	Barbados	166	260,000
15.	Antigua & Barbuda	171	83,000

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157. Statement by His Excellency Mr. Enele Sosene Sopoaga, Ambassador / Permanent Representative of Tuvalu to the United Nations as a part of the General Debate of the 61st United Nations General Assembly, Sept. 27, 2006, <http://www.un.org/webcast/ga/61/pdfs/tuvalu-e.pdf> (last visited Sept. 28, 2006). Tuvalu's "population of 11,636 (est. 2005) live on Tuvalu's nine atolls, which have a total land area of 10 square miles, or 27 square kilometres [about 6,400 acres]. This ranks Tuvalu as the fourth smallest country in the world, in terms of land area." Tuvalu's Homepage, <http://www.tuvaluislands.com/about.htm> (last visited Sept. 28, 2006).

158. Official Tuvalu Website, <http://www.tuvaluislands.com/small-tv.htm> (last visited Sept. 28, 2006).

The small reservation on which I reside would be too large to be listed here. It contains approximately 750 square miles.<sup>159</sup>

Perhaps one day, an Indian tribal State, as a dependant enclave within the United States, will be able to stand with the representative of Tuvalu, and compare our paddles before we address the General Assembly.

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159. Treaty with the Sauk and Foxes, Article VI, Feb. 18, 1867, 15 Stat. 495 (Ratified July 25, 1868, Proclaimed Oct. 14, 1868).