

**Beyond Reparations: An American Indian Theory  
of Justice**

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*It is perhaps impossible to overstate the magnitude of the human injustice perpetrated against American Indian people: indeed, the severity and duration of the harms endured by the original inhabitants of the U.S. may well rival those suffered by any other group past or present, domestic or international. While financial reparations for certain past transgressions may be appropriate to some groups and situations, the historical and ongoing injustices committed against Indians living within the U.S. cannot be adequately understood in material terms. Although in recent decades various models of justice have been proposed in respect of a series of gross human injustices, incomplete and even erroneous understandings of the nature of Indian claims and an overly narrow conception of the potential parameters of remedial justice render these approaches ineffectual.*

*This Article presents a alternative theory of justice, termed “Justice as Indigenism” (JAI). As applied, JAI commits its practitioners to a sequential process consisting of seven distinct stages: acknowledgment, apology, peacemaking, commemoration, compensation, land restoration, legal reformation, and reconciliation. JAI advances the frontiers of thinking about justice on behalf of Indians in that its normative mission is not the award of material compensation or the attribution of blame but rather the ultimate healing of the American and Indian nations and the joint authorship of a peaceful and harmonious future.*

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## I. INTRODUCTION

“Although wrongs have been done me I live in hopes.”<sup>1</sup>

The number of states, corporations, and religious groups formally disowning past records of egregious human injustice is mushrooming.<sup>2</sup> Although the Age of Apology<sup>3</sup> is a global phenomenon, the question of reparations—a tort-based mode of redress whereby a wrongdoing group accepts legal responsibility and compensates victims for the damage it inflicted upon them<sup>4</sup>—likely consumes more energy, emotion, and resources in the U.S. than in any other jurisdiction. Since the final year of the Cold War, the U.S. and its political subdivisions have apologized or paid compensation to Japanese-American internees,<sup>5</sup> native Hawaiians,<sup>6</sup> civilians killed in the Korean War,<sup>7</sup> and African-American victims of

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<sup>1</sup> Black Kettle, Cheyenne, after the massacre of hundreds of Cheyenne by the U.S. Army at Sand Creek, Colorado, in 1864 at <http://www.pbs.org/weta/thewest/program/episodes/four/whois.htm> (last visited Mar. 9, 2005).

<sup>2</sup> See William Bradford, “*With a Very Great Blame on Our Hearts*”: *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 5–9 (2002/2003) (chronicling the global history of reparations).

<sup>3</sup> See WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 3 (Roy L. Brooks ed., 1999) (coining the phrase).

<sup>4</sup> Reparations is a mode of redress “where a guilty party makes up for an injustice by paying or otherwise benefiting a victim.” Samuel C. Wheeler III, *Reparations Reconstructed*, 34 AM. PHIL. Q. 301, 301 (1997).

<sup>5</sup> In 1942 all persons of Japanese ancestry resident in designated military exclusion zones in the Western U.S. were relocated to internment camps. See *Korematsu v. United States*, 323 U.S. 214, 218–23 (1944) (upholding internment based on “the judgment of the military . . . that there were disloyal members of [the Japanese American] population”). In 1988 the Civil Liberties Act finally granted each individual who was relocated, interned, or deprived of property \$20,000 and an apology from President Bush. Pub. L. No. 100-383, 102 Stat. 903 (1988) (codified as amended at 50 U.S.C. app. 1989(2)&b–4(i) (1988 & Supp. V. 1993)).

<sup>6</sup> See Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. 103-150, 107 Stat. 1510, 1513 (1993) (apologizing for the U.S. role in the forcible overthrow of the Hawaiian monarchy).

<sup>7</sup> Richard Pyle, *U.S. Commanders Told Troops to Shoot Korean Civilians*, MILW. SENTINEL, Nov. 25, 2001.

medical experiments,<sup>8</sup> racial violence,<sup>9</sup> and lending discrimination.<sup>10</sup> A barrage of lawsuits demanding reparations from slavery profiteers is on the dockets of several courts, and more are expected.<sup>11</sup> In the U.S., *circa* 2004, reparations is the topic not only of litigation but legislative proposals, academic and popular articles, news editorials, town hall meetings, campus demonstrations, television programs, office water cooler debates, dinner table conversations, and cyberchat groups. If reparations is not a uniquely American remedy, it is no stretch to say that in the U.S. “reparations talk”<sup>12</sup> is very much with us.

The phrase “reparations talk” is an understatement. “Reparations debate” better describes current social discourse over what to do about gross historical injustices. Although advocates maintain that reparations is the first step in recovering history and fashioning a more equitable collective future, critics describe a divisive and retrospective<sup>13</sup> movement threatening to widen racial and ethnic fault lines running through the American body politic. Consequently, reparative justice is hotly contested on doctrinal, political, and practical grounds: opponents reject the notion of collective harm and responsibility<sup>14</sup> for “ancient wrongs,”<sup>15</sup> deny linkages between the relative socioeconomic status of aggrieved

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<sup>8</sup> See Editorial, *Apologize but Don't Forget*, AUSTIN AMERICAN-STATESMAN, May 16, 1997 at A14 (African Americans denied medical treatment in syphilis study under federal auspices at Tuskegee Institute received compensation and presidential apology).

<sup>9</sup> In 1923 the black community of Rosewood, Florida was immolated by white rioters with the consent of public officials. Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 679–80 (1996). In 1994 House Bill 591 compensated nine survivors and created a scholarship fund for their descendants. C. Jeanne Bassett, *House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury*, 22 FLA. ST. U. L. REV. 503, 520–23 (1994).

<sup>10</sup> A class of African American farmers recently settled a suit against the U.S. Department of Agriculture, alleging failure to investigate discriminatory lending practices. Emily Newburger, *Breaking the Chain*, 52 HARV. L. BULL. 18–19 (Summer 2001), at 19.

<sup>11</sup> See Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051, 1065 (2003) (discussing these suits).

<sup>12</sup> See Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 497 (2003) (coining the phrase “reparations talk” to refer to a broadening discourse on reparations for gross historical injustices).

<sup>13</sup> See Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 692 (2003) (describing reparations as “backward-looking”).

<sup>14</sup> See *id.* at 698–99 (contrasting theories of group rights, or “ethical collectivism,” with the theory of “ethical individualism” that treats only individuals as the bearers of moral rights and duties).

<sup>15</sup> See Wheeler, *supra* note 4, at 301.

racial minority groups and past injustices,<sup>16</sup> and cling to limiting doctrines that deny remedies for acts and omissions that were lawful centuries ago.<sup>17</sup> Reparations thus fuel unresolved debates over the nature of minority disenfranchisement, the adequacy of civil rights legislation,<sup>18</sup> the constitutionality of group entitlements, the ideal racial distribution of socioeconomic power, and the appropriate channel to pilot between the pursuit of racial justice and the preservation of social peace.<sup>19</sup> Moreover, because a successful reparations movement might awaken other dormant claims, reparations debates generate resistance<sup>20</sup> and backlash.<sup>21</sup>

Still, even if it can be realized only at the price of social unrest and the painful reopening of old wounds, reparations may well be the appropriate remedy in the

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<sup>16</sup> See Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 643 (1993) (summarizing arguments denying that present African-American economic deprivation is caused by slavery).

<sup>17</sup> For a much more detailed analysis of doctrinal objections to reparations lawsuits see Bradford, *supra* note 2 at 78–91. For a philosophical examination of hostility to reparations, see generally HANOCH DAGAN, *THE FOURTH PILLAR: THE LAW AND ETHICS OF RESTITUTION* (2003).

<sup>18</sup> Critics of reparations are adamant in their defense of the sufficiency of existing civil rights laws. See Tuneen Chisholm, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 704 n. 160 (1999) (“[M]ost of my African American friends and advisors don’t believe that we should get into what was essentially a press story about whether there should be an apology for slavery in America. They think . . . we need to be looking toward the future.”) (quoting Interview by EBONY, JET, and American Urban Radio Network with President William J. Clinton, Cape Town, South Africa (Mar. 27, 1998) (first alteration in original)).

<sup>19</sup> Heritage and life experience polarize the lens through which reparations is viewed. See Verdun, *supra* note 16, at 646 (“What is obviously right to the opponent of reparations is clearly wrong to the reparatationist.”). For a detailed discussion of political and philosophical objections to reparations, as well as counter-arguments, see generally Gregory Kane, *Comment: Why the Reparations Movement Should Fail*, 3 MARGINS 189 (2003).

<sup>20</sup> Politics is a numbers game, and a white majority strongly disfavors reparations. See generally Lee A. Harris, “Reparations” as a Dirty Word: *The Norm Against Slavery Reparations*, 33 U. MEM. L. REV. 409 (2003); Alfred L. Brophy, *The Cultural War Over Reparations for Slavery*, 53 DEPAUL L. REV. 1181, 1184 (2004) (citing surveys indicating that as few as four percent of whites support reparations for slavery, compared to 67% of African-Americans).

<sup>21</sup> See Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 19 B.C. THIRD WORLD L.J. 477, 494 (1998) (noting that demands for reparations trigger “regressive reactions,” rooted in fear of reduction in relative social advantage, by the dominant social group); see generally DAVID HOROWITZ, *UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY* (2002) (condemning reparations as “socially destructive” and “un-American”).

case of specific meta-wrongs, foremost among them slavery.<sup>22</sup> A significant element in the slavery reparations claim is the lost value consequence of the unpaid labor extracted from slave ancestors,<sup>23</sup> and thus it is logical that, with few exceptions,<sup>24</sup> proponents of slavery reparations equate the remedy with financial compensation.<sup>25</sup> Although money cannot undo history, it can ameliorate the socioeconomic conditions of the descendants of former slaves, and money is the lodestar of most reparatationists.<sup>26</sup>

However, justice is not a one-size-fits-all commodity, and the potential suitability of compensatory remedies to the harms absorbed by any particular group is not dispositive of, nor even instructive in regards to, the question of whether reparations is appropriate for other claimant groups. Slavery is not the sole, the first, nor even, arguably, the most egregious historical injustice for which the U.S. bears responsibility.<sup>27</sup> Moreover, cash is not the primary, or even an important, objective of some aggrieved groups. Non-monetary modes of redress<sup>28</sup>

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<sup>22</sup>From 1619–1865, the enslavement of Africans “hulled empty a whole race . . . . Every . . . custom, every ritual, every god, every language, every trace element of . . . identity, [was] wrenched from them and ground into a sharp choking dust.” RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 216 (2000). Slavery also stole the value-consequences of billions of man-hours of black labor. See CLARENCE J. MUNFORD, *RACE AND REPARATIONS: A BLACK PERSPECTIVE FOR THE 21ST CENTURY* 428 (1996) (claiming value of expropriated labor between \$96.3–\$97.0 billion).

<sup>23</sup>See, e.g., Charles J. Ogletree, Jr., *Reparations for the Children of Slaves: Litigating the Issues*, 33 U. MEM. L. REV. 245, 261 (2003) (explaining that the primary goal of reparative justice on behalf of the descendants of slaves is financial compensation).

<sup>24</sup>See generally, e.g., Lee A. Harris, *Political Autonomy as a Form of Reparations to African-Americans*, 29 S.U.L. REV. 25 (2001) (positing an independent African-American state, rather than money, as the proper form for reparations in redress of slavery); see also Thomas Bray, *Granholm Tries to Slip Reparations Hook*, DETROIT NEWS, Oct. 9, 2002, at 11A (reporting demand by Nation of Islam leader Louis Farrakhan for “millions of acres that black people can build”).

<sup>25</sup>For a discussion of contemporary African-American reparations theory, see generally Note, *Bridging the Color Line: The Power of African-American Reparations to Redirect America’s Future*, 115 HARV. L. REV. 1689 (2002).

<sup>26</sup>See, e.g., Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 470 (1998); Molefi Kete Asante, *The African American Warrant for Reparations: The Crime of European Enslavement of Africans and Its Consequences*, in *SHOULD AMERICA PAY?* 3, 12 (R. A. Winbush ed., 2003); Ogletree, *supra* note 24, at 261.

<sup>27</sup>See *infra* Part II (presenting the Indian claim for redress).

<sup>28</sup>Reconciliation, the primary paradigmatic challenger of reparations in the field of remedies for historical injustices, “aims to heal social wounds by bringing back into the community those wrongly excluded, essentially healing through restoration of the polity.” Eric K. Yamamoto et. al., *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1336 (2003). Although

may be more effective in inducing the national government to accept moral responsibility, in restoring the dignity and autonomy of injured groups, and in healing, reconstituting, and relegitimizing the nation.<sup>29</sup>

In other words, the specific claims posed by each aggrieved group bear examination and evaluation on their unique merits. Although the interests of groups may converge on particular issues and proposals emerging in reparations debates,<sup>30</sup> what suffices to make one group “whole” may be wholly inadequate for, or even harmful to, another. Prevailing theories of justice, even those drafted in good faith with the intent that they be universally applicable or at least readily malleable in transit from one application to another, may in fact be so bounded by the cultures and worldviews in which they were incubated that they are unable to recognize, capture, and remedy all the injuries inflicted upon the aggrieved group. Without judging its value as a remedy in general, reparations, as well as other theories of justice sketched and pitched at a high level of abstraction but without a comprehensive analysis of the context and history of the claims of the particular group in question, may, when applied, be useless at best and damaging at worst. Just as “all politics is local,”<sup>31</sup> so is all (in)justice.

For the indigenous peoples<sup>32</sup> who have inhabited, since time immemorial, the lands within the external borders of the U.S., remediation of historical injustice is a pressing issue. Despite this, reparations would fail to advance, and might even frustrate, important Indian objectives, primarily the reacquisition of the capacity to self-determine as autonomous political communities on ancestral lands. Because the immense injustice at the core of U.S. national history is neither broadly acknowledged nor deeply understood, Part II of this Article will provide some historical foundation and briefly sketch the necessary factual predicate to

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reconciliation may be augmented by compensation, its primary concerns are to encourage the dominant group to recognize moral responsibility, restore the dignity of the aggrieved minority group, and craft a more symmetrical distribution of economic, political, and legal power. *See generally* Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801 (1999).

<sup>29</sup> *See infra* Part IV.

<sup>30</sup> *See, e.g.*, Donald Laverdure, *An Indigenous Perspective of Brown v. Board of Education: A Historical Braid of Inequality*, 43 WASHBURN L. R. 285, 287 (2004) (suggesting that a “braid of inequality” suffered by both African-American and Indian peoples could lead to a “red-black interest convergence” on questions of remediation of past injustices) (referencing Derrick Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980)).

<sup>31</sup> The phrase is attributed to former Representative Thomas “Tip” O’Neill (D-Mass.), Speaker of the U.S. House of Representatives. *See* TIP O’NEIL, ALL POLITICS IS LOCAL: AND OTHER RULES OF THE GAME, xv–xvi (1994).

<sup>32</sup> Indigenous peoples are “descen[dants] of the populations which inhabited [a] country . . . at the time of conquest or colonisation.” Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, art 1.1.b, 28 I.L.M. 1382, 1384–85 [hereinafter ILO Convention No. 169].

the Indian<sup>33</sup> claim for redress. Part III will present and evaluate several theories of justice with respect to this claim. Part IV will counter these theories with an indigenist theory of justice intended to transcend the limitations of extant theories and accord the full measure of relief to Indian claimants consistent with the requirements of justice for all individuals and groups.

## II. The Indian Claim for Redress

“I want to tell you this, because I believe if you know it you will correct the evil.”<sup>34</sup>

The brutal reality of invasion, slavery, forced relocation, genocide, land theft, ethnocide, and forcible denial of the right to self-determination has not percolated deeply into contemporary understandings of U.S.-Indian history. The role of the U.S. in the deliberate destruction of Indian populations, property rights, and cultural patrimonies is for most Americans a hidden history that must be revealed and asserted as a factual predicate supporting redress before theories of justice can be evaluated.<sup>35</sup>

### A. Genocide: “*The Metaphysics of Indian-Hating*”<sup>36</sup>

#### 1. Conquest

In May 1493 Pope Alexander VI called upon Spanish *conquistadores* to discover and conquer new lands in the Americas in order to draw “barbarous

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<sup>33</sup>“Indian,” “Indians,” and “Indian tribe(s)” denote the indigenous inhabitants of the U.S. in the singular, plural, and collective forms. James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT’L & COMP. L. REV. 55, 55 (1997). “‘Native American’ is a [“politically correct”] term . . . [that] perpetuates colonial efforts to subordinate indigenous sovereignty to mere ethnicity, as in the case of African-Americans or Irish-Americans.” Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 237 at n.7 (1997).

<sup>34</sup>Little Raven, Arapaho, *quoted in*, JOYCE SEQUICHIE HIFLER, II, *A CHEROKEE FEAST OF DAYS* (1999), *excerpted at* [http://thunder-fox.com/DailyFeast/2004\\_09\\_01\\_archive-DailyFeast.html](http://thunder-fox.com/DailyFeast/2004_09_01_archive-DailyFeast.html) (last visited Mar 7, 2005).

<sup>35</sup>Most Americans are ignorant of the dark history of U.S.-Indian relations. *See* VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS*, *AMERICAN JUSTICE* 102 (1983) (describing knowledge of U.S.-Indian relations as limited).

<sup>36</sup>The phrase is the title of a book chapter from a Melville novel that propounds the view that U.S.-Indian policy is a confidence game with the government the confidence-man and U.S. citizens, ignorant of the genocide ongoing against the Indian population, the dupes. *See* HERMAN MELVILLE, *THE CONFIDENCE-MAN MASQUERADE* ch. XXVI (1857).

nations” to the Christian faith.<sup>37</sup> The subsequent invasion of the Western Hemisphere, predicated upon a jurisprudential assumption that the indigenous inhabitants were a distinctly inferior species,<sup>38</sup> was governed by the legal principles of discovery<sup>39</sup> and conquest. As a matter of existing international law, a nation became sovereign of territory its agents “discovered” provided it subjugated the population and annexed its lands.<sup>40</sup> Although prudence restrained pre-eighteenth century aggression in what became the U.S.,<sup>41</sup> conquest was eventually applied in all the Americas, and the period subsequent to first contact is notorious as the “Age of Genocide.”<sup>42</sup>

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<sup>37</sup> See WILCOMB E. WASHBURN, *RED MAN’S LAND / WHITE MAN’S LAW: THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN* 5 (2d ed. 1995) (citing *Inter Caetera*).

<sup>38</sup> Donald Juneau, *The Light of Dead Stars*, 11 AM. INDIAN L. REV. 1, 8 (1983).

<sup>39</sup> The international legal fiction of “discovery” bestowed occupancy and exclusive negotiating rights to impair the title of a “discovered” Indian nation upon a so-called discovering European nation. Although Europeans initially affirmed the collective rights of indigenous peoples, once European military superiority was established state sovereignty trumped claims to collective rights, and indigenous peoples were relegated to the status of minorities devoid of legal personality and entitled to protection only as individuals within states. See Lawrence Rosen, *The Right to Be Different: Indigenous Peoples and the Quest for Unified Theory*, 107 YALE L. J. 227, 242 (1997). By fiat, discovery permitted colonial powers to construct mutually exclusive spheres of influence and thereby prevent internecine conflicts. See *Johnson v. M’Intosh*, 21 U.S. 543, 573 (1823).

[I]t was necessary, in order to avoid . . . war . . . to establish a principle, which all should acknowledge as the law by which the right of acquisition . . . should be regulated. . . . This principle was, that discovery gave title to the government by . . . whose authority, it was made, against all other European governments, which title might be consummated by possession.

*Id.* Although the discovery doctrine impaired Indian title only via allocation of spheres of influence, it provided colonial nations sufficient time and space to survey, claim, and defend footholds in what became the United States.

<sup>40</sup> See Juneau, *supra* note 38, at 8. However, the right to acquire territory by conquest was not theoretically absolute: a “conquering” state only gained recognizable rights to land if it entered armed struggle defensively, and as empire-building expeditions did not qualify as defensive wars, lands obtained thereby did not qualify as legitimately conquered. See Lesley Karen Friedman, *Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts*, 14 HAWAII L. REV. 519, 560 (1992). In practice, however, the legal proscription against conquest was circumvented by claims to self-defense buttressed by papal imprimatur.

<sup>41</sup> See *THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880S* 190 (Sandra L. Cadwalader & Vine Deloria, Jr. eds., 1994) (noting pre-nineteenth century European “conquerors” would have been handily defeated); *M’Intosh*, 21 U.S. at 590 (Marshall, C.J.) (“Indians . . . were fierce savages, whose occupation was war . . . [T]hey were as brave and as high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence.”).

<sup>42</sup> See DAVID E. STANNARD, *AMERICAN HOLOCAUST* 55–146 (1992).

## 2. Slavery

In the aftermath of conquests, colonizers offered financial incentives to corporate slavers to create bounties between tribes, facilitating a divide and conquer strategy that served territorial objectives while providing free Indian slave labor to developing economies.<sup>43</sup> Although Indian slavery had largely discontinued in favor of African-American slavery by the early nineteenth century, Californian Indians, as late as the early twentieth century, were regularly raided by slave-hunters looking for men to work in mines and women to work in brothels<sup>44</sup> and extermination befell many who resisted.<sup>44</sup>

## 3. Ethnic Cleansing<sup>45</sup>

The precise number of Indian victims of the genocide<sup>46</sup> committed by Euro-American colonizers over the past half-millennium evades quantification. Estimates of the pre-Columbian indigenous population in what later became the U.S. range from five to ninety-four million,<sup>47</sup> yet by 1880 disease,<sup>48</sup> slaughter,

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<sup>43</sup> BROOKS, *supra* note 3, at 242 (stating that “Indian slavery was . . . an integral part of the colonial economy”).

<sup>44</sup> See Mathew Atkinson, *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 OKLA. CITY U. L. REV. 379, 389 (1998). For a detailed discussion of Indian slavery, see generally L.R. BAILEY, *INDIAN SLAVE TRADE IN THE SOUTHWEST: A STUDY OF SLAVE-TAKING AND THE TRAFFIC IN INDIAN CAPTIVES* (1966); CAROLYN THOMAS FOREMAN, *INDIANS ABROAD 1493–1938*, 3–21 (1943).

<sup>45</sup> See Ibrahim Gassama, *Transnational Critical Race Scholarship: Transcending Ethnic and National Chauvinism in the Era of Globalization*, 5 MICH. J. RACE & L. 133, 143 (1999) (applying to U.S.-Indian relations the euphemism “ethnic cleansing,” coined during Bosnian war to describe violent depopulation by one ethnic group of a territory populated by another).

<sup>46</sup> See Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, 78 U.N.T.S. 277 (entry into force Jan. 12, 1951) (hereinafter “Genocide Convention”), at art. II (defining genocide as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”).

<sup>47</sup> See James P. Sterba, *Understanding Evil: American Slavery, the Holocaust, and the Conquest of the American Indian*, 106 ETHICS 424, 424–25, 438, 440. (1996) (stating that between seventy-four and ninety-four million Indians died during conquest of the Americas and comparing this number with the number of African-Americans who perished during slavery—forty to sixty million—and the number of Jews killed in the Holocaust—six million).

<sup>48</sup> See generally JARED DIAMOND, *GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES* (1999) (describing introduction of European diseases against which Indians had no

slavery, and aggressive wars had reduced their number to as few as 300,000—and declining.<sup>49</sup> Although luminaries, such as President Thomas Jefferson, denounced the genocide as it unfolded,<sup>50</sup> the prevailing racial ideology reassured the public that the disappearance of an inferior people before the U.S. continental advance was a “historical and scientific inevitability.”<sup>51</sup> Initially, a legislative approach effected physical removal of Indian people from ancestral lands; however, when this proved inefficient,<sup>52</sup> measures more clearly within the inherent powers of the executive and therefore less susceptible to judicial review were devised.<sup>53</sup> Indian genocide became official policy of the political subdivisions of the U.S.<sup>54</sup>

In the aftermath of the Civil War the might of the U.S. Army was directed toward Indian eradication. Contractors induced deliberate starvation by

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immunities); RUSSELL THORNTON, *AMERICAN INDIAN HOLOCAUST AND SURVIVAL* (1992) (providing demographic data on destruction by disease of Indian populations).

<sup>49</sup> See Lenore A. Stiffarm & Phil Lane, Jr., *The Demography of Native North America: A Question of American Indian Survival*, in *THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE* 23, 26, 36 (M. Annette Jaimes ed., 1992).

<sup>50</sup> See, e.g., THOMAS JEFFERSON: WRITINGS 1313 (Merrill Peterson, ed., 1984).

[T]he extermination of this race in our America is therefore to form an additional chapter in the history of the same colored man in Asia, and of the brethren of their own color in Ireland, and wherever else Anglo-mercantile cupidity can find a two-penny interest in deluging the earth with human blood.

*Id.* (reprinting personal letter of Thomas Jefferson, Nov. 6, 1813).

<sup>51</sup> See REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLI-SAXONISM* 6 (1981).

<sup>52</sup> Of the many forcible relocations, the removal of the Cherokee Nation from ancestral homes in the Eastern Woodlands is perhaps the most infamous. With a federal statute explicitly overruling a contrary Supreme Court opinion, the entire Cherokee Nation was forced, in the dead of winter, on a 1000-mile “Trail of Tears” trek to Oklahoma. See Indian Removal Act of May 28, 1830, ch. 148, 4 Stat. 411 (overruling *Cherokee Nation v. Georgia*, 30 U.S. 1, 1 (1831)) (holding Cherokee were entitled to retain possessory interest and to exercise reserved rights under treaties of peace). Gloating after passage of the Indian Removal Act, President Jackson reportedly remarked, “Marshall has made his decision let him enforce it now.” FERGUS M. BOREWICH, *KILLING THE WHITE MAN’S INDIAN* 47 (1996). More than 4000 Cherokee died during the Trail of Tears. *Id.*

<sup>53</sup> See *id.* at 44–45 (quoting Georgia Governor Wilson Lumpkin) (“Our government over that [Indian] territory, in order to be efficient, must partake largely of a military character, and consequently must be more or less arbitrary and oppressive . . .”).

<sup>54</sup> See Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713, 718 (1986) (listing passages by state legislatures of resolutions legalizing murder of Indians); see also STANNARD, *supra* note 42, at 142–46 (noting that several U.S. states legalized murder of Indians). Introduction of diseases to effect Indian deaths, although initially indeliberate when carried by infected “discoverers,” constituted genocide, as the crime is now defined, when deliberately transmitted. See *Genocide Convention*, *supra* note 46.

destroying the buffalo,<sup>55</sup> yet Indian tenacity necessitated more direct applications of force.<sup>56</sup> One by one, tribes were hunted, pursued, cornered, and murdered.<sup>57</sup> A series of “massacres” were written in Indian blood on the pages of American history: Blue River (1854), Bear River (1863), Sand Creek (1864),<sup>58</sup> Washita River (1868), Sappa Creek (1875), Camp Robinson (1878), Wounded Knee (1890), and over forty others.<sup>59</sup> Gruesome exterminations of defenseless women and children were perfectly legal exercises of State and federal authority as the law then stood.<sup>60</sup> By the conclusion of the “Indian Wars” in 1886,<sup>61</sup> aggression and disease had reduced the pre-Columbian Indian population as much 98%,<sup>62</sup> and an Indian-free U.S. was a possibility.<sup>63</sup> Although radical depopulation of

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<sup>55</sup> See Steven J. Prince, *The Political Economics of Articulation: Federal Policy and the Native American/Euroamerican Modes of Production* 186 (1993) (unpublished Ph.D. dissertation, University of Utah) (on file with University of Utah Library) (noting by the 1870s many thousands starved due to deliberate buffalo eradication programs).

<sup>56</sup> Most Indian tribes were not passive subjects of genocide during the dark decades of the 1870s and 1880s. Courageous armed resistance earned Indian warrior-heroes the begrudging admiration of adversaries. As General George Crook, a famed “Indian fighter” commented in 1873, “[t]he American Indian commands respect for his rights only so long as he inspires terror for his rifle.” <http://www.glendonswarthout.com/screenplays/sergeantsladyexcerpt.htm> (last visited Mar. 9, 2005).

<sup>57</sup> See Atkinson, *supra* note 44, at 389. Aggressive Indian Wars of the nineteenth century—campaigns intended to depopulate territory as prelude to annexation—clearly satisfy the element of deliberate killing of persons belonging to a protected class.

<sup>58</sup> In one of the most brutal incidents of genocide on U.S. soil, 133 Cheyenne and Arapaho women and children were murdered in the village of Sand Creek, Colorado on Nov. 29, 1864, by Col. Chivington and seven hundred troops of the U.S. Cavalry. See generally STAN HOIG, *THE SAND CREEK MASSACRE* (1961).

<sup>59</sup> Atkinson, *supra* note 44, at 391.

<sup>60</sup> See generally Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13 (1990) (describing collusion of law and force producing one such massacre-by-law).

<sup>61</sup> In 1886 the surviving three hundred members of the Chiricahua Apache, suffering from disease, starvation, and the murder of over three thousand of their number, became the last Indian tribe to surrender. DONALD E. WORCESTER, *THE APACHES: EAGLES OF THE SOUTHWEST* 167 (1979). The entire tribe was incarcerated for a generation in military prisoner-of-war camps in which the population was reduced to less than half by disease, hunger, and exposure. See RICHARD J. PERRY, *APACHE RESERVATION: INDIGENOUS PEOPLES AND THE AMERICAN STATE* 119–59 (1993) (chronicling Chiricahua Apache conflict, surrender, incarceration, relocation, and genocide). Upon their release in 1913, the Chiricahua were divided in two and relocated to reservations far from ancestral lands and surrounded by traditional rivals. See MICHAEL LIEDER & JAKE PAGE, *WILD JUSTICE: THE PEOPLE OF GERONIMO VS. THE UNITED STATES* 49 (1997).

<sup>62</sup> Sterba, *supra* note 47, at 430.

<sup>63</sup> Though a fraction of the pre-contact Indian population survived, the remainder were corralled on reservations, many infested with vermin and disease and lacking in adequate

Indian land, particularly in the latter half of the nineteenth century, may have functioned primarily as an efficient means to facilitate the annexation of territory, the U.S. nonetheless committed genocide in overtly manifesting a clear intent to kill, and killing, Indians as such.<sup>64</sup>

### B. *Land Theft*<sup>65</sup>

The relationship between the land and Indian people is fundamental to their physical and cultural survival as distinct, autonomous groups. Indian land is constitutive of the Indian cultural identity<sup>66</sup> and designative of the boundaries of the Indian cultural universe.<sup>67</sup> Long before first contact with European “discoverers,” Indians proclaimed a sacred responsibility to preserve and transmit Indian land, and with it identity, religion, and culture, to successive generations.<sup>68</sup>

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shelter and food. Desperate reservation populations were initially forbidden to depart by illegal threats of renewed military force. *See* United States ex rel. Standing Bear v. Crook, 25 F. Cas. 695, 700–01 (C.C.D. Neb. 1879) (No. 14, 891) (holding, contrary to position of War Department, that Indians are “persons within the meaning of the law” with rights to protest and move freely throughout the U.S.).

<sup>64</sup> *See* Genocide Convention, *supra* note 47, at art. II. Forced sterilization of Indian women in BIA health clinics also constituted genocide within the meaning of the Convention. *See* THOMAS M. SHAPIRO, POPULATION CONTROL POLITICS: WOMEN, STERILIZATION, AND REPRODUCTIVE CHOICE 91 (1985) (noting routine sterilization of over one thousand Indian women per year by the Indian Health Service); Lindsay Glauner, Comment: *The Need for Accountability and Reparation: 1830–1976 The United States Government’s Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911, 939–40 (2002) (describing covert sterilization of up to 42% percent of Indian women of childbearing age between 1930 and 1976) (citing Bill Wagner, *Lo, The Poor and Sterilized Indian*, AMERICA 75 (1977)).

<sup>65</sup> *See* ALASDAIR MCINTYRE, AFTER VIRTUE 13–14 (1990) (“The property-owners of the [U.S.] are not the legitimate heirs of Lockean individuals who performed. . . . acts of original acquisition; they are the inheritors of those who . . . used violence to steal . . . vast tracts . . .”).

<sup>66</sup> *See* VINE DELORIA, JR., GOD IS RED: A NATIVE VIEW OF RELIGION 122 (2d ed. 1992) (“Indian tribes . . . identify their origin as a distinct people with a particular geographic site. This origin place—which may be a river, mountain, plateau, or valley—becomes a central and defining feature of the tribe’s religion and cultural world view . . .”).

<sup>67</sup> Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1640 (2000).

<sup>68</sup> *See* THE QUEST FOR JUSTICE: ABORIGINAL PEOPLE AND ABORIGINAL RIGHTS 22–23 (Menno Boldt & J. Anthony Long eds., 1985) [hereinafter Boldt & Long] (“Our aboriginal responsibility is to preserve the land for our children.”). So sacred is the Indian obligation to preserve the tribal landbase for future generations that the loss of Indian land, and the severance of links to ancestors, religion, and culture, is universally deemed the ultimate catastrophe. *See* DALE VAN EVERY, DISINHERITED: THE LOST BIRTHRIGHT OF THE AMERICAN INDIAN 239 (1966).

The discharge of that responsibility has been compromised by U.S. policies of land acquisition ranging from fraud to outright theft.

Throughout the seventeenth and early eighteenth centuries, prudence directed Euro-Americans to formally recognize militarily potent Indian tribes as independent sovereigns and accord them diplomatic recognition.<sup>69</sup> The Euro-American foothold in North America remained tenuous and ongoing military insecurity stymied territorial ambitions while stifling any notions of conquest. Moreover, U.S. land hunger was largely sated by available space within the original thirteen colonies and most land acquisitions from Indian tribes were of necessity accomplished by treaties of cession<sup>70</sup> after peaceful negotiations.<sup>71</sup> Still, if during its first several decades of existence the fledgling U.S. was obliged to recognize the sovereignty of Indian nations and to respect Indian land titles as a matter of international and domestic law,<sup>72</sup> from the moment of its creation the

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<sup>69</sup> See William N. Fenton, *Leadership in the Northeastern Woodlands of North America*, 10 AM. INDIAN Q. 21, 81 (1986).

<sup>70</sup> For Indian tribes, entry into treaty relations with the U.S. was a sacred act undertaken to secure mutual advantages as well as create kinship bonds of peace and friendship. See ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800*, 112 (1997) (describing U.S.-Indian treaties as “multicultural agreements that impart duties of good faith and fair dealing”). For the U.S., Indian treaties were constitutive documents providing the framework for an economic and political joinder of mutual sovereigns. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 408–09 (1993). Thus, the Indian treaties of the post-Revolutionary period, though they ceded Indian land in exchange for U.S. promises, must be construed not as acts of tribal surrender but as negotiated contracts, governed by international law, in which Indian tribes reserved those rights not clearly granted to the U.S. and acquired other rights and privileges from the U.S. *Id.* at 401–02.

<sup>71</sup> The late eighteenth century U.S. policy with regard to land acquisition from Indian tribes is seemingly predicated upon a desire for peaceful relations and mutual respect for sovereignty and territorial integrity. See Letter from Secretary of State Knox (1789) (“The principle of the Indian right to the lands they possess being thus conceded, the dignity and the interest of the nation will be advanced by making it the basis of the future administration of justice toward the Indian tribes.”); see also 25 U.S.C. § 177 (1982) (“Trade and Intercourse Act”) (precluding acquisition of Indian land except for by cession via a U.S.-Indian treaty). In those rare eighteenth century instances of military hostilities initiated by the U.S. to annex Indian land, most campaigns resulted in stalemate or decisive Indian victory. CADWALADER & DELORIA, *supra* note 41, at 193.

<sup>72</sup> See Statement of U.S. Attorney General William Wert, Apr. 26, 1821, *cited* in Atkinson, *supra* note 44, at 383 (“So long as a tribe exists and remains in possession of its lands, its title and possession are sovereign and exclusive . . . [and] we have no more right to enter upon their territory than we have to enter upon the territory of a foreign prince.”).

U.S. was crafting legal solutions to the “problems caused by the . . . fact that the Indians were here when the white man arrived . . . .”<sup>73</sup>

### 1. *Fraud and Firewater*

The Indian conception of land as utterly incapable of reduction to ownership by human beings<sup>74</sup>—an essential element of pan-Indian cosmology<sup>75</sup>—crippled tribes in their early negotiations with U.S. representatives operating within an imported common law tradition that commodified land.<sup>76</sup> While Indian tribes generally understood treaties to create sacred kinship ties entitling the U.S. to share and settle the lands in question,<sup>77</sup> the U.S., disinterested in kinship but desirous of no less than fee simple title, manipulated Indian (mis)appreciations of Western property rights in treaty texts incomprehensible to Indian negotiators not proficient in the English language.<sup>78</sup> Moreover, U.S. negotiators secured further advantage by dulling Indian wits with alcohol.<sup>79</sup> Deliberately faulty translations of treaty terms for Indian tribes, as well as a *Weltanschauung* in which land is a

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<sup>73</sup> FRANCIS P. PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 1 (1994). The Indian presence posed not only a military, but a legal, challenge to white settlement. Although the discovery doctrine purported to grant the United States, as a successor state of Great Britain, the right to impair title to all Indian lands “discovered” by Great Britain, the Indian nations “discovered” by Britain retained aboriginal title, subject only to the superior sovereign title of the United States, and as of the early nineteenth century many private titles claimed by whites under original grants by either the United States or Great Britain remained clouded by prior possessory rights as yet unceded by Indian tribes. *See Mitchel v. United States*, 34 U.S. 711, 746 (1835) (Baldwin, J.) (“[It is] a settled principle, that [the Indians’] right of occupancy is . . . as sacred as the fee simple of the whites.”).

<sup>74</sup> *See* Eric T. Freyfogle, *Land Use and the Study of Early American History*, 94 *YALE L.J.* 717, 723 (1985) (“[Indian tribes] believed that land was no more subject to ownership than was the air, water, sky, or . . . spirits.”).

<sup>75</sup> *See* VAN EVERY, *supra* note 68, at 239.

<sup>76</sup> *See* CHARLES M. HAAR & LANCE LIEBMAN, *PROPERTY AND LAW* 15 (1977) (quoting letter from Chief Sealth of the Nez Perce tribe to President Franklin Pierce) (“[The] white man . . . is a stranger who comes in the night and takes from the land whatever he needs. The earth is not his brother but his enemy, and when he has conquered it he moves on.”); *see also* Carol M. Rose, *Possession as the Origin of Property*, 52 *U. CHI. L. REV.* 73, 87 (1985) (“[T]he audience presupposed by [common law property concepts] is an agrarian or a commercial people” rather than the more nomadic or pastoral Indian peoples.).

<sup>77</sup> *See* Gerald Torres & Kathryn Milun, *Frontier of Legal Thought III: Translating Yonnodio by Precedent and Evidence: The Mashpee Indian Case*, 1990 *DUKE L.J.* 625, 637–38 (1990) (noting inability of Indian tribes to understand Western property concepts).

<sup>78</sup> *See generally* Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 *AM. U. L. REV.* 753 (1992) (suggesting language barriers and variant conceptions of relationship of people to land caused misunderstanding of legal nature of grants to whites).

<sup>79</sup> STEPHEN PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 26 (2002).

sacred living thing incapable of reduction to ownership, exacerbated an unequal bargaining relationship and erased the line between consent and coercion.<sup>80</sup> Worse, later treaties simply codified conquest and genocide. In sum, many of the Indian treaties ceding land to the U.S. are physical embodiments of the fraud,<sup>81</sup> unconscionability,<sup>82</sup> and duress<sup>83</sup> governing their drafting and as such are arguably subject to reconstruction and even renunciation.<sup>84</sup>

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<sup>80</sup> Twentieth-century federal jurisprudence, in recognition of the fundamental unfairness prevailing during the creation of many Indian treaties, belatedly adopted canons of construction to guide interpretation of these instruments and mitigate the severity of their operation against Indian rights. As the United States is the party with presumptively superior negotiating skills and knowledge of the language of an Indian treaty, the Court has held that it has the responsibility to avoid taking advantage of Indians and therefore has interpreted the terms of treaties liberally in favor of Indian parties. *See, e.g.*, *Minnesota v. Mille Lacs*, 526 U.S. 172, 200 (1999); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675–76 (1979). The canons of construction also require courts to give effect to the terms of an Indian treaty as the Indians themselves would have understood them at the time of their drafting. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (providing that “treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.”); *United States v. Winans*, 198 U.S. 371, 380–81 (1905). Ambiguities in Indian treaties are to be resolved “not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians . . .” *Washington*, 443 U.S. at 676 (quoting *Jones v. Meehan* 175 U.S. 1, 11 (1899)); *Winters v. United States*, 207 U.S. 564, 576–77 (1908). Still, courts are “without authority to determine the rights of parties upon the ground of mere justice or fairness, much less, under the guise of interpretation, to depart from the plain import of the words of the treaty.” *United States v. Choctaw Nation*, 179 U.S. 494, 535 (1900); *see also* *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986) (“The canon[s] of construction . . . [do] not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.”). Thus, despite the ameliorative influence of the canons of construction, Indian treaties themselves can impede enjoyment of Indian rights.

<sup>81</sup> *See* *Patterson v. Meyerhofer*, 97 N.E. 472, 473 (N.Y. 1912) (elaborating implied duty of good faith in contracting); *see also* *Vienna Convention on the Law of Treaties*, May 23, 1969, U.N. Doc. A/CONF. 39/27 art. 49, 1155 U.N.T.S. 331, 344 (hereinafter *Vienna Convention*) (providing as a matter of customary international law that “if a [party] has been induced to conclude a treaty by the fraudulent conduct of another [party], the [party] may invoke the fraud as invalidating its consent to be bound . . .”).

<sup>82</sup> *See, e.g.*, *Williams v. Walker Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (holding that unconscionability includes absence of meaningful choice coupled with contractual terms unreasonably favoring the other party); *see also* *Vienna Convention*, *supra* note 81, at art. 53 (providing, as an international legal definition of unconscionability, that “[a] treaty is void if, at the time of its conclusion, it conflicts with a preemptory norm of general international law.”)

<sup>83</sup> *See, e.g.*, *Employers Ins. of Wausau v. United States*, 764 F.2d 1572, 1576 (Fed. Cir. 1985) (providing that duress consists of the involuntary acceptance of terms of another party where circumstances permit of no other alternative and such circumstances were the result of

## 2. *Conquest by Fiction: Johnson v. M'Intosh*

By the early nineteenth century the U.S. population was clamoring for more Indian land even as tribes, increasingly aware of the insatiability of white land hunger, began to resist. Original legal protections for Indian land grew incompatible with white notions of progress, and pressure mounted to annul the marriage of political convenience and legal principle effected by the discovery doctrine.<sup>85</sup> However, even as the U.S. waxed ever more potent, Indian tribes retained the capacity to defeat conquest, and law was invoked yet again to wrest away additional Indian lands. The seminal case *Johnson v. M'Intosh*<sup>86</sup> provided the opportunity whereby to expand the Euro-American foothold.

Although he acknowledged both the “impossibility of undoing past events and the fact that the sovereign he represented was born in sin,”<sup>87</sup> and although he recognized that Indian tribes were as yet independent political communities in retention of original rights to property and self-governance, Chief Justice John Marshall accepted the extravagant arguments that European discovery—not Indian occupancy—constituted ultimate title to lands in the U.S.<sup>88</sup> and that

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coercive acts of the other party); *see also* Vienna Convention, *supra* note 81, at arts. 51–52 (“[a] treaty is void if its conclusion has been procured by the threat or use of force”).

<sup>84</sup> *See* Friedman, *supra* note 40, at 559 (arguing that Indian cessions of lands in fraudulent, unconscionable, or duressive treaties are void or voidable); CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 92–93 (1981) (developing basis for judicial reconstruction or voiding of unconscionable contracts).

<sup>85</sup> P.T. SHATTUCK & J. NORGREN, *PARTIAL JUSTICE: FEDERAL INDIAN LAW IN A LIBERAL CONSTITUTIONAL SYSTEM* 113 (1991).

<sup>86</sup> 21 U.S. (8 Wheat.) 543 (1823).

<sup>87</sup> Joseph William Singer, *Well-Settled? The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 489 (1994).

<sup>88</sup> *See* 21 U.S. at 574. The Court continued:

[T]he rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily . . . impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it[;] . . . but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will . . . was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. . . . subject only to the Indian right of occupancy.

*Id.*

conquest by the discovering sovereign conferred good title.<sup>89</sup> While Marshall conceded that such arguments “may be opposed to natural right,” he drew from the doctrine of *stare decisis*,<sup>90</sup> comparisons to the practice of other states,<sup>91</sup> and ultimately a jurisprudential affirmation of the “inferiority” of Indian nations<sup>92</sup> to find that “if [such arguments] be indispensable to that system under which the [U.S.] has been settled, and be adapted to the actual condition of the two people, it . . . certainly cannot be rejected by Courts.”<sup>93</sup> Although the progressive Marshall intended to impose legal limits on the future conduct of conquerors less charitably disposed toward Indians than he,<sup>94</sup> *M’Intosh* fueled subsequent claims that

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<sup>89</sup> *Id.* at 588–89 (noting that while the denial of good title to original Indian occupants was unjust, “[c]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.”).

<sup>90</sup> *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810) (deeming Indian land vacant for purpose of uncompensated taking by state).

<sup>91</sup> *M’Intosh*, 21 U.S. at 592 (noting uniform practice of European states in accepting discovery and conquest as operative in the Americas).

<sup>92</sup> *Id.* at 573 (“[T]he character and religion of [Indians] afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy.”).

<sup>93</sup> *Id.* at 591–92.

<sup>94</sup> *See id.* at 596–97

The peculiar situation of the Indians, necessarily considered, in some respects, as a dependent, and in some respects as a distinct people, . . . too powerful and brave not to be dreaded as formidable enemies, required, that means should be adopted for the preservation of peace; and that their friendship should be secured by quieting their alarms for their property. This was to be effected by restraining the encroachments of the whites . . . .

. . . .

The authority of this . . . ha[s] always been sustained in our Courts.

*Id. See also id.* at 574. The Court made clear that in the absence of conquest, Indian title can only be lawfully acquired by the U.S. through a consensual transfer, as Indians were the

rightful occupants of the soil, with a legal as well as a just claim to retain possession of it . . . .

. . . .

[The Indian] right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right.

*Id.* at 574, 603.

“Indians were conquered as soon as John Cabot set foot on American soil,” “that it only required the inevitable march of history to carry out this preordained outcome,” and that “tribal property rights are not . . . rights at all, but merely . . . revocable licenses, or . . . ‘permission by the whites to occupy.’”<sup>95</sup>

### 3. *Trust Doctrine: Cherokee Nation v. Georgia*

Subsequent cases further diminished tribal sovereignty over Indian land. In the 1831 case *Cherokee Nation v. Georgia*,<sup>96</sup> the second in the Marshall Trilogy, Chief Justice Marshall determined that, despite their retention of reserved rights, to include occupancy of their lands subject only to voluntary cession,<sup>97</sup> Indian tribes were mere “domestic dependent nations” under U.S. “pupilage,”<sup>98</sup> not sovereign foreign nations or States within the meaning of the Constitution,<sup>99</sup> and that as a result the Court could not take original jurisdiction over a case wherein the Cherokee sought to enjoin enforcement of the laws of Georgia on land guaranteed by treaties.<sup>100</sup> Although Marshall held that the U.S. owed a common-law trust duty to Indians, not only was this duty judicially unenforceable,<sup>101</sup> but an examination of the other justices’ opinions, construing the U.S.-Cherokee

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<sup>95</sup> Singer, *supra* note 87, at 489–90 (noting citation of conquest theories derived from *M’Intosh* for proposition that Congress has unlimited authority over Indians) (citing *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955)).

<sup>96</sup> *Cherokee*, 30 U.S. (5 Pet.) 1 (1831).

<sup>97</sup> *See id.* at 17 (“Indians are acknowledged to have an unquestionable . . . right to the lands they occupy, until that right shall be extinguished by a voluntary cession”).

<sup>98</sup> The Chief Justice stated:

[Indian tribes] are in a state of pupilage. Their relation to the [U.S.] resembles that of a ward to his guardian.

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.

*Id.*

<sup>99</sup> *Id.* at 15–16 (citing U.S. CONST. art. III, § 2).

<sup>100</sup> *Id.* at 20.

<sup>101</sup> *Id.*

If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.

*Id.*

relationship as that between a conqueror and a subject people,<sup>102</sup> hinted that the “trust doctrine,” true to its roots in medieval Christian xenophobia,<sup>103</sup> would become yet another legal tool with which to diminish Indian sovereignty.<sup>104</sup> In short order, the U.S. claimed trust title to all Indian lands within U.S. borders. Although the trust doctrine<sup>105</sup> generated a host of express obligations in the context of subsequent treaties, statutes, and executive orders creating Indian reservations,<sup>106</sup> political pressure ensured that these judicially unenforceable

<sup>102</sup> See *Cherokee*, 30 U. S. at 26 (Johnson, J., concurring); *id.* at 32–33 (Baldwin, J., concurring). The dissent proved more consonant with the trend in international law, which, although it continued to sanction the creation of consensual guardianships with powers and duties limited by treaties between sovereign peoples, shortly thereafter abandoned altogether any consideration of indigenous peoples as political bodies with rights. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 21, 14 (1996).

<sup>103</sup> See ANAYA, *supra* note 102 (arguing that the trust doctrine is a “form of scientific racism” that posits that whites have a duty to “wean native peoples from their ‘backward’ ways and to ‘civilize’ them”); see also Friedman, *supra* note 40, at 563–64 (“From the very beginning, the federal-tribal trust doctrine . . . explicitly relied upon the ‘primitivism’ of natives to justify interference in their affairs.”); CADWALADER & DELORIA, *supra* note 41, at 196 (noting that the trust doctrine was the political will of a white population committed to the notion that Indians were a semi-barbarous people who ought to yield to white civilization).

<sup>104</sup> Such fears proved well-founded when the Supreme Court explained the trust obligation as the duty to act as “a Christian people in their treatment of an ignorant and dependent race.” *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877). The “white man’s burden” motivated federal Indian policy as actualized through the trust doctrine well into the twentieth century. See *U.S. v. Sandoval*, 231 U.S. 28, 39, 46 (1913).

Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetishism, and chiefly governed according to the crude customs inherited from their ancestors, [Indians] are essentially a simple, uninformed, and inferior people.

....

[A]s a superior and civilized nation [the U.S. has] the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders . . .

*Id.*

<sup>105</sup> Over the course of the past two centuries the trust doctrine has broadened to encompass a set of duties greater than those pertaining strictly to land, including to “ensure the survival and welfare of Indian tribes and people” and to “provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.” ROBERT N. WELLS, JR., *NATIVE AMERICAN RESURGENCE AND RENEWAL* 19 (1994).

<sup>106</sup> U.S.-Indian treaties post-*Cherokee* unambiguously contemplated discrete reserved land bases where Indian tribes would exercise beneficial ownership while enjoying political, economic, and cultural sovereignty under U.S. guardianship. See CHARLES F. WILKINSON,

obligations were almost never discharged with “good faith and utter loyalty to the best interests” of the Indian tribes.<sup>107</sup>

#### 4. *Plenary Power*: Worcester v. Georgia

In *Worcester v. Georgia*, Marshall interpreted the Commerce Clause<sup>108</sup> to hold that Congress had “plenary” power over Indian affairs.<sup>109</sup> Although the precise meaning of the term “plenary” was not subject to ready determination,<sup>110</sup>

AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 14, 16 (1987) (asserting that the central thrust of federal Indian law has always been to create a “measured separatism”). Indian tribes under the trust doctrine would remain distinct peoples in a political relationship with the U.S. based on the treaties and the Commerce Clause, which sets Indian tribes apart from states and foreign nations as sovereigns and provides that Congress has the exclusive authority to regulate trade. *See* U.S. CONST., art. I, § 8, cl. 3.

<sup>107</sup> In a democratic republic, a self-interested majority represents a powerful barrier to honoring treaty commitments benefiting a discrete minority not formally an organic part of the body politic yet in possession of vast lands and resources. *See* JOHN ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135–79 (1980) (“There will always be a conflict when a government . . . must act both as trustee in the best interests of a small segment of the populace and also as a servant of the best interests of the entire society.”); THE FEDERALIST NO. 51 (James Madison) (addressing the majoritarian problem).

<sup>108</sup> *See* U.S. CONST., art. I, § 8, cl. 3 (granting power to Congress “to regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes.”).

<sup>109</sup> 31 U.S. (6 Pet.) at 536–63 (1832). However, even as it expanded congressional power, *Worcester* restricted state jurisdiction. *Id.* at 561 (“[The] Cherokee nation . . . is a distinct community . . . in which the laws of Georgia can have no force”).

<sup>110</sup> The “plenary power” doctrine, with origins in medieval-era traditions of Christian cultural racism, was carried into the New World by Columbus, developed by successive European arrivals, and reified as moral imperative in U.S. jurisprudence to permit the “superior” race to exercise whatever power necessary to “civilize” indigenous peoples. DAVID GETCHES ET AL., *CASES AND MATERIALS IN FEDERAL INDIAN LAW* 177 (3d ed. 1993); *see also* Robert A. Williams Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Jurisprudence*, 1986 WIS. L. REV. 219, 265 (arguing plenary power “erase[s] the difference presented by the Indian in order to sustain . . . European norms and value structures”). Other commentators suggest Marshall’s use of the term “plenary” was not meant to denote “absolute” or “total” power but rather to signify federal, as opposed to state powers, thereby shielding tribal sovereignty from state legislation. *See* Rachel San Kronowitz et al., *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 525 (1987). The orthodox view suggests that “plenary” as used in *Worcester* implies general police powers, as opposed to the limited, delegated powers the federal government bears in relation to states, and as such arrogates to Congress general powers to regulate every aspect of Indian affairs. WILKINSON, *supra* note 106, at 78–79. By the late nineteenth century “plenary power” was accepted as the absolute prerogative of Congress vis-à-vis the Indian tribes. *See* *United States v. Kagama*, 118 U.S. 375, 381–84 (1886) (holding Congress has a right to exercise authority over Indians for their own

through congressional practice its purpose became plain, and by 1900 Congress qualified all remaining tribal powers by express legislation.<sup>111</sup> Moreover, by the late 1840s, with the military power calculus shifting<sup>112</sup> and gold discovered out West, “whites c[ould] no longer be kept out of Indian country.”<sup>113</sup> By adding plenary power to the legal arsenal, *Worcester* and its progeny ushered in a violent phase of U.S. expansion, executed under the rubric “Manifest Destiny.”<sup>114</sup>

Over the next several decades the Army prosecuted a sequence of wars to perfect discovery by divesting Indians of their possessory interest.<sup>115</sup> Still other wars were fought to suppress Indian unrest after U.S. violations of Indian treaties.<sup>116</sup> After each genocidal campaign, a dwindled, harried, and hungry

well-being); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (holding Congress, under its plenary power, could abrogate a treaty when doing so “[would be] in the interest of the country and the Indians themselves”). Plenary power to dispose of Indian land is a nonjusticiable political question, and no Congressional exercise of regulatory jurisdiction over Indian affairs has ever been set aside by the courts. See CADWALADER & DELORIA, *supra* note 41, at 165 (noting plenary power renders all disputes arising under U.S. Indian legislation non-justiciable political questions).

<sup>111</sup> See AMERICAN INDIAN POLICY: SELF-GOVERNANCE AND ECONOMIC DEVELOPMENT 3 (Lyman H. Legters & Fremont J. Lyden eds., 1994) [hereinafter LEGTERS & LYDEN] (noting that, subsequent to *Kagama*, Congress passed the first of more than 5,000 laws regulating Indians).

<sup>112</sup> After the Civil War, U.S. military power was so overwhelming that all subtlety was abandoned, and armed force was employed against Indian nations west of the Mississippi. See ALBERT K. WEINBERG, MANIFEST DESTINY 115 (1935).

<sup>113</sup> VAN EVERY, *supra* note 68, at 261–62. By the late 1840s, homesteaders and prospectors pressured policymakers to grant access to the material wealth of the American West—an area populated theretofore almost exclusively by Indian nations. See BRIAN W. DIPP, THE VANISHING AMERICAN: WHITE ATTITUDES AND UNITED STATES’ INDIAN POLICY 73 (1982).

<sup>114</sup> “Manifest Destiny,” a term which first appeared in print in 1845, refers to the nineteenth century political philosophy holding that the U.S. was charged with a divinely-inspired mission of extending its moral enlightenment, democratic principles, and republican values to the furthest reaches of North America. See generally WEINBERG, *supra* note 112 at 2. If fulfillment of this Manifest Destiny required the defeat, displacement, and murder of Indians, the imprimatur of the Supreme Court supported the inevitability of the expansion of the frontier and affirmed divine approbation of the mid- to late-nineteenth century Indian Wars. *Id.* at 81–83.

<sup>115</sup> Theretofore, Indian claims based on lineal descendancy and exclusive occupancy earned recognition, by treaty or statute, of a limited possessory right to permanent occupancy known as “recognized Indian title.” See *M’Intosh*, 21 U.S. at 574.

<sup>116</sup> The Supremacy Clause establishes treaties as legal authority coequal to the Constitution itself. See U.S. CONST., art. VI, cl. 2 (“This Constitution, and the Laws . . . which shall be made in Pursuance thereof, and all Treaties made . . . under the authority of the United States, shall be the supreme Law of the Land . . .”). A violation of a treaty is therefore a violation of federal law unless Congress subsequently and unambiguously legislates to abrogate

Indian nation *in extremis* sued for a peace that surrendered vast tracts of lands and political freedom in exchange for dependence<sup>117</sup> and “civilization.”<sup>118</sup> During the first decade after the Civil War the U.S. acquired nearly one-fourth of the land within its modern contiguous boundaries<sup>119</sup> entirely free of any legal obligation to pay more than token compensation.<sup>120</sup> Yet despite distribution of millions of

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the treaty. *Head Money Cases*, 112 U.S. 580, 599 (1884) (citing common-law rule supporting legislative modification of treaties); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (providing Congress may modify treaty provisions, or “supersede them altogether,” by subsequent statute). Although an Indian treaty thus binds all branches of government, Congress has plenary power to abrogate or otherwise limit it provided it does so explicitly and “with perfect good faith toward Indians,” which good faith is legally presumed. *Lone Wolf*, 187 U.S. at 566; *see also Puyallup Tribe, Inc. v. Dep’t of Game of Washington*, 433 U.S. 165, 174 (1977) (upholding, under political question doctrine, plenary power to abrogate Indian treaties). Moral restraint has been in as short supply as “perfect good faith”: to cure breaches of land provisions of Indian treaties occasioned by invasion Congress passed abrogating statutes allowing the U.S. to violate with impunity all of the more than 400 Indian treaties. Singer, *supra* note 87, at 483–84. For a historical review of Congressional bad faith, see VINE DELORIA, JR., *BEHIND THE TRAIL OF BROKEN TREATIES* (1985).

<sup>117</sup>VINE DELORIA, *supra* note 116, at 382 (“The [U.S.] Army dogged tribes across the plains, through the forests, in and out of desert canyons, and through the swamps . . . until tribe after tribe realized they would have to sign a terrible treaty or face extinction . . .”). Treaty promises of annuities for peace were bitter bargains: defeated tribes were confined on distant, strange lands, restricted from engaging in traditional subsistence practices, and forced into dependency. *Id.*

<sup>118</sup>*See Beecher v. Wetherby*, 95 U.S. 517, 526 (1877) (“Congress . . . expected . . . the semi-barbarous condition of the Indian tribes [to] give way to the higher civilization of our race.”)

<sup>119</sup>*See* Nell Jessup Newton, *Compensation, Reparations, and Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 460–61 (1994) (discussing expropriation of one billion acres of Indian land from 1865–1875).

<sup>120</sup>The Court refused to confine plenary power within the Due Process and Just Compensation Clauses, choosing abstention under the political question doctrine. *See Lone Wolf*, 187 U.S. at 553, 565–66. Although it held that takings of Indian property are subject to the Fifth Amendment, the Court adopted a formal distinction that permitted Congress near-unlimited freedom in establishing compensation requirements. *See Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955):

[T]he tribes who inhabited the [U.S.] held claim to such lands after the coming of the white man, under what is . . . termed original Indian title or permission from the whites to occupy. That . . . means mere possession not specifically recognized as ownership by Congress . . . This is not a property right but . . . a right of occupancy . . . [that] may be terminated . . . by the sovereign . . . without any legally enforceable obligation to [pay] compensat[ion] . . .

Given the judicially-crafted distinction between “recognized Indian title” and “aboriginal title,” Congress may take even those lands exclusively occupied by a tribe since time immemorial and extinguish Indian occupancy at will, without compensation, and for any purpose, so long as

cheap acres to settlers,<sup>121</sup> the national greed for space, fueled by an evolving inter-branch compact authorizing *gratis* takings,<sup>122</sup> dictated confiscation of most of the remainder of Indian Country. In 1871 Congress exercised plenary power to strip away the last formal vestiges of Indian juridical sovereignty by providing that “hereafter no Indian nation or tribe . . . shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.”<sup>123</sup> No longer compelled as a matter of U.S. law to treat Indian nations as foreign sovereigns, the U.S. could now acquire Indian land without even the pretense of consent, and Congress, unwilling to allow “(a)n idle and thrifless race of savages . . . to stand guard at the treasure vaults of the nation,” gave the Army free rein to employ genocide<sup>124</sup> to crush the last obstacles on the march to the Pacific.

### 5. Allotment to Present

By 1887 all two billion acres of the U.S. continental landmass had been discovered, conquered, and expropriated save for 138 million acres apportioned to Indian reservations, which the General Allotment Act of 1887 [“Allotment”]<sup>125</sup> targeted for dismemberment. Allotment, an exercise of plenary power, subdivided large swaths of communally owned tribal lands into parcels for the private use of

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those lands were not conveyed by an official act of Congress or so long as the tribe did not claim them by treaty. *Alaska v. Native Village of Venetie Tribal Government*, 522 US 520, 532 (1998) (requiring explicit congressional designation to find recognized title); CADWALADER & DELORIA, *supra* note 41, at 187–88 (Indians occupying aboriginal title land are “mere tenants at the will of the [U.S.]”). Even with respect to recognized title, Congress may pay compensation at levels bearing no discernible nexus to market value. *See Babbitt v. Youpee*, 519 U.S. 234, 239 (1997) (subjecting plenary power only to limited constitutional restraint that Congress pay some compensation when extinguishing recognized title). In sum, Indian property is beyond the Constitutional pale. *See Newton*, *supra* note 119, at 457–58 (analogizing federal Indian law to Communist law in that neither afford meaningful protection against takings).

<sup>121</sup> *See, e.g.*, Homestead Act of 1862, 12 Stat. 392 (granting 250 million acres of Indian land to settlers for as little as \$1/acre).

<sup>122</sup> *See Singer*, *supra* note 87, at 484 (stating that, as all questions relating to Indian affairs were now nonjusticiable political questions, “Congress and the President therefore possessed absolute, unreviewable power over Indian nations”).

<sup>123</sup> Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (as amended at 25 U.S.C. §71 (2000)).

<sup>124</sup> Scores of tribes, their numbers reduced by war, disease, and starvation, were forced onto land reservations in the 1870s and 1880s. The surviving three hundred members of the last belligerents, the Chiricahua Apache, surrendered unconditionally in 1887 after the murder of three thousand of their number. For a comprehensive history of the genocide of the Chiricahua Apache, *see generally* LIEDER & PAGE, *supra* note 61, 16–49.

<sup>125</sup> Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.).

individual Indian allottees under a 25-year period of U.S. guardianship.<sup>126</sup> Upon expiration of the trust period the U.S. issued an unrestricted fee patent to allottees who proved “competence,” assumed U.S. citizenship, and paid property taxes.<sup>127</sup> For most tribes, Allotment was devastating: although tribal governments remained *in situs* on vestiges still under trust protection, by encouraging Indian individuals to formally withdraw from the tribe<sup>128</sup> for a per capita share of tribal land, and by punishing the failure of unemployed allottees to pay taxes with foreclosure, reversion of title, and sale to white speculators,<sup>129</sup> Allotment abolished Indian reservations as autonomous and integral sociopolitical entities.<sup>130</sup>

Although several tribes attempted to block Allotment,<sup>131</sup> the Supreme Court ruled not only that Indian land was subject to the sovereign right to take for public use upon payment of just compensation,<sup>132</sup> but that takings of Indian land, described by Congress as a legitimate form of “investing for the tribe” that did not require either consent or notification, were precluded from judicial review.<sup>133</sup> By

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<sup>126</sup> *Id.* The original plan was to allot tribal heads of household 160 acres each and to make surplus land available to non-Indians. See WILKINSON, *supra* note 106, at 19–20. However, effects varied, and while some reservations, such as the Jicarilla Apache, remained unallotted (see *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 134 (1982)), others, such as the Lake Traverse Reservation of the Wahpeton and Sisseton Bands of the Sioux Tribe, were held to be terminated once 85% of the reservation had been purchased by non-Indians. See *DeCoteau v. District County Court*, 420 U.S. 425, 427–28 (1975).

<sup>127</sup> See PEVAR, *supra* note 79, at 196 (noting that Allotment subjected individual Indian landowners to the full panoply of territorial and state laws, including property taxation).

<sup>128</sup> The concept that an Indian could not simultaneously be a tribal member and a U.S. citizen persisted until Congress granted citizenship to “all non-citizen Indians born within the territorial limits of the United States.” See Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified as carried forward at 8 U.S.C. 1401(b) (2000)). Prior to 1924, “Indian naturalization was conditioned on the severing of tribal ties . . .” FELIX COHEN, FEDERAL INDIAN LAW 644 (1953).

<sup>129</sup> JAMES LOPAC & RICHMOND CLOW, TRIBAL GOVERNMENT TODAY 20 (1990).

<sup>130</sup> See PEVAR, *supra* note 79, at 8–9 (describing Allotment as a partitioning of the tribal estate).

<sup>131</sup> Kiowa Chief Lone Wolf sued unsuccessfully to prevent allotment of 2.5 million acres of tribal lands, guaranteed by treaty against allotment, without the signature of two-thirds of the adult males. See *Lone Wolf*, 187 U.S. at 568 (providing that compensation for takings of Indian land need not be paid where Congress acts as a trustee in the “best interest” of Indian tribes despite violation of treaty) (abrogating Medicine Lodge Treaty, 15 Stat. 581, 589 (1867)).

<sup>132</sup> See *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307 (1902) (upholding allotment of Indian land despite violation of treaties).

<sup>133</sup> *Lone Wolf*, 187 U.S. at 565–66 (establishing that Congressional exercise of plenary power in regulation of Indian affairs, even to the extent of abrogating treaty-based property rights, is immune from judicial review under political question doctrine). A skein of subsequent cases has reinforced, as a matter of domestic law, the sweeping breadth and depth of plenary power to abridge Indian treaty-based property rights. See William J. Murphy, *Jurisdiction—*

1934, Indian lands had been reduced by a further 90 million acres, with 26 million lost through fraudulent transfers, and of the two billion acres of formerly contiguous tribal landholdings all that remained was a fragmented, 47 million acre mosaic of reservation lands under trust, plots owned in fee simple by whites, and plots held by Indian individuals no longer members of any tribe.<sup>134</sup> Ninety-five thousand Indians were landless.<sup>135</sup>

In sum, the synergy of discovery, the trust doctrine, and plenary power as manifested in case law and federal policies perfected the legal theft of Indian land.<sup>136</sup> Despite infrequent restitution and compensation of Indian land,<sup>137</sup> the Constitution affords no protection to Indian tribes,<sup>138</sup> and what remains of their landbase continues under siege.<sup>139</sup> The U.S. currently wields

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*Sovereign Immunity—Business Owned by Native American Nation Granted Sovereign Immunity from Suit Arising from its Private Off-Reservation Transaction*, In re Greene, 980 F.2d 590 (9th Cir. 1992), cert. denied, 114 S. Ct. 681 (1994), 17 SUFFOLK TRANSNAT'L L. REV. 599, 601 n.16 (1994) (listing cases). Still, several Indian tribes continue, perhaps quixotically, to assert legal claims arising from U.S. takings of recognized Indian title. See Susan Lope, *Indian Giver: The Illusion of Effective Legal Redress for Native American Land Claims*, 23 SW. U. L. REV. 331, 342–49 (1994) (evaluating such claims).

<sup>134</sup> See Atkinson, *supra* note 44, at 398 (noting that due to Allotment many reservations are checkerboards of U.S. and Indian land, with some even populated mainly by non-Indians).

<sup>135</sup> Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 256 (1989).

<sup>136</sup> More than half of the U.S. land mass was purchased at an average price of pennies per acre, while another 300 million acres were taken without compensation and another 700 million acres are claimed by the U.S. although it has taken no action to extinguish Indian title. See Russell Lawrence Barsh, *Indian Land Claims Policy in the United States*, 58 N.D. L. REV. 7, 7–8 (1982). Moreover, all of “Indian Country,” a legal term-of-art meaning essentially lands within the territorial limits of an Indian reservation, is now either trust land owned by the U.S. or non-trust land permanently Indian-occupied but subject to Congressional plenary power to restrict alienation and use. See 18 U.S.C. §1151 (1994) (defining “Indian Country”). In sum, the U.S. owns superior title to all land within its borders, and efforts to reacquire Indian land are vigorously opposed by all levels of government. From the Indian viewpoint, non-Indians not only shamelessly “gorg[e] themselves on the spoils of old wars” but remain unrepentant, as evinced by ongoing land seizures. Atkinson, *supra* note 44, at 381.

<sup>137</sup> See, e.g., Maine Indian Land Claims Settlement Act, 25 U.S.C. §1721 et seq. (1980) (providing recognition and \$81.5 million for purchase of 300,000 acres to Penobscot, Passamaquoddy, and Maliseet). While the U.S. has restored 540,000 acres since 1970, this represents .05% of the two billion acres under Indian possession at First Contact. Newton, *supra* note 119, at 476–77.

<sup>138</sup> *United States v. Sioux Nation*, 448 U.S. 371, 415 (1980) (reiterating that nonconsensual transfers of Indian land to third parties are insulated from the Takings Clause of the Fifth Amendment provided the U.S. acts as tribal guardian, rather than as sovereign). Recently, several courts have mitigated the scope of plenary power marginally by requiring that the U.S. demonstrate a rational connection between a proposed legislative enactment and fulfillment of a “unique obligation toward the Indians” under the trust doctrine. See, e.g.,

absolute, unreviewable power to continue the conquest of Indian nations that have not yet been forced to sign a treaty . . . [and to] take land held under original Indian title as it pleases, . . . without any constitutionally mandated obligation to pay compensation for the taking of land possessed by Indian nations for thousands of years, and despite the fact that the members of such tribes are United States citizens otherwise protected by the Constitution.<sup>140</sup>

### C. *Ethnocide*<sup>141</sup>

With its Manifest Destiny secured, the U.S, heretofore oriented toward the physical separation and extermination of indigenous people, changed tacks to follow the prevailing political winds,<sup>142</sup> and U.S. Indian policy adopted a treble action agenda: liquidation of Indian culture,<sup>143</sup> eradication of tribal self-

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Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 85 (1977) (quoting Morton v. Mancari, 417 U.S. 535, 555 (1974)); Williams v. Babbitt, 115 F.3d 657, 663 (9th Cir. 1997). Still, no court has ever set aside an exercise of plenary power as unconstitutional.

<sup>139</sup> See Larry Sager, *Rediscovering America: Recognizing the Sovereignty of Native American Indian Nations*, 76 U. DET. MERCY L. REV. 745, 781 (1999) (noting recent expropriations of Indian land), Newton, *supra* note 119, at 473 (chronicling post-World War II expropriations of Indian land). Moreover, tribal efforts to aggregate land parcels fractured by Allotment and other federal policies are kept at bay only by the occasional intervention of the judicial branch. See, e.g., Babbitt v. Youpee, 519 U.S. 234, 243–45 (1997) (holding a provision of the Indian Land Consolidation Act, 96 Stat. 2519, 25 U.S.C. § 2206, prohibiting the descent or devise of small fractional interests in allotments and providing that such fractional interest would escheat back to tribes, unconstitutional as a taking of private property without compensation).

<sup>140</sup> Singer, *supra* note 87, at 487. Remedial legislation designed to enforce the legal equality of “all persons within the jurisdiction of the United States” with respect to the “full and equal benefit of all laws and proceedings for the security of . . . property” and the “right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property” renders the legal burden all the more indefensible. 42 U.S.C. §§1981–82 (“Civil Rights Act of 1866” 14 Stat. 27). Perhaps the only way to harmonize the statutes with the burdens upon Indian property is to deny that Indians are persons within the meaning of the Constitution.

<sup>141</sup> Ethnocide is defined as “any act which has the aim or effect of depriving [indigenous people] of their ethnic characteristics or cultural identity [or] any form of forced assimilation or integration, [such as the] imposition of foreign life-styles.” *Discrimination Against Indigenous Peoples: First Revised Text of the Draft Universal Declaration on Rights of Indigenous People*, at 6, P5, U.N. Doc. E/CN. 4/Sub. 2/1989/33 (1989).

<sup>142</sup> See Russell Lawrence Barsh, *Progressive-Era Bureaucrats and the Unity of Twentieth-Century Indian Policy*, 15 AM. INDIAN Q. 1, 10 (1991) (identifying liberal humanist intellectuals as responsible for transformation of late-nineteenth century Indian policy).

<sup>143</sup> Culture can be defined as a “set of shared and enduring meanings, values, and beliefs that characterize national, ethnic, or other groups and orient their behavior which is transmitted from one generation to the next and shapes interactions with others and the environment . . . .”

government,<sup>144</sup> and forced assimilation of “civilized” Indians, shorn of cultural and social attachments, into the body politic.<sup>145</sup> These interrelated policies painted Indian tribes as targets for a sinister “genocide-at-law”:<sup>146</sup> promising to free “backward” Indians from an outmoded past and endow them with “civilization,” “education,” and “prosperity,”<sup>147</sup> the BIA<sup>148</sup> introduced religious missionaries to dissolve the glue of Indian society.

### 1. *Cultural Liquidation*

#### a. “*Kill the Indian to Save the Man*”<sup>149</sup>

Of all the processes engineered to strip away Indian culture, perhaps the most nefarious was Congressional funding of religious schools geared toward the

Guy O. Faure & Gunnar Sjostedt, *Culture and Negotiation: An Introduction*, in *CULTURE AND NEGOTIATION* 1, 3 (Guy O. Faure & Jeffrey Z. Rubin eds., 1993). As such, “[e]ach culture . . . records . . . experiences in ways that provide meaning, guidance and codes of rectitude that serve as compasses for the individual as he or she navigates the vicissitudes of life.” W. Michael Reisman, *International Law and the Inner Worlds of Others*, 9 *ST. THOMAS L. REV.* 25, 25 (1996). While culture is germane to the constitution of group identities, it is particularly so for Indian tribes: a communal culture, constituted by language, law, music, dance, religion, history, and worldview, touches every facet of Indian life and serves as a template for determining and patterning Indian behavior. See Richard Herz, *Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights*, 79 *VA. L. REV.* 691, 704 (1993) (“[Indians] without communal culture are not whole. They are, as one Indian leader derisively put it, ‘just people’ and nothing more.”). Indian culture, thus construed, can be analogized to tribal property entitled to defense as such. See Christine Zuni Cruz, *On the Road Back In: Community Lawyering in Indigenous Communities*, 5 *CLINICAL L. REV.* 577, 566 (1999) (“ownership of cultural property may actually be a . . . right, not unlike a right to speak a certain language or practice a religion . . .”). For a discussion of Indian culture as a property right, see, e.g., Walter R. Echo-Hawk, *Museum Rights v. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 *N.Y.U. REV. L. & SOC. CHANGE* 437, 441–51 (1986).

<sup>144</sup> The term “self-government” refers to the autonomous determination of the institutions, structures, and processes of political organization, economic development, and legal regulation.

<sup>145</sup> See Fenton, *supra* note 69, at 80–81 (interpreting 1871–1934 federal Indian policy as acquisition of Indian land, destruction of Indian political leadership, and assimilation of Indians).

<sup>146</sup> See Strickland, *supra* note 54, at 713 (coining the term “genocide-at-law”).

<sup>147</sup> Barsh, *supra* note 142, at 10.

<sup>148</sup> The BIA is the executive agency responsible for U.S. relations with the tribes and for discharge of the trust responsibility.

<sup>149</sup> In 1892, Captain Richard Henry Pratt, founder of the Carlisle Industrial Indian School, opined that “all the Indian there is in the race should be dead. Kill the Indian in him and save the man.” Cited in Atkinson, *supra* note 44, at 392–93.

substitution of Euro-American, Christian culture in its stead.<sup>150</sup> Beginning in the late nineteenth century, Indian children were spirited off to boarding schools where their hair was cut, their tribal clothing was exchanged for Western garb, and harsh abuses were meted out for speaking tribal languages or engaging in customary religious practices.<sup>151</sup> During their residence, Indian children were prohibited from visiting their relatives, who, as a result, they often did not see for years.<sup>152</sup> Removed Indian children, and their descendants down through the generations, have typically lost the use of their languages, been denied cultural knowledge, and been deprived of opportunities to take on tribal responsibilities.<sup>153</sup>

### b. *American Crusade: Eradication of Indian Religion*

While Indian children underwent forced conversions, the U.S. posted Christian missionaries to the reservations as Indian agents with orders to ban tribal religions, initiate Christianization, and pacify political discourse.<sup>154</sup> At the behest of the Indian agents, Congress launched an assault upon Indian religion with laws<sup>155</sup> that weakened “marriage, family and clan relationships, the

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<sup>150</sup> See Jorge Noriega, *American Indian Education in the United States: Indoctrination for Subordination to Colonialism* 380–81 in *THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION & RESISTANCE* (M. Annette Jaimes ed., 1992) [hereinafter JAIMES] (noting that boarding school curricula stressed Anglo-American, while stifling Indian, languages, cultures, and religions).

<sup>151</sup> See *id.* at 371, 382 (stating that Indian children in boarding schools were subjected to beatings, whippings, and sexual abuse well into the twentieth century); see also Tsosie, *supra* note 67, at 1663 (terming this forcible process whereby full Indian participation in, and knowledge of, their culture was denied beginning at an early age by non-Indians as “natal alienation”); ROBERT A. TRENNERT, JR., *THE PHOENIX INDIAN SCHOOL: FORCED ASSIMILATION IN ARIZONA, 1891–1935* 65–66 (1988).

<sup>152</sup> See Pommersheim, *supra* note 135, at 256–57 (noting that denial of visitation advanced the process of assimilation).

<sup>153</sup> See Sarah Pritchard, *The Stolen Generation and Reparations*, 21 U. NEW S. WALES L. J. 259, 263 (1998) (discussing deprivation of cultural patrimony occasioned by removal of indigenous children); see also Allison M. Dussias, *Waging War with Words: Native Americans’ Continuing Struggle Against the Suppression of Their Languages*, 60 OHIO ST. L. J. 901, 973–77 (1999) (detailing effects of suppression of Indian languages).

<sup>154</sup> See VINE DELORIA, *CUSTER DIED FOR YOUR SINS* 108 (1969).

<sup>155</sup> By 1892 the BIA Commissioner had listed the following offenses as within the jurisdiction of the CIO: “participating in dances or feasts; entering into plural . . . marriages; acting as medicine men [i.e., practicing Indian religion]; destroying property of other Indians; engaging in immorality, [and] intoxication . . . .” Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1033–34 (1995).

distribution of property, and social and political organization.”<sup>156</sup> Courts of Indian Offenses (“CIO”) enforced these stringent social control mechanisms.<sup>157</sup> In arguing for the suppression of tribal dancing and feasting, the Secretary of the Interior proclaimed that “[i]f it is the purpose of the [U.S.] to civilize the Indians, they must be compelled to desist from . . . savage rites and heathenish customs.”<sup>158</sup> For most of the twentieth century, non-Indian “cultural game wardens”<sup>159</sup> circumscribed the legal exercise of Indian religion.<sup>160</sup> Despite the 1978 passage of the American Indian Religious Freedom Act [“AIRFA”] establishing the policy of the U.S. to “protect and preserve for American Indians their inherent right . . . to believe, express, and exercise . . . traditional religions,”<sup>161</sup> in practice Indian religions—particularly when they involve the hunting of charismatic mega-fauna or the use of controlled substances—have

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<sup>156</sup>Sidney L. Harring, *Crow Dog’s Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191, 194 (1989).

<sup>157</sup>By 1900 CIO/CFR Courts had been created on the majority of reservations, extending the criminal jurisdiction of the U.S. See Andrea M. Seielstad, *Unwritten Laws and Customs, Local Legal Cultures, and Clinical Legal Education*, 6 CLINICAL L. REV. 127, 139 n.28 (1999). Judges were chosen from the ranks of “assimilated” Indians who were willing to cut their hair, wear western attire, and accept allotments. See Newton, *supra* note 155, at 1034.

<sup>158</sup>*Id.* at 1033.

<sup>159</sup>Rosen, *supra* note 39, at 253.

<sup>160</sup>Instances of the denial of the right to practice Indian religion are legion. For several generations the BIA suppressed Indian religious practices, particularly the Sun Dance, as promoting “superstitious cruelty, licentiousness, idleness, . . . and shiftless indifference to family welfare.” COHEN, *supra* note 128, at 175 (citing BIA Commissioner in 1921 congressional testimony). Rigid proscriptions of all manifestations of Indian religion have been vigorously enforced by all three branches of the federal government for more than a century. See Allison M. Dussias, *Ghost Dance and the Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 788–94 (1997) (chronicling prohibition of all forms of traditional Indian religious practice). In recent times denials have often involved the right to gather or use ceremonial natural materials. See, e.g., *United States v. Dion*, 476 U.S. 734, 746 (1986) (finding in legislative history and text of a federal criminal statute extending protection to eagles clear evidence of Congressional intent to exercise plenary power and abrogate right of the Yankton Sioux to quiet and undisturbed possession of their reservation, to include reserved right to hunt eagles); Sharon O’Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families*, 53 FORDHAM L. REV. 315, 322 (1984) (noting international travel restrictions and domestic laws prohibiting importation of flora and fauna prevent Indians from crossing national boundaries to gather or trade sacred items); *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 441–42 (1988) (discussed *infra* at note 164).

<sup>161</sup>American Indian Religious Freedom Act, Pub. L. No. 95–341, 92 Stat. 469 (1978) (codified in part at 42 U.S.C. § 1996 (1988)) (declaring as grounds for protecting and preserving expression of Indian religions against infringement by state action that “the religious practices of the American Indian . . . are an integral part of their culture, tradition and heritage”).

proven too enigmatic for non-Indian jurists to admit within the meaning of “religion” as enunciated in the Bill of Rights.<sup>162</sup> For Indian claimants, who have not won a single religious freedom case<sup>163</sup> and may not celebrate the sacraments of their faith without threat of prosecution for violation of controlled-substance or species-protection legislation, the American tradition of religious freedom has been a “cruel hoax.”<sup>164</sup>

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<sup>162</sup> Racism, paternalism, and romanticism conspire to prevent protection of Indian religious freedom except when it is possible to cram Indian claims into the pigeonholes of the Bill of Rights and the European-derived values and traditions supporting notions of what religion should be—organized churches, formal institutions, a separation between church and state, and a hierarchical relationship between the deity and worshippers. See GETCHES ET AL, *supra* note 110, at 764 (explaining inability of non-indigenous judges to translate Indian claims under AIRFA into cognizable claims). To Getches,

Indian religious life does not include the existence of a church, periodic meetings, ritual, and identifiable dogma. Instead, there is a pervasive quality to Indian religion which gives all aspects of Indian life and society a spiritual significance . . . Judicial understanding and protection of Indian religion are hindered by a general unfamiliarity with Indian spiritual life, and perhaps even intolerance for religious beliefs and practices not succinctly defined by the ancient writings or a central authority familiar to European-developed religious traditions.

*Id.* Conflicts over land use exacerbate judicial unwillingness to draw Indian religions within the penumbra of the Constitution. As Deloria notes,

America is content with religious denominations which are capable of squeezing their entire experience with land into a city block, into a pew, and into a pulpit, leaving plenty of environmental “elbow room” for the business of the real world. As long as our religions tow the line insofar as they expect land to be sacrificed to our needs, we are happy . . . But when a religion dares to turn the tables and encourages humans to make medicine, prayers, and sacrifices in behalf of other living things, we feel violated, bullied by “an agenda,” and even irritated at such “primitive” ideas which hold “progress” hostage.

Vine Deloria, Jr., *Is Religion Possible? An Evaluation of Present Efforts to Revive Traditional Religions*, 8 WICAZO SA REV. 38–39 (1992).

<sup>163</sup> See Sharon O’Brien, *A Legal Analysis of the American Indian Religious Freedom Act*, in HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 27, 42–43 (Christopher Vecsey, ed., 1995); see also *New Mexico Navajo Ranchers’ Ass’n v. Interstate Commerce Comm’n*, 850 F.2d 729 (D.C. Cir 1988) (obligating the U.S. to consider the impact of actions on Indian religion but not obligating consultation with tribes whose religion was threatened with imminent destruction of its material foundations).

<sup>164</sup> Dean B. Suagee, *Self-Determination for Indigenous Peoples at the Dawn of the Solar Age*, 25 U. MICH. J.L. REFORM 671, 712 (1992). Not only did AIRFA provide little intellectual support for the finding that Indian religions were “religions” with respect to the Constitution, but it was passed as a resolution without concrete mandate other than a requirement that federal agencies evaluate their policies and procedures in consultation with Indian religious leaders and report findings to Congress. Laura Nader & Jay Ou, *Idealization and Power: Legality and Tradition in Native American Law*, 23 OKLA. CITY L. REV. 13, 22 (1998). Moreover, judicial

## 2. *Suppression of Indian Self-Government*

U.S. Indian policy has long disabled autonomous determination of the political organization, economic development, and legal regulation of Indian tribes and people, principally by disintegrating tribal institutions and supplanting them with Euro-American forms of governance. From the dark ages of the Allotment Era to the present, Indian legal institutions have presented an attractive point-of-entry to agents of forced social evolution.

### a. *Legal Imperialism*

Although no Indian tribe had codified a body of written law as of 1776, many tribes had kinship-based rules of conduct and belief that conditioned members to adhere to sacred values of order, harmony, and peace.<sup>165</sup> Intra-tribal disputes were typically resolved not through formal adjudication but rather with the aid of respected elders who would guide disputants to a restorative compromise. “Though it appeared to the casual white observer that anarchy reigned,”<sup>166</sup> spiritual consensus produced an internally coherent and rational jurisprudence. Despite retention of nearly exclusive subject matter and personal jurisdiction to the territorial limits of their reservations even as of the late nineteenth century,<sup>167</sup>

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interpretation further guts constitutional protection of Indian religious practice: in 1988 the Supreme Court, finding no independent cause of action arising under AIRFA, upheld U.S. logging and construction activities on National Forest lands used for religious purposes by several tribes, even while conceding it was undisputed that the activities could have “devastating effects on . . . Indian religious practices,” on the theory that to find otherwise would be tantamount to permitting a religious servitude on public lands. *Lyng*, 485 U.S. at 451–53 (1988) (“Whatever rights the Indians may have to the use of the area, those rights do not divest the Government of its right to use what is, after all, its land.”) (emphasis omitted). In 1990 the Court refused to apply the “compelling state interest” test developed under the First Amendment to an Oregon prohibition on the use of peyote applied, in the case at bar, to religious practice by members of the Native American Church: a majority held it would be “courting anarchy” to “open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind” and that “leaving accommodation to the political process” is the appropriate means to determine the state interest in regulating Indian religion. *Employment Div., Dep’t of Human Resources of Oregon v. Smith*, 494 U.S. 872, 888, 890 (1990).

<sup>165</sup> Ken Traisman, Note, *Native Law: Law and Order Among Eighteenth-Century Cherokee, Great Plains, Central Prairie, and Woodland Indians*, 9 AM. INDIAN L. REV. 273, 274, 278–79, 282–83 (1981).

<sup>166</sup> WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES 11 (1966).

<sup>167</sup> Individual federal statutes had provided for piecemeal federal prosecution of crimes occurring on Indian land since the eighteenth century. *See, e.g.*, Act of Mar. 3, 1817, ch. 92, 3 Stat. 383 (extending federal jurisdiction to crimes committed on reservations by non-Indians) (revised considerably and codified at 18 U.S.C. §1152 (1994)). Still, the legal regulation of

Indian tribes, with no easily identifiable legal institutions, procedures, or records, were beset by a constellation of proselytizers and BIA agents who, concluding they were without law,<sup>168</sup> imposed legal “civilization.”<sup>169</sup>

The 1883 case of *Ex parte Crow Dog*,<sup>170</sup> in which the U.S. Supreme Court overturned the federal conviction of an Indian charged with the murder of another Indian,<sup>171</sup> induced Congress to extend the complete coercive power of federal criminal law to the reservations. Determined to rectify the “savage nature” of tribal law, Congress applied “white man’s morality”<sup>172</sup> with the Major Crimes

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reservation transactions not involving non-Indians was left intact well into the late nineteenth century, save for the removal of virtually all tribal jurisdiction over non-Indians. *See, e.g.,* *United States v. McBratney*, 104 U.S. 621, 624 (1881) (permitting Colorado to exercise criminal jurisdiction over crimes of non-Indians against other non-Indians occurring on the Ute Reservation as no exception was made to territorial jurisdiction on Colorado’s admission to Union).

<sup>168</sup> *See* *Zion & Yazzie*, *supra* note 33, at 68 (contrasting U.S. practice with international practice of recognizing validity and legitimacy of indigenous law).

<sup>169</sup> *See* *Harring*, *supra* note 156, at 224 (quoting Secretary of the Interior Carl Schurz’s 1879 report to Congress) (“If the Indians are to be advanced in civilized habits it is essential that they be accustomed to the government of law . . .”).

<sup>170</sup> 109 U.S. 556 (1883). Spotted Tail, an authoritarian Brule Sioux chief who had staked his political fortunes on accommodation of U.S. authorities, was shot and killed on the reservation by his political rival, Crow Dog. After a peacemaking ceremony, the family of Spotted Tail agreed to accept a payment of \$600, eight horses, and one blanket to resolve the dispute. *Harring*, *supra* note 156, at 205. Despite the satisfaction of the entire Brule tribe, the case presented federal authorities the pretext for extension of federal criminal law to Indians. *Id.* at 200–01. Crow Dog was arrested, tried in the Territorial Court of South Dakota, and sentenced to hang by an all-white jury. *Id.* at 204–12. However, the Supreme Court reversed the conviction, finding that the Brule had the sovereign right to resolve disputes wholly internal to the tribe. *See Crow Dog*, 109 U.S. at 567–68, 571 (refusing to extend U.S. criminal law to acts occurring on Indian reservations on the ground that to do so would “measure[] the red man’s revenge by the maxims of the white man’s morality”). Nonetheless, for a white majority *Crow Dog* was a “legal atrocity” inasmuch as an Indian killer had “escaped punishment.” *Harring*, *supra* note 156, at 191, 194.

<sup>171</sup> *Id.* at 572.

<sup>172</sup> *Crow Dog*, 109 U.S. at 571. As Rep. Cutcheon (D-Mich.) stated before the Indian Affairs Committee in 1884:

[A]n Indian, when he commits a crime, should be recognized as a criminal, and so treated under the laws of the land. I do not believe we shall ever succeed in civilizing the Indian race until we teach them regard for law, and show them that they are not only responsible to the law, but amenable to its penalties .

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Act of 1885 to expressly establish concurrent federal jurisdiction over major felonies committed by Indians on reservations regardless of the status of their victims.<sup>173</sup> Legal challenges failed to reestablish tribal legal self-determination but provided the judiciary occasion to further under gird plenary power.<sup>174</sup>

The paternalistic assault upon Indian legal sovereignty, joined on the religious front with the adoption of the CIO/CFR courts, intensified during the Great Depression with the passage of the Indian Reorganization Act of 1934 (IRA).<sup>175</sup> Although the IRA expressly recognized that tribes might create their own courts<sup>176</sup> and enact their own laws,<sup>177</sup> the legislation imposed BIA-drafted boilerplate constitutions<sup>178</sup> that created strange new substantive and procedural obligations. Moreover, after the passage of Public Law 280 in 1954,<sup>179</sup> providing

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It is an infamy upon our civilization, a disgrace to this nation, that there should be anywhere within its boundaries a body of people who can, with absolute impunity, commit the crime of murder . . . .

16 CONG. REC. 934 (1885).

<sup>173</sup> Major Crimes Act of 1885, ch. 341, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. §1153 (1994) and expanded to fourteen felonies from original seven). The Major Crimes Act subjects Indians charged with serious felonies to exclusive federal criminal jurisdiction regardless of the place of the alleged offense or the identity of the victim. 18 U.S.C. § 1153 (1994).

<sup>174</sup> See, e.g., *U.S. v. Kagama*, 118 U.S. 375, 384–86 (1886) (holding, in suit challenging Major Crimes Act as an unconstitutional extension of federal criminal jurisdiction over murder on an Indian reservation, that Congress has plenary power, immune from judicial review, to exercise authority over Indians as it sees fit, for their own well-being).

<sup>175</sup> Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §1401(b) (1994)).

<sup>176</sup> Although the IRA appeared to encourage tribal legal self-determination, tribal courts created under the IRA were merely revamped CIO/CFR Courts, with American substantive law governing process and imposing a regime of individual rights hostile to traditional Indian legal systems. See Porter, *supra* note 33, at 268–70.

<sup>177</sup> See 25 C.F.R. § 11.100(c) (1997).

<sup>178</sup> See THE ROAD TO WOUNDED KNEE 7 (Robert Burnette & John Koster eds., 1974) [hereinafter BURNETTE & KOSTER] (noting that under the IRA as implemented, only standardized, authoritarian tribal constitutions that mirrored a BIA-promulgated model providing for no separation of powers or branches and incorporating harsh restrictions on freedom of action in trade, property, land, and political associations, were ratified). Furthermore, constitutions imposed by the IRA subject tribal governments to majority rule principles and grant the the Secretary of the Interior or his delegate, the BIA Commissioner, veto power over almost all important tribal decisions. See *Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt*, 107 F.3d 667, 870 (8th Cir. 1997) (upholding review and veto powers of Secretary of the Interior over tribal actions).

<sup>179</sup> Act of Aug. 15, 1953, Pub. L. No. 83–280, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1994), 25 U.S.C. §§1321–22 (1994), & 28 U.S.C. § 1360 (1994)). Although it expressly disclaimed any grant to the states of power to tax Indian lands held in

that specified States could unilaterally accept concurrent jurisdiction over Indian territory within their borders, the entire body of State civil and criminal law was extended to classes of cases involving Indians.<sup>180</sup> Fearing that failure to create acceptable tribal courts would result in states taking jurisdiction over *all* cases occurring on reservations,<sup>181</sup> and understanding that review of the exercise of regulatory jurisdiction over Indian affairs was an exercise in futility, tribes begudgingly implemented constitutions and adversarial justice systems.<sup>182</sup>

The penultimate blow fell in 1968 when the Indian Civil Rights Act (ICRA)<sup>183</sup> imposed many of the individualist strictures of the U.S. Constitution on tribal governments<sup>184</sup> and smoothed the way for what Indian activists branded “white-man’s justice.”<sup>185</sup> Although the ICRA amended Public Law 280 to require tribal consent for the exercise of State jurisdiction and left interpretation of the legislation to the tribes themselves,<sup>186</sup> by the early 1970s pre-Columbian

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federal trust or to abrogate Indian reserved rights under treaties, Public Law 280 extended state civil and criminal jurisdiction to most Indian tribes in California, Nebraska, Minnesota, Oregon, and Wisconsin. Alaska was added in 1958. *See id.* Perhaps just as significantly in terms of the devolution of authority and responsibility, Public Law 280 also shifted responsibility for administration and funding of trust-based Indian entitlement programs to the states. *Id.*

<sup>180</sup> *See Williams v. Lee*, 358 U.S. 217, 220–21 (1959) (upholding application of state law to Indians absent a governing federal statute without explicitly overturning *Worcester*, which held that state law cannot be applied due to its harmful effect on tribal sovereignty).

<sup>181</sup> *See, e.g., Nancy A. Costello, Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875, 896 (1999) (stating that Navajo Tribal Courts were created to exclude state court jurisdiction).

<sup>182</sup> *See COHEN, supra* note 128, at 332–35 (detailing U.S. role in the development of tribal courts).

<sup>183</sup> Indian Civil Rights Act of 1968, Pub. L. No. 90–284, Title II, 82 Stat. 73, 77 (codified as amended at 25 U.S.C. §§ 1301–1303 (1994)). ICRA limits tribal powers to define and punish offenses and imposes substantive due process provisions of Article III and the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments of the Constitution upon tribal governments. 25 U.S.C. § 1302 (1994).

<sup>184</sup> Indian tribes were not subject to constitutional restrictions prior to ICRA. *See Talton v. Mayes*, 163 U.S. 376, 385 (1896) (holding that Indian tribes, as they are not states within the meaning of the U.S. Constitution, are not subject to its restrictions).

<sup>185</sup> Porter, *supra* note 33, at 271–73; ICRA was foreign to sacred tribal traditions of fairness and justice, and its reference to “due process,” “equal protection,” “speedy trial,” and “freedom of speech” were an unwelcome intrusion on tribal sovereignty. *See Robert Laurence, The Convergence of Cross-Boundary Enforcement Theories in American Indian Law: An Attempt to Reconcile Full Faith and Credit, Comity and Asymmetry*, 18 QUINNIPIAC L. REV. 115, 135 (1998) (indicating ICRA “significantly altered the focus . . . from the tribal community towards the individual . . .”).

<sup>186</sup> *See* 25 U.S.C. §§1321–1322, 1326 (1994). Congress specifically provided that interpretation of the ICRA was to be left to tribes and admonished that its purpose was protection of individual rights against the administration of tribal justice, without eroding the

methods of social control had displaced traditional tribal justice from courts where an Anglo-American adversarial legal system had sunken roots. BIA-drafted codes permitted tribal court judges to apply tribal statutes, yet federal and state laws were supreme,<sup>187</sup> and federal judicial review steered tribal jurisprudence into lockstep conformity.<sup>188</sup> When, in 1978, *Oliphant*<sup>189</sup> denied tribes jurisdiction over the criminal acts of non-Indians on reservations,<sup>190</sup> a new generation of critical jurisprudence began to question the foundations of federal Indian law.<sup>191</sup>

Although tribal proactivity and federal interposition hold State law partly at bay,<sup>192</sup> at present Indian tribes may exercise jurisdiction without impediment

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parameters of tribal sovereignty. Laurence, *supra* note 185, at 123. Furthermore, the sole remedy ICRA provides for a tribal member contesting the legality of his detention by a tribal court is a writ of habeas corpus. *See* 25 U.S.C. §1303 (1994).

<sup>187</sup> *See* 28 U.S.C. §1360(c) (1994) (requiring state courts exercising jurisdiction in Indian country to apply tribal laws and customs only “if not inconsistent with any applicable civil law”).

<sup>188</sup> Newton, *supra* note 78, at 853. One of the most powerful instruments in enforcing control is the doctrine of comity. A long-standing practice of American courts is the denial of comity to tribal court judgments on the ground that tribal justices systems do not accord sufficient due process, which courts of the United States are swift to identify where tribal justice departs “significantly” from practices “commonly employed in Anglo-Saxon society.” *Bird v. Glacier Electric Coop., Inc.*, 255 F.3d 1136, 1143 (9th Cir. 2001) (holding individual rights to due process violated by closing argument in Tribal Court referencing history of white oppression against Indians) (quoting *Randall v. Yakima Nation Tribal Ct.*, 841 F.2d 897, 900 (9th Cir. 1988)). Although U.S. courts are quick to disavow any interest in judicial paternalism in derogation of tribal self-government, denial of recognition of tribal court judgments utterly neuters the legal autonomy of Indian tribes, particularly with respect to their transborder legal contacts. *See id.* at 1141–43.

<sup>189</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

<sup>190</sup> *See Montana v. United States*, 450 U.S. 544, 566–67 (1981) (denying Indian tribes inherent power to regulate hunting and fishing by non-Indians on non-Indian-owned land within a reservation).

<sup>191</sup> *See* Newton, *supra* note 78, at 753. “Federal Indian law,” as distinguished from “tribal law,” is the body of U.S. statutes, doctrines, and caselaw that governs relations with Indian tribes.

<sup>192</sup> *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996) (stating that the Indian Commerce Clause divested states “of virtually all authority over Indian commerce and Indian tribes”); *See Williams*, 358 U.S. at 220 (ruling that to permit states to exercise jurisdiction over Indians where “essential tribal relations” are involved would “infringe on the right of the Indians to govern themselves.”). *But see* *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 266–68 (1992) (allowing states to tax reservation lands held in fee); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152–53 (1980) (allowing states to tax cigarette sales on reservations); *Rice v. Rehner*, 463 U.S. 713, 733–35 (1980) (allowing state regulation of on-reservation liquor sales); *Seminole Tribe*, 517 U.S. at 62 (Indian Commerce Clause does not

solely over consenting tribal members on fragmented remnants of former tribal holdings.<sup>193</sup> Even this vestige of sovereignty is threatened by the plenary power to extend all federal, and, by inaction, State laws to the reservations.<sup>194</sup> Rediscovery of tribal dispute resolution methods after a century of legal imperialism, and the reassertion of tribal autonomy to prescribe, adjudicate, and enforce tribal laws, are pressing concerns, yet reacquisition of Indian law is inadequate by itself to offset the crushing force of federal Indian law, a mechanism “genocidal in both its practice and intent . . . .”<sup>195</sup>

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grant Congress power to abrogate Eleventh Amendment immunity of a state from suits by tribes, regardless of whether congressional intent to do so is clear). The contentious battle between tribes and states over the precise boundaries of Indian legal autonomy, fought increasingly on the plain of taxation, continues. See Robert A. Fairbanks, *Native American Sovereignty and Treaty Rights: Are They Historical Illusions?*, 20 AM. INDIAN L. REV. 141 (1995–96) (predicting future state attempts to tax Indian tribes).

<sup>193</sup> See *Montana*, 450 U.S. at 564 (“[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.”). Although the *Montana* Court recognized tribal competence to regulate aspects of the dealings of non-Indians who enter consensual relationships with or threaten the political or physical well-being of the tribe, subsequent decisions eroded these inherent powers still further. See *State v. A-1 Contractors*, 520 U.S. 438 (1997) (“*Montana* thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation . . . .”). Presently, the presumption is that Indian sovereignty over Indian land is absent unless Congress explicitly legislates otherwise. *Id.*

<sup>194</sup> See *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 180 (1973) (providing that states may exercise jurisdiction over Indian tribes where federal law does not preempt exercise of such power, the conduct of non-Indians is at issue, and tribal self-government will not be impeded). Although the complex web of jurisdictional issues exceeds the scope of this Article, the general pattern is the transfer of legal sovereignty from Indian tribes to federal and state governments. See, e.g., *United States v. Lara*, 124 S. Court. 1628 (2004) (upholding tribal inherent jurisdiction over nonmember Indians but stressing the plenary power of Congress to terminate this jurisdiction at will). For a discussion of the gradual erosion of tribal jurisdiction, see William Bradford, *Another Such Victory and We Are Undone: A Call to an American Indian Declaration of Independence*, 40 TULSA L. REV. 71 (2004).

<sup>195</sup> Robert A. Williams, *Encounters on the Frontier of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World*, 1990 DUKE L.J. 660, 662–65 (implicating federal Indian law in displacement of peoples, dissolution of tribal institutions, domination of legal systems, and disabling of land title and cultural practice).

### b. *Political Domination*

Although Indian tribes are separate sovereigns in retention of all rights and powers not explicitly ceded to the U.S. by treaty,<sup>196</sup> or abrogated by explicit legislative intent,<sup>197</sup> U.S. Indian policy has been generally hostile to the right of Indian tribes to self-govern as politically distinct communities.<sup>198</sup> If the theme of the nineteenth century was eradication of Indians and the seizure of their land, the motif of the twentieth century was the destruction by law of tribal sovereignty. With the passage of the IRA, Indian tribes, traditionally hyperdemocratic and consensus-driven institutions,<sup>199</sup> were reconstituted and subjected to the veto power of the Secretary of the Interior;<sup>200</sup> subsequent legislative and judicial action

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<sup>196</sup>United States v. Wheeler, 435 U.S. 313, 327 n.24 (1978) (citing United States v. Winans, 198 U.S. 371 (1905)). As separate sovereigns predating the U.S. Constitution, Indian tribes possess inherent, residual powers of sovereignty not deriving from congressional grants. See *Cherokee*, 30 U.S. at 16. These inherent recognized powers include, inter alia, powers to establish a tribal government, determine tribal membership (*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978)), administer justice, exclude persons from the reservation (see *Quechan Tribe v. Rowe*, 531 F.2d 408, 411 (9th Cir. 1976)), charter business organizations, exercise police power, invoke sovereign immunity (*Santa Clara Pueblo*, 436 U.S. at 72 (1978)), levy taxes (see *Confederated Colville Tribes*, 447 U.S. at 152–53), and regulate domestic relations (see *Fisher v. District Court*, 424 U.S. 382, 389 (1976)). Still, although tribes retain many of the trappings of sovereign nations, the exercise of inherent tribal powers may be abrogated or restricted by a treaty or law or, in limited circumstances, by state laws. See Atkinson, *supra* note 44, at 397–98, 408.

<sup>197</sup>See *Dion*, 476 U.S. at 738–40. In recent years, the legal doctrine that the powers lawfully vested in an Indian tribe are not delegated but rather inherent concomitants of a limited sovereignty never extinguished by the U.S., has been under threat. See *Mille Lacs*, 526 U.S. at 219 (Rehnquist, C.J., dissenting) (rights reserved by Indian tribes under treaties may be “temporary and precarious” if not explicitly guaranteed in perpetuity by their plain language) (citing *Ward v. Race Horse*, 163 U.S. 504, 515 (1896)).

<sup>198</sup>U.S. hostility to indigenous political forms found expression in policy statements supporting allotment. See TERRY L. ANDERSON, SOVEREIGN NATIONS OR RESERVATIONS? AN ECONOMIC HISTORY OF AMERICAN INDIANS 94 (1995) (quoting BIA Commissioner) (“[E]xisting forms of Indian government which [are] menacing the peace . . . and irritating their white neighbors, should be replaced by a regularly organized Territorial form of government . . .”).

<sup>199</sup>LARRY W. BURT, TRIBALISM IN CRISIS: FEDERAL INDIAN POLICY 1953–1961, 3 (1982); see also BURNETTE & KOSTER, *supra* note 178, at 15 (describing tribal governments prior to 1934 as council democracies advised by elders that operated on principles of consensus and voluntary compliance with decisions).

<sup>200</sup>See BURNETTE & KOSTER, *supra* note 178, at 183 (noting that BIA-adopted constitutions grant the Secretary of the Interior veto power over most tribal actions and decisions). For an opposing view, see AMERICAN INDIAN LAW DESKBOOK 21–23 (Nicholas J. Spaeth et al., eds. 1993) (suggesting the IRA replaced federal with tribal governance).

has stripped Indian tribes of control over their form, property, and powers.<sup>201</sup> Relations with post-IRA Indian tribes, rather than proceed as if between mutual sovereigns, are conducted largely through a welter of executive agencies.<sup>202</sup> As a result, the terms and conditions of Indian existence are frequently dictated by Washington, rather than debated on the reservations.<sup>203</sup> Federal agencies to which Congress delegates power smother tribes under a blanket of regulation<sup>204</sup> that, although it provides the means of subsistence, suppresses traditional modes of social control and value allocation, and the Secretary of the Interior looms large over every aspect of tribal life.<sup>205</sup> A dawning recognition that Indians are entitled to self-govern has spurred calls to end the fundamental asymmetry of U.S.-Indian relations. Nevertheless, decades after introduction of the federal policy of “Indian Self-Determination,”<sup>206</sup> tribes remain politically subordinate to, and thus economically dependent upon, the U.S.<sup>207</sup>

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<sup>201</sup> See LEGTERS & LYDEN, *supra* note 111, at 6 (noting that, as a consequence of the legislative and judicial diminution of their sovereignty, Indian tribes are now often junior partner in the hierarchy of federal, state, local, and tribal governments).

<sup>202</sup> See Thomas Biolsi, “*Indian Self-Government*” as a *Technique of Domination*, 15 AM. IND. Q. 23, 24 (1991) (describing U.S. policy of “indirect rule” through a nexus of federal agencies and reorganized tribal structures). Indirect rule imposes fiscal, cultural, and social costs: increased tribal bureaucratization associated with governance from afar consumes nearly half of tribal budgets, far more than that allocated to economic development. WELLS, *supra* note 105, at 17.

<sup>203</sup> See ALVIN M. JOSEPHY, *RED POWER: THE AMERICAN INDIAN’S FIGHT FOR FREEDOM* 84 (1971) (quoting National Indian Youth Congress President Clyde Warrior in 1967 address) (“We are not allowed to make those basic human choices and decisions about our personal life and about the destiny of our communities . . . . Our choices are made for us . . . by federal administrators, bureaucrats, and their ‘yes men,’ euphemistically called tribal governments.”); see also ANDERSON, *supra* note 198 at 148–49 (1995) (noting that rather than foster time-honored education, cultural expression, and economic development, federal Indian agencies force tribal leaders to lobby for federal funding for social programs developed without significant Indian participation); Atkinson, *supra* note 44, at 393 (describing exclusion of Indian organizations and individuals from agency planning).

<sup>204</sup> Under the trust doctrine, the U.S. funds and participates in the management of a welter of complex statutory programs, involving education, health, social services, economic development, and resource management, on Indian reservations. See *infra* note 219 (listing programs). Although Indian participation in the development and administration of these programs shapes them to fit tribal needs and values, the parameters within which such local influence is exercised are determined by Congress.

<sup>205</sup> ANDERSON, *supra* note 198, at 247 (noting veto power of Secretary of Interior over tribal decisions).

<sup>206</sup> In 1970 Congress delegated authority to the executive to enter into contracts with Indian tribes in which federal Indian programs would be funded by the U.S., but responsibility for planning and administration would be assumed by tribal governments. Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C §§ 450–450(n) (1976). Support

### c. *Ethnodevelopmental Suppression*

Despite significant resource endowments,<sup>208</sup> many Indian tribes<sup>209</sup> remain ensnared in a web of economic dependence,<sup>210</sup> institutionalized domination,<sup>211</sup>

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for Indian self-determination took on a bipartisan tint in the early 1980s. *See* President Reagan, Statement On Indian Policy, PUB. PAPERS OF RONALD REAGAN 96 (Jan. 24, 1983) (“Our policy is to reaffirm dealing with Indian Tribes on a government-to-government basis . . .”). Congress authorized development of enhanced self-governance plans under the rubric of a “New Federalism” advanced by the Senate Select Committee on Indian Affairs. *See* Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 209, 102 Stat. 2285, 2296 (1988) (allowing tribes to assume administration of some BIA programs). Nevertheless, federal Indian agencies remained mired in patterns of costly and unresponsive provision of services. PEVAR, *supra* note 79, at 37-38 (noting investigations implicating BIA as primary deterrent to development of Indian self-government in areas of employment, housing, and health care). Throughout the 1980s, Indian Self-Determination simply decentralized the fiduciary relationship, and by the start of the 1990s, both major political parties, eager to decrease the financial drain of Indian welfare programs, cut aid while pressing Indian tribes to enter the world of private enterprise. DELORIA & LYTLE, *supra* note 35, at 7. Although the Clinton Administration urged federal Indian agencies to adopt the Reagan principle of mutual sovereignty, many Indian tribes remain, paradoxically, under pupillage. *See, e.g.,* WELLS, *supra* note 105, at 9-10 (elaborating paradox wherein continued federal funding is necessary to implement Indian Self-Determination).

<sup>207</sup> Empirical evidence suggests that, for Indian tribes, political domination produces economic dependence. *See* ANDERSON, *supra* note 198, at 245 (“Economy follows sovereignty in Indian Country . . . The most striking characteristic of . . . successful tribes . . . is that they have aggressively made the tribe itself the effective decision maker . . .”). Nonetheless, economics and politics exert reciprocal influence, and economic dependence precludes the free exercise of Indian sovereignty. *See* John C. Mohawk, *Indian Economic Development: An Evolving Concept of Sovereignty*, 39 BUFF. L. REV. 495, 499 (1991) (“Indian economic development may be less about creating wealth than it is about creating the conditions for political power . . .”).

<sup>208</sup> The irony of Indian poverty is rendered all the more acute by reference to the abundant, sustainable resources in Indian country. Timber, hydroelectric sources, grazing land, minerals, oil and gas, and wildlife abound. However, the U.S., as trustee, controls leasing and production of these assets. *See, e.g.,* Prince, *supra* note 55, at 239-42 (noting that federal management of the \$27 billion of mineral assets on the Crow Reservation currently yields a return of only .01% to the tribe).

<sup>209</sup> The conditions of each reservation are as distinct as are the more than five hundred tribes; several “report ‘a sense of pride and accomplishment’” in recent development of autonomous programs which include “law enforcement, education, organic farming, sustainable-resource logging, recycling plants, construction, environmental repair industries, language and culture academies, arts and crafts workshops, casinos, buffalo ranches, resorts, solar and wind energy production, computer assembly, tribal courts, veterans affairs offices, housing, road improvement, sanitation, etc.” Atkinson, *supra* note 44, at 430 (citation omitted).

<sup>210</sup> *See* Daniel Boxberger, *Individualism or Tribalism?: The “Dialectic” of Indian Policy*, 15 AM. INDIAN Q. 29, 29 (1991) (noting “complex factors that have shaped tribal institutions . . .

geographic dislocation, and gross undercapitalization.<sup>212</sup> Although the non-legal obstacles to Indian economic independence, the first and foremost goal of tribal governments,<sup>213</sup> are very real, the constraints imposed by federal Indian law are even more formidable. To wit, the U.S. holds trust title to Indian lands and resources,<sup>214</sup> and Indians cannot sell, lease, or borrow against their property without the express approval of the Secretary of the Interior.<sup>215</sup> As the very question of secretarial approval introduces political uncertainty,<sup>216</sup> trust-based

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as dependent, internal colonies”); *see also* ROBERT H. WHITE, *TRIBAL ASSETS: THE REBIRTH OF NATIVE AMERICA* 7 (1990) (“Less than 10 percent of [Indian] communities have[] any control over their economic fate . . .”). In addition to dependence for social services, many tribes rely on low-wage federal and state jobs and the export of nonrenewable natural resources for subsistence. *See, e.g.*, WELLS, *supra* note 105, at 361–70.

<sup>211</sup> *See* Mohawk, *supra* note 207, at 496–97 (suggesting that Indian economic development is hostage to BIA interference with the organization of independent political communities).

<sup>212</sup> *See* Robert A. Williams, Jr., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Governmental Tax Status Act of 1982*, 22 HARV. J. ON LEGIS. 335, 342–50 (1985) (relating the remoteness of reservations from centers of commerce and education to difficulty in accessing markets, capital, and managerial expertise).

<sup>213</sup> WHITE, *supra* note 210, at 273. Admittedly, tribal governments do not always speak with a single voice as to the appropriate developmental path: there is a broad intra- and inter-tribal diversity of opinion as to the objectives, pace, and direction of Indian economic development. Still, a pan-Indian near-consensus favors independent Indian allocation, free from non-Indian mediation, of the cultural values informing Indian economic life. ANDERSON, *supra* note 198, at 246.

<sup>214</sup> The U.S. defines the trust responsibility as the obligation to assert plenary power “to ensure the survival and welfare of Indian[s]” by “provid[ing] those services required to protect and enhance Indian lands, resources, and self-government” and “to raise the[ir] standard of living . . . to a level comparable to the non-Indian society.” WELLS, *supra* note 105, at 19.

<sup>215</sup> *See* 25 U.S.C. §§ 393, 396, 415, 483 (1994) (providing that an Indian individual or tribe who wishes to sell, convey, lease, or mortgage property in Indian country for more than one year must first secure the permission of the Secretary of the Interior).

<sup>216</sup> Justifications for congressional refusal to consign the trust doctrine to the ashcan of history focus on the claim that the trust is necessary to protect Indians from exposure to market forces and the improvident disposal of their property. *See* PERRY, *supra* note 62, at 16. However, it is questionable at best whether the increasingly sophisticated tribes of the twenty-first century are any longer in need of the “protection” afforded by an inept trustee such as the U.S. has demonstrated itself to be. Critical examinations of BIA management decisions, as well as recent case law, support the argument that the trust doctrine operates as legal dressing for the assertion of federal politico-economic power for the benefit of non-Indian constituencies, such as industries that compete against, or rely upon raw materials derived from Indian interests. *See* WELLS, *supra* note 105, at 381 (identifying trust doctrine as facilitating corporate exploitation of Indian lands and resources); *see also* Cobell v. Babbitt, 91 F. Supp. 2d 1, 6–7 (D.D.C. 1999) (finding as a matter of fact that the purpose of the trust doctrine was to “deprive [Indians] of their native lands and rid the nation of their tribal identity” to avail non-Indians of tribal lands

land-tenure constraints diminish the relative output-values of land-intensive enterprises such as agriculture, ranching, and resource development.<sup>217</sup> Moreover, U.S. management of Indian resources grants the U.S. paternalistic control over Indian economic destiny.<sup>218</sup> Although the U.S. is under a moral obligation to husband Indian resources, diligently advance Indian land claims against the States, secure adequate funding for Indian social services,<sup>219</sup> and enhance the economic well-being of Indian people,<sup>220</sup> federal agencies have withheld basic subsistence,<sup>221</sup> mismanaged tribal resources,<sup>222</sup> and violated the animating

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and resources). Within this understanding of the trust, agency decisions regarding Indian property are inherently governed by political considerations, rather than fiduciary concerns.

<sup>217</sup> See ANDERSON, *supra* note 198, at 134 (illustrating process whereby the trust imposes opportunity costs, bureaucracy, and dependence rather than permits self-determination).

<sup>218</sup> Royalties earned from leases of rights on Indian lands are paid not to Indian individuals or tribes but are deposited by the BIA, in theory, into trust accounts. See 25 U.S.C. § 415 et seq. However, a 1996 federal audit discovered that the BIA could not account for \$2.4 billion in Indian monies ostensibly safeguarded in federal trust funds. See Atkinson, *supra* note 44, at 424–26. Indian beneficiaries seeking remedies must confront the fact that U.S. authority over Indian resources held in trust is legally limited only by the requirement of “good faith.” See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 408–09 (1980) (holding that the United States, as trustee, may alter the form of trust assets as long as it attempts, in good faith, to provide property of equivalent value).

<sup>219</sup> Although the trust imposes a moral obligation on the U.S. to provide funding for Indian social services, the process whereby such funds are made available is a paradigm of inefficiency and paternalism: only a fraction of what Congress allots to the BIA reaches Indian tribes, and monies are specifically earmarked for programs selected by the BIA despite tribal determinations that funds are better allocated elsewhere. WELLS, *supra* note 105, at 21. Nevertheless, the U.S. has created a series of Indian benefit programs that purport to uphold its obligations under the trust responsibility. See National Historic Preservation Act, 16 U.S.C. §§ 470(a)-(d)(6) (1994) (providing particular protection to properties with cultural and religious importance to Indian tribes); National Museum of the American Indian Act, 20 U.S.C. §§ 80(q)-(q)(15) (1994) (creating museum exclusively for preservation and study of history and artifacts of Indians); Drug Abuse Prevention, Treatment and Rehabilitation Act, 21 U.S.C. § 1177(d) (1994) (giving preference to grant applications aimed at combating Indian drug abuse); Native American Languages Act, 25 U.S.C. §§ 2901–06 (1994) (accordng Indian languages statutory protection); Workforce Investment Act of 1998, 29 U.S.C. § 2911 (1994) (supporting Indian employment); Native American Programs Act of 1974, 42 U.S.C. §§ 2991–2992(d) (1994) (creating financial and cultural benefit programs); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–13 (1994) (protecting Indian burial sites and remains).

<sup>220</sup> *Cherokee*, 30 U.S. at 1.

<sup>221</sup> DELORIA & LYTLE, *supra* note 35, at 181 (charging both major political parties with default on trust obligations).

<sup>222</sup> The paternalistic policies of a non-Indian majority, violative of the moral and legal imperatives arising under the trust doctrine, add the insult of impoverishment to the injury of expropriation: the BIA arranges Indian leases, and collects their royalties and usufructuary

principles of the trust with near-impunity. Only in very recent years has the trust doctrine charged the U.S. with judicially enforceable obligations apart from those incorporated in specific treaties, statutes, or executive orders.<sup>223</sup> Although the protective dimensions of the trust doctrine have broadened,<sup>224</sup> aggrieved Indian beneficiaries still lack effective legal recourse for its breach.<sup>225</sup>

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benefits for their “protection.” See Atkinson, *supra* note 44, at 404–05, 408. Moreover, because all tribal land is held in trust, leases of more than one year are prohibited without permission of the Secretary of the Interior, and funds generated from such leases cannot be used to purchase land. U.S. mismanagement of Indian resources is of epic proportions. See, e.g., S. REP. NO. 101–216, at 105–29, 140 (1989) (documenting a century of theft of Indian oil and gas). In the most recent case, a federal court, finding the U.S. in breach of a common law fiduciary obligation due to its “long and sorry history” of gross mismanagement of over \$500 million in 300,000 individual Indian Money Accounts, retained jurisdiction to enforce an accounting but stopped short of ordering further remedies unauthorized by statute. *Cobell*, 91 F. Supp. 2d at 7. Although the Secretary of the Interior concedes the issue of gross federal mismanagement, the means proposed as the most cost-effective to make an accounting—statistical sampling—would cost Indian claimants at least \$70 million: whether relief will ever be afforded is uncertain, although the court maintains jurisdiction and defendants are currently required to file reports as to trust reform activities. *Id.*; see also *Assiniboine and Sioux Tribe of the Fort Peck Indian Reservation v. Norton*, 211 F. Supp. 2d 157, 158, 160 (D.D.C. 2002) (finding that the case at bar presented the same questions of law and fact as *Cobell*, and refusing to refer the case at bar, and other related tribal cases, to the Calendar Committee).

<sup>223</sup> See *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308–09 (9th Cir. 1997) (finding no general obligation under trust doctrine entitling tribes to rights broader than those created by statute). Moreover, tribes must exhaust administrative remedies for claims of breach of trust to be justiciable. See *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677–78 (9th Cir. 1988).

<sup>224</sup> The full range of obligations owed under common law principles of fiduciary duty is broad. RESTATEMENT (SECOND) OF TRUSTS, §§ 170–72 (1959) (listing, inter alia, duties to exercise diligence and prudence, avoid conflict of interest, deal fairly, and assume liability for loss). A few limit U.S. management of the Indian trust. See, e.g., *Cramer v. United States*, 261 U.S. 219, 229 (1923) (construing statute in light of trust doctrine to protect Indian right of occupancy); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (judging U.S. conduct with respect to Indians “by the most exacting fiduciary standards”); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975) (enforcing fiduciary obligations to Indians). For a discussion of judicial efforts to expand enforcement, see Reid Payton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975).

<sup>225</sup> See *Cobell*, 91 F. Supp. 2d at 6–7 (holding that federal courts are limited by separation of powers considerations in reviewing executive management of Indian resources and, where not authorized by statute, cannot function as “a grievance committee”); COHEN, *supra* note 128, at 169 (noting full body of common-law duties and rights “does not exist between the [U.S.] and the Indians”). As of 2004, the U.S. Supreme Court has never granted relief for a breach of duty arising under the trust doctrine as defined at common law: relief for a putative breach is available only in those limited circumstances where the U.S. acts in the narrow role of (quasi) private, rather than public, trustee. See *Nevada v. United States*, 463 U.S. 110, 128 (1983)

Plenary power, as well as judicial review of its exercise,<sup>226</sup> further stifles Indian economic development by enabling Congress to terminate federal benefits<sup>227</sup> and restrict, or even abrogate, Indian rights reserved under treaties.<sup>228</sup> Domestic lobbying to induce Congress to allow non-Indian economic interests access to Indian resources<sup>229</sup> threatens tribal sustenance and culture.<sup>230</sup> Although

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(holding that when the U.S. acts generally under the trust doctrine it “cannot follow the fastidious standards of a private fiduciary”). For a discussion of the recent history of the effectiveness of judicial enforcement of the trust responsibility, particularly regarding Indian lands, *see generally* Rebecca Tsosie, *The Conflict Between the “Public Trust” and the “Indian Trust” Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271 (2003).

<sup>226</sup>Two centuries after *Worcester*, the Supreme Court “continues to permit the exercise of plenary power . . . where . . . broad discretionary powers are vital to the solution of the ‘Indian problem.’” Williams, *supra* note 111, at 261.

<sup>227</sup>L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 861 n. 329 (1996).

<sup>228</sup>*See supra* notes 96–124 and accompanying text (elaborating doctrines of reserved rights, plenary power, and their intersection in federal Indian law). The legal standard for abrogation of Indian treaties remains “plain and unambiguous” congressional intent. *Dion*, 476 U.S. at 740 (establishing that “Congress actually [has to have] considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose[n] to resolve that conflict by abrogating the treaty.”); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247–48 (1985); *see also* *Lac du Flambeau Indians v. Stop Treaty Abuse-Wisconsin, Inc.*, 759 F.Supp 1339 (W.D. Wis. 1991). Absent this showing, federal courts have read reserved rights to require imposition of corresponding state and federal duties, including obligations to secure access rights to historic lands and waters, insulate tribes from state licensing fees, and protect against discriminatory state regulations. *See* Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 500 (1998) (enunciating duties of U.S. and states to protect Indian reserved rights).

<sup>229</sup>Recent critics of Indian reserved rights have attacked the foundations of the reservation system itself, not merely as “some sort of Rube Goldberg device for control of Indian people” but as an inefficient, ineffective system. *See, e.g.*, George P. Castile, NATIVE NORTH AMERICAN AND THE NATIONAL QUESTION, in *THE POLITICAL ECONOMY OF NORTH AMERICAN INDIANS* 275. (John H. Moore ed., 1993) [hereinafter MOORE]. Some call for the dissolution of reservations and the redistribution of reservation-based resources. *Id.*

<sup>230</sup>Indian reserved rights to fish, hunt, use water, and possess land have been frequent subjects of violent treaty abrogation campaigns. *See, e.g.*, *Progressive Animal Welfare Society v. Slater*, No. 98–36053, 1999 U.S. App. LEXIS 3525, at \*3 (9th Cir. March 4, 1999) (affirming decision of district court in refusing to grant preliminary injunction to prevent Coast Guard from implementing a rule establishing a protective zone around the Makah Indian tribe exercising reserved right to whale); John Enders, *Ore. Farmers Rejoice at Water’s Release*, BOST. GLOBE, Mar. 30, 2002, at A2 (reporting conflict between Klamath Basin Indian religious rights to take fish and farmers’ interest in use of dammed water in Oregon). For a discussion of the cultural and religious importance of hunting and fishing rights to Indian tribes, as well as a sketch of the dimensions and intensity of the conflict over Indian reserved rights and their

Indians, as prior sovereigns, reserved rights in treaties to use water,<sup>231</sup> hunt and fish, and engage in traditional modes of production and worship on customary lands and waters,<sup>232</sup> recent cases suggest that these are merely “temporary and precarious”<sup>233</sup> privileges subject to revocation even absent explicit congressional intent to do so.<sup>234</sup> The synergy of the trust doctrine, plenary power, and judicial review in derogation of reserved rights is felt most acutely when tribes employ development methods that promote Indian culture and identity.<sup>235</sup> When Indian “ethnodevelopment”<sup>236</sup> threatens the regulatory jurisdiction, market power, and

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intersection with and opposition to non-Indian economic interests, see Shelley D. Turner, *The Native American's Right to Hunt and Fish: An Overview of the Aboriginal Spiritual and Mystical Belief System, the Effect of European Contact and the Continuing Fight to Observe a Way of Life*, 19 N.M. L. REV. 377 (1999).

<sup>231</sup> Machinations within the so-called “iron triangle”—interlocking directorates of the Bureau of Reclamation, state officials, and corporate interests—have denied Indians the beneficial use of reserved water rights. See LLOYD BURTON, *AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF THE LAW* 23 (1991). For a discussion of this contested Indian right, see Taiawagi Helton, Comment, *Indian Reserved Water Rights in the Dual-System State of Oklahoma*, 33 TULSA L. J. 979 (1998).

<sup>232</sup> Analysis of access to resources on lands ceded by treaty tracks closely with reserved rights in land not ceded, with explicit congressional intent the standard for abrogation. See *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 770 (1985) (termination of usufructuary rights requires express statutory language and cannot be inferred).

<sup>233</sup> See *Race Horse*, 163 U.S. at 515 (holding Indian usufructuary rights are “temporary and precarious” privileges that do not survive admission of the state in which those rights are exercised into the Union).

<sup>234</sup> Recent case law suggests that, while the standard for abrogation remains clear expression of congressional intent, legal protection of Indian reserved rights is backsliding. See, e.g., *Mille Lacs*, 526 U.S. at 226 (Thomas, J. dissenting) (finding Indian reserved rights, where they can be construed to operate in derogation of state sovereignty, are mere privileges subject to state regulation) (citations omitted); *Western Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 200 (9th Cir. 1991) (upholding ICC finding that Shoshone reserved rights to hunt and fish were extinguished “by gradual encroachment by whites”) (citation omitted); *Crow Tribe of Indians v. Reppis*, 73 F.3d 982, 994 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996) (finding treaty rights reserved “during the pleasure of the President” abrogated by the equal-footing admission of Wyoming into the Union).

<sup>235</sup> Indian culture is a meta-value informing and legitimizing Indian politico-economic organization. Stephen Cornell & Joseph P. Kalt, *Culture and Institutions as Public Goods: American Indian Economic Development as a Problem of Collective Action*, in *PROPERTY RIGHTS AND INDIAN ECONOMIES* 246 (Terry L. Anderson ed., 1992). Preferences, institutions, and strategies are determined by Indian culture, and observers identify BIA failure to craft development plans that enjoy a cultural “goodness of fit” as a primary determinant of relative Indian deprivation. See, e.g., Prince, *supra* note 55, at 19 (positing cultural fit as condition precedent to sustainable Indian development).

<sup>236</sup> See Mireya Maritza Peña Guzmán, *The Emerging System of International Protection of Indigenous Peoples' Rights*, 9 ST. THOMAS L. REV. 251, 257 (1996) (defining

legal sovereignty of the States<sup>237</sup> and the U.S.,<sup>238</sup> federal Indian law checks its expression.

### 3. *Forced Assimilation*

Early U.S.-Indian treaties did not contemplate incorporation of Indians as U.S. citizens, and later treaties incorporated only those individuals who had been “detrribalized.”<sup>239</sup> Against the force of a clear general preference for a primary affiliation with tribal institutions,<sup>240</sup> federal Indian policy has subsumed individual Indians within the body politic, thereby facilitating the seizure of tribal

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“ethnodevelopment” as autonomous economic activity comporting with religious and cultural requirements of equitability and intergenerational responsibility, and citing international “soft law” in support). For Indians, hunting, fishing, and other ethnodevelopmental enterprises are religious duties that reinforce stewardship.

<sup>237</sup> Indian gaming, though but one of the economic modalities that generate competition and conflict with states, is perhaps the most visible. See Naomi Mezey, *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*, 48 STAN. L. REV. 711, 736 (1996) (noting that states may soon enter the gaming market as competitors).

<sup>238</sup> Profound polarization of belief systems and underdeveloped historical understandings conspire to deprive Indian tribes of ethnodevelopmental rights, as a recent case illustrates. In 1855 the Makah reserved the right to hunt gray whales as they had for millennia in traditional waters off Washington State. See Treaty between the United States of America and the Makah Tribe of Indians, Jan. 31, 1855, 12 Stat. 939, 940. By the 1920s, non-Indian whalers had hunted gray whales to near-extinction, and the Makah, motivated by a deep religious connection to gray whales, voluntarily ceased whaling. When by 1993 gray whales were no longer endangered as a matter of U.S. law, the Makah asked the U.S. to espouse their petition for an aboriginal subsistence exception to the international legal prohibition on whaling. See International Convention for the Regulation of Whaling, Dec. 2, 1946, art. VIII, 62 Stat. 1716, 1719–20, 161 U.N.T.S. 72, 82 (prohibiting whaling listed species without a permit). Although the U.S. assisted the Makah in receiving a quota to whale under international law, the Ninth Circuit interpreted procedural provisions of environmental legislation narrowly so as to divest their substantive right to whale. See *Metcalf v. Daley*, 214 F.3d 1135, 1145 (9th Cir. 2000) (interpreting U.S. executive action in support of Makah petition prior to completion of Environmental Assessment as violating timing requirements of NEPA); William Bradford, “*Save the Whales*” v. *Save the Makah: Finding Negotiated Solutions to Ethnodevelopmental Disputes*, 13 ST. THOMAS L. REV. 155 (2000) (discussing the case).

<sup>239</sup> See Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER L. J. 107, 111–12 (1999) (discussing mechanisms whereby Indians became citizens prior to 1924, including acceptance of individual share of communal landholdings and assumption of “characteristics and mannerisms of a civilized person”).

<sup>240</sup> See Rosen, *supra* note 39, at 246 (“Many [Indian tribes] want true self-governance to the exclusion of any other polity; many do not want citizenship imposed upon them . . .”).

lands and resources, the elimination of contending governmental entities,<sup>241</sup> and the eradication of a critical mass of practitioners of alien cultures “stand[ing] in the way of progress.”<sup>242</sup> The first such assimilative measure, Allotment, divested many Indians of land and created great physical and social distance between them and their tribes. The imposition of U.S. citizenship in 1924<sup>243</sup> added legal momentum by foisting an awkward dual allegiance upon Indians and pressuring them to transfer loyalties from their tribes to the U.S.<sup>244</sup>

a. *Termination*

Although assimilationist pressure abated during the Depression and World War II, with the onset of the Cold War and mounting fears of enemies within, the preservation of distinct political communities within U.S. boundaries became too

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<sup>241</sup> See Herz, *supra* note 143, at 691–92 (stating that indigenous groups “undermine political and social stability by creating an orthodoxy in competition with . . . the dominant culture” that “undermines the state’s claim to territorial sovereignty as well as its status as the representative of all citizens.”). The solution to the problem of competing governance regimes is, for many states, the assimilation of indigenous peoples, whether through force or cooptation. *Id.* at 692 (citation omitted).

<sup>242</sup> LOPAC & CLOW, *supra* note 129, at 20; see also Tsosie, *supra* note 67 at 1656 (“American Indian[s] . . . have experienced cultural imperialism not merely as an unspoken [social] phenomenon . . . but through government policies that promoted their forcible assimilation . . .”); RUSSEL L. BARSH & JAMES Y. HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* viii (1980) (chronicling “a history of attempts to subvert [tribal] consciousness and replace it with naked, alienated individualism”). As with many other dimensions of U.S. Indian policy, many assimilationists attach benign purposes to their proposals; “friends of the Indian” suggest assimilation is promotive of racial and ethnic harmony. See, e.g., ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* 17 (1992); J. Harvie Wilkinson III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 *STAN. L. REV.* 993, 1000 (1995). This “benign assimilationism” flies in the face of culturally deprived, economically dependent urban Indians, who, as a consequence of their inability to participate meaningfully in either traditional tribal or majoritarian societies, suffer physical and mental ills. See WELLS, *supra* note 105, at 61 (correlating increased incidence of Indian social pathology with assimilationist policies that divided kinship groups and divested Indians of culture); LAURENCE FRENCH, *THE WINDS OF INJUSTICE: AMERICAN INDIANS AND THE U.S. GOVERNMENT* xvi (1994) (discussing challenges facing assimilated urban Indians).

<sup>243</sup> See Act of June 2, 1924, Pub. L. No. 68–175 ch. 233, 43 Stat. 253, 253 (codified as carried forward at 8 U.S.C. § 1401(b) (1988) (“Indian Citizenship Act”) (granting citizenship to all non-citizen Indians “born within the territorial limits of the United States”).

<sup>244</sup> See Joseph William Singer, *The Stranger Who Resides With You: Ironies of Asian-American and American Indian Legal History*, 40 *B.C. L. REV.* 171, 174 (1998); see also Atkinson, *supra* note 44, at 263 (noting that after passage of the Indian Citizenship Act it became extremely difficult as a matter of law for an Indian to claim dual citizenship).

offensive for many non-Indians to tolerate.<sup>245</sup> House Concurrent Resolution 108 [“Termination”] exercised plenary power to “make the Indians . . . subject to the same laws and . . . responsibilities as are applicable to other citizens of the [U.S., and] to end their status as wards . . . .”<sup>246</sup> Termination, under the direction of the former head of the War Relocation Authority,<sup>247</sup> ended the U.S. trust relationship with over 100 selected tribes,<sup>248</sup> curtailing federal benefits and services, dissolving tribal governments, and distributing former tribal lands and assets on a per capita basis.<sup>249</sup> By legislatively disappearing tribes,<sup>250</sup> Termination stripped Indian people not only of primary sources of political allegiance and economic sustenance but of sacred sites and other fonts of cultural renewal. Assimilationist pressure mounted, and in 1954 Public Law 280,<sup>251</sup> by according States extensive jurisdiction over Indian tribes and individuals, granted non-Indian institutions of social control the legal authority to adjudicate and condemn Indian domestic relations and employment practices.<sup>252</sup>

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<sup>245</sup> DELORIA & LYTLE, *supra* note 35, at 111.

<sup>246</sup> H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132, B132 (Aug. 1, 1953) (enacted) (repealed by 25 U.S.C. § 2502 (1988)) (authorizing administrative and Congressional action to terminate tribes in California, Florida, New York, and Texas).

<sup>247</sup> Perhaps uncoincidentally, the BIA Commissioner responsible for executing Termination, Dillon Myer, served as Head of the War Relocation Authority, the agency in charge of Japanese-American internment. FRENCH, *supra* note 242, at 65–66.

<sup>248</sup> Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 151 (1977) (identifying 109 terminated tribes). Although the process whereby tribes were selected for Termination is beyond the scope of this Article, scholars note correlations with wealth and political activism. CADWALADER & DELORIA, *supra* note 41, at 119.

<sup>249</sup> See H.R. Con. Res. 108, 67 Stat. at B132 (1953).

<sup>250</sup> Termination has been partially reversed: thirty-one previously terminated tribes have been reinstated to federally-recognized status. See, e.g., Oklahoma Indians Restoration Act of 1977, Pub. L. No. 95–281, 92 Stat. 246, 246 (1977) (codified at 25 U.S.C. §§ 861–861(c) (1982)). However, many tribes remain terminated or unreconstituted and therefore unrecognized, a status which precludes availment of the protective aspects and benefits programs of the trust doctrine.

<sup>251</sup> Act of Aug. 15, 1953, Pub. L. No. 83–280, ch. 505, 67 Stat. 588, 588–90 (codified as amended at 18 U.S.C. §§ 1161–1162 (1994), 25 U.S.C. §§ 1321–22 (1994), & 28 U.S.C. § 1360 (1994)).

<sup>252</sup> Subsequent to Public Law 280, state Departments of Health seized Indian children and placed them with non-Indian parents at rates disproportionate to other races, relying on the culturally-bound theory that traditional Indian parenting, reliant on extended kinship groups for monitoring and nurturing children, was tantamount to neglect. BURNETTE & KOSTER, *supra* note 178, at 133–34; see also Pritchard, *supra* note 153, at 259 (noting long history of forced division of Indian families). Although legislation has heightened protection of Indian familial and tribal rights, the right of Indian children to be raised as Indians by Indian parents remains a focal point in the struggle to remedy the assimilative effects of Public Law 280. See Indian

### b. *Relocation*

Predicated upon the misapprehension that the emerging “Indian problem”<sup>253</sup> was rooted in segregation and parochialism rather than a cascade of assimilative legislation, Public Law 959 [“Relocation”]<sup>254</sup> directed federal agencies to create “Indians who were Indian in appearance but not in culture”<sup>255</sup> and sap remaining tribal political strength. At a time when reservations were increasingly unable to provide material necessities,<sup>256</sup> Relocation, by portraying “contented Indian[s] working at good jobs and sitting beside televisions and refrigerators [in Northern cities,]”<sup>257</sup> induced an exodus to magnet urban areas. A generation of the Indian best and brightest<sup>258</sup> were dumped into substandard housing<sup>259</sup> and menial employment<sup>260</sup> and subsumed in the American melting pot.<sup>261</sup>

By 1970 reservation populations had dwindled so far that a final solution to the Indian problem appeared at hand, and yet the “stubborn [Indian] refusal to . . .

Child Welfare Act, Pub. L. No. 95–608, 92 Stat. 3069, 3069–78 (1978) (codified at 25 U.S.C. §§ 1901–1963 (1982)). Similarly, adult urban Indians experience considerably more contact with criminal justice systems than they did prior to the passage of Public Law 280. See “*We Are Not Free: Testimony of Clyde Warrior, President, National Indian Youth Council*, in JOSEPHY, *supra* note 203, at 87 (linking Indian maladjustment with federal Indian law and policy and stressing that “[f]or the sake of our psychic stability as well as our physical well-being we must be free men and exercise free choices”); see also ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 94–95 (1999) (linking cultural imperialism of federal Indian policies such as Public Law 280 with psychological trauma and social dysfunction, including substance abuse, incarceration, and domestic violence).

<sup>253</sup> The “Indian problem” from the mid-twentieth century dominant perspective consisted of (1) continuing tribal sovereignty on land within U.S. borders and (2) social maladjustment experienced by Indians forced from reservations by Allotment and Termination.

<sup>254</sup> Act of Aug. 3, 1956, Pub. L. No. 84–959, 70 Stat. 986, 986 (1956) (“Relocation”).

<sup>255</sup> PEVAR, *supra* note 79, at 32.

<sup>256</sup> See JOSEPHY, *supra* note 203, at 72 (noting that by the 1950s many reservations could not support their populations).

<sup>257</sup> Russel L. Barsh, *Are We Stuck in the Slime of History?* 15 AM. INDIAN Q. 159 (1991).

<sup>258</sup> BURT, *supra* note 199, at 78 (identifying Indians with leadership skills as targets of Relocation). More than 35,000 were relocated after signing an agreement that they would never reestablish residence on reservations. Atkinson, *supra* note 44, at 409.

<sup>259</sup> See BURNETTE & KOSTER, *supra* note 178, at 172 (noting institutionalized housing discrimination against urban Indians).

<sup>260</sup> FRENCH, *supra* note 242, at 66.

<sup>261</sup> Off-reservation Indians who do not enroll as tribal members are not only ineligible for reservation-based federal services; they are, for reasons of physical and social distance, unable to participate in the languages, lifestyles, and communities constituting Indian identity. WELLS, *supra* note 105, at 5–6.

become simply another American citizen”<sup>262</sup> has sustained tribalism against a malign tide of assimilationism unto the present day.<sup>263</sup> Although Indian individuals currently possess both tribal and federal citizenship, federal Indian law treats tribes as subordinate governments,<sup>264</sup> and thus meaningful “dual citizenship”—predicated upon the assumption that tribal and federal governments exercise separate, if overlapping, spheres of authority in good faith—is a legal fiction. For many Indians, this forced “split identification” was a genocidal act destructive of tribal political identities,<sup>265</sup> and few believe that tribal and national political participation can coexist when Indian self-determination is construed to threaten U.S. territorial integrity.<sup>266</sup>

#### D. Summary: *The Claim for Indian Redress*

“We have borne everything patiently for this long time.”<sup>267</sup>

The past two centuries of U.S. relations with Indians have been replete with “tremendous violence, treachery, and . . . pure ‘evil.’”<sup>268</sup> Millions of Indians were murdered to depopulate and seize Indian land while eliminating rival polities within the colonial state constructed thereon. Presently, a set of institutionalized legal impediments<sup>269</sup> runs through the domestic order, trammeling what remains

<sup>262</sup>J. C. WISE, *THE RED MAN IN THE NEW WORLD DRAMA* 399 (Vine Deloria, Jr., ed., 1971) (“While the years have shown . . . assimilation of other groups, only the red man has stood firm, resisting all efforts to merge him with the groups that surround him.”)

<sup>263</sup>Relocation continues as federal policy, albeit outside the legislative orbit of Public Law 959. See CADWALADER & DELORIA, *supra* note 41, at 121 (describing exercises of plenary power to relocate Indians within reservations to facilitate mineral extraction and corporate development).

<sup>264</sup>See Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617, 632 (1994) (elaborating on the theory of “compact federalist” incorporation of Indian nations within the federal system in a constitutional relationship “roughly approximating [that] between the states and the federal government . . .”).

<sup>265</sup>See Porter, *supra* note 239, at 166–68 (arguing that forcing Indians to accept U.S. citizenship, along with ongoing practices of forced relocation and assimilation, qualify as genocidal acts within the meaning of the Genocide Convention).

<sup>266</sup>See AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 99 (Vine Deloria, Jr. ed., 1985).

<sup>267</sup>Joseph Brant, Mohawk, available at [http://thunder-fox.com/DailyFeast/2004\\_03\\_01\\_archive-DailyFeast.html](http://thunder-fox.com/DailyFeast/2004_03_01_archive-DailyFeast.html) (last visited Mar 7, 2005).

<sup>268</sup>Tsosie, *supra* note 67, at 1662.

<sup>269</sup>Taken together, the trust doctrine, plenary power, and judicial subversion of reserved rights constitute a matrix of legal disability that refers Indian rights to property, culture, and self-government to interpretation and suppression by an often hostile non-Indian majority. Further, although it incorporates principles that are not “relentlessly hurtful” and provides

of the Indian right to legal, political, and economic self-determination.<sup>270</sup> Caught in a web woven from a malign history and a skein of ongoing legal disabilities, Indians have been rendered the most materially deprived,<sup>271</sup> politically and economically dependent, and legally exposed group in the nation. It is perhaps impossible to overstate the magnitude of the human injustice perpetrated against Indian people: indeed, the severity and duration of the harms endured by the original inhabitants of the U.S. may well rival those suffered by any other group domestic or international.<sup>272</sup> The next Part will present several theories of justice in regard to the Indian claim.

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internal resources with which to mount criticisms against it, federal Indian law is a contradictory maze, and the U.S. does not live up to its aspirations as to the best interpretation thereof.

<sup>270</sup>Self-determination raises the question of precisely who has the right to decide the political, legal, cultural, and economic norms and rules that govern Indian tribes. See Felix S. Cohen, *Indian Self Government*, in JOSEPHY, *supra* note 203, at 35. By exercising their rights to self-determine, Indian tribes challenge states, transnational corporations, NGOs, and others who impose norms and rules. See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 45–50 (1994).

<sup>271</sup>Indian reservations remain among the most impoverished areas in the U.S. Whereas between 8–14% of the U.S. population toils below the poverty line, the figure is 40% of all Indians, with some tribes faring worse. See 138 Cong. Rec. S5318 (1992) (statement of Sen. John McCain (Rep.-Ariz.)); BUREAU OF THE CENSUS, *SOCIAL AND ECONOMIC CHARACTERISTICS, UNITED STATES* 95 (tbl. 95), 98 (tbl. 98) (listing poverty rates for nine largest tribes). Indian unemployment hovers at 40%, eight times the national average, and the median Indian family income is less than half the national average. ANDERSON, *supra* note 198, at 1–4. Underfunded reservation schools are the worst in the U.S. See Atkinson, *supra* note 44, at 421. The socioeconomic status of “urban” Indians—the bulk of the Indian population—is no better. See Terrel Rhodes, *The Urban American Indian*, in *AMERICAN INDIANS: A CULTURAL GEOGRAPHY*, at 254, 262 (tbl. 14.1) (Thomas E. Ross et al. eds., 1995) (data for 1990) (noting only 24% of Indians live on reservations). Unemployment, infant mortality, suicide, homicide, substance abuse, homelessness, and poor health are common: by every objective indicator Indians are the most disadvantaged group in the U.S.

<sup>272</sup>See BROOKS, *supra* note 3, at 241.

For more than five hundred years attempts have been made to exterminate, assimilate, or otherwise eliminate [Indians] from the American hemisphere. . . . No other group within the [U.S.] has been subjected to such cruel, harsh, and deceptive exploits at the hands of the dominant society and for such a long period of time. Massacres at the hands of the military and civilians, slavery, wars, removal, treaty deceit, starvation, disease, genocide, forced sterilization, and cultural genocide [were] used in the Euro-American effort to destroy the native peoples and their cultures . . . .

*Id.*

### III. THE INDIAN CLAIM FOR REDRESS: EXISTING THEORIES OF JUSTICE

“Hardly any two . . . agree on what should be done.”<sup>273</sup>

Extant theories of justice with respect to the Indian claim cluster around three distinct approaches: supersession, compensation, and restoration.<sup>274</sup>

#### A. *Justice as Supersession*

While the historical record of genocide, land theft, and ethnocide inflicted upon Indians might be understood as establishing a factual predicate presumptively obligating the U.S. and its political subdivisions to remedy these gross historical injustices, some theorists, foremost among them proponents of the Justice as Supersession [“JAS”] theory, reach a very different conclusion. JAS theorists reject as foolishly naïve a “natural way of reasoning” that would require that lands illicitly taken by colonial invaders and passed on to their descendants through the generations be nonetheless returned.<sup>275</sup> Although JAS theory recognizes that the historical record has an important place in the development and application of a theory of justice with respect to Indian claims, for JAS theorists the historical injustices suffered by Indian claimants must be weighed against the current injustice that would be inflicted upon innocent owners now in possession of erstwhile Indian lands were those lands stripped away and restored to Indian ownership.<sup>276</sup> To sanction a moral understanding that demands

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<sup>273</sup> Spotted Tail, Lakota, *quoted in* HIFLER, *supra* note 34, *excerpted at* [http://thunderfox.com/DailyFeast/2004\\_03\\_01\\_archive-DailyFeast.html](http://thunderfox.com/DailyFeast/2004_03_01_archive-DailyFeast.html) (last visited March 8, 2005).

<sup>274</sup> This Article does not treat the category of responses to Indian claims calling for the resubjection of Indians to genocide or forced relocation as a theory of justice, although for some these measures are appropriate means to defend against the prospect that the redress of Indian claims might redistribute resources or otherwise offend their moral senses. *See, e.g.*, PAUL BRODEUR, *RESTITUTION: THE LAND CLAIMS OF THE MASHPEE, PASSAMAQUODDY, AND PENOBSCOT INDIANS OF NEW ENGLAND* 65 (1985) (describing white reactions to Indian legal claims for land restoration in the Northeastern United States); Bradford, *supra* note 238, at 205 (describing use of violent methods by non-Indians convinced that preventing Indians from exercising reserved rights is a moral imperative); Iver Peterson, *Despite Promise of Easy Money, Indian Casinos Meet Resistance*, N.Y. TIMES, Feb. 1, 2004, at A29 (reporting virulent anti-Indian sentiments are gathering nationwide).

<sup>275</sup> David Lyons, *The New Indian Claims and Original Rights to Land*, 4 SOC. THEORY & PRACT. 249, 252 (1977); *see also* Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 27–28 (1992) (dismissing Indian claims as “simple” convictions).

<sup>276</sup> *See* Waldron, *supra* note 275, at 26–27 (rejecting disruption of the settled expectations of non-Indian property owners and querying whether it is “fair to expropriate the land of an immigrant who purchased the land in good faith and whose ancestors had nothing to do with the injustice, in order to end the continued injustice of the expropriation of indigenous people’s lands?”).

restoration of Indian lands would have practical effects, foremost among them the dispossession and impoverishment of non-Indian landowners, an outcome with which JAS theorists are not prepared to abide.<sup>277</sup> To avoid this, JAS theorists urge us to reconceive of the historical injustices suffered by Indian tribes and individuals as a “dead history”<sup>278</sup> and to accept that Indian claims for redress have been superseded by demographic and ecological transformations<sup>279</sup>—in other words, while injustice may have been inflicted in centuries past, injustice is perishable, and the accreting rights of non-Indians in Indian land have incrementally extinguished, or at least rendered morally irrelevant, any present claims for its restoration.<sup>280</sup>

Although they recognize that “[t]he view that a violated entitlement can ‘fade’ with time may seem unfair,”<sup>281</sup> JAS theorists defend their supersession thesis by way of two arguments. First, they claim that it is impossible to know with any degree of certainty whether Indian claimants would in fact have remained seized of their land entitlements (and thus transmitted their landholdings to their descendants) in the absence of non-Indian expropriation or whether they might have voluntarily parted with them for good consideration.<sup>282</sup> In other words, because Indians might in theory have been divested of title by some other process, the moral relevance of forcible and fraudulent expropriation to the contemporary question of whether to afford redress for the seizure of Indian land is to be discounted in proportion to the perceived probability that Indians would have sold or otherwise alienated their entitlements.

Second, JAS theorists posit that the true test of the legitimacy of an entitlement stems not principally from the inherent justice of the process whereby it was acquired<sup>283</sup> but rather from its indispensability to the subsistence of the party claiming it. Thus, if a disentitled claimant, who is generations removed from

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<sup>277</sup> See Lyons, *supra* note 275, at 270 (rejecting the return of Indian lands now occupied by non-Indians on the ground that it “would impose enormous burdens on small home owners and small businesses . . .”); Waldron, *supra* note 275, at 26 (divestiture of Indian lands from contemporary non-Indian possessors “would mean many people going hungry who might otherwise be fed and many people living in poverty who might otherwise have an opportunity to make a decent life.”).

<sup>278</sup> Lyons, *supra* note 275, at 252.

<sup>279</sup> See, e.g., *Solem v. Bartlett*, 465 U.S. 463, 471–72 (1984) (stating that “subsequent demographic history” is relevant to determining whether, with arrival of significant numbers of non-Indians upon Indian land, Indian rights in such land have been diminished).

<sup>280</sup> Lyons, *supra* note 275, at 257 (“From the fact that [Indians] had morally defensible claims two hundred or four hundred years ago it cannot be inferred that those claims persist.”).

<sup>281</sup> Waldron, *supra* note 275, at 15.

<sup>282</sup> See *Id.* at 8.

<sup>283</sup> See J. Angelo Corlett, *Wrongdoing, Reparations and Native Americans*, in INJUSTICE AND RECTIFICATION 147, 151–52 (Rodney C. Roberts ed., 2002).

ownership, cannot demonstrate that he has “organized [his] life around the use of [the property interest],” rather than simply “organize[d] [his] life around the campaign for its restoration,” his claim based upon original entitlement is depreciated and even forfeited to a party currently in possession for whom the property is presumptively indispensable as his current residence, business, or farm.<sup>284</sup> In practice, because Indians have managed to stave off extinction and starvation despite the divestiture of nearly 98% of their pre-contact land mass, and because that land mass has been thickly settled over the course of several generations by non-Indians who would “starve” or be “hurt or degraded”<sup>285</sup> if they were evicted, it is plain to JAS theorists that the lands in question are indispensable only to their present possessors. Although JAS theorists concede that the mechanisms whereby Indian claimants were separated from their entitlements were unjust, they maintain that the remediation of past injustices cannot be accomplished without inflicting a present and even greater injustice upon the non-Indian majority, and thus JAS theory rejects proposals to restore land to Indian ownership as practically irrelevant and fundamentally unfair in light of fundamental changes in circumstances.<sup>286</sup> In short, property rights are “thinner and much more flexible, or variable with circumstances,” than Indian claimants understand them to be, and they must “bend to the needs and interests of human beings.”<sup>287</sup>

JAS proponents defend what they further concede is very much a prospective theory<sup>288</sup> by asserting that only a deliberate discounting of the past can possibly ensure that resources are allocated in a manner that is “fair to all of [the world’s] existing inhabitants.” Because they now constitute the overwhelming majority,

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<sup>284</sup> Waldron, *supra* note 275, at 19; *see also* Corlett, *supra* note 283, at 156–57 (describing this proposition as the “Acquired Rights Trumping Original Land Rights Objection” to restoration or compensation); JANNA THOMPSON, TAKING RESPONSIBILITY FOR THE PAST: REPARATION AND HISTORICAL JUSTICE xvi (2002) (noting that the question of how historical entitlements ought to be weighed against the rights of current possessors of real property may be the central dilemma in developing a coherent theory of justice for historical acts of gross injustice).

<sup>285</sup> Waldron, *supra* note 275, at 26–27.

<sup>286</sup> JAS theorists carve out a narrow exception to the general refusal to restore land to Indian claimants in respect to lands of “symbolic or religious significance” on the ground that such lands are “particularly important for [Indians’] sense of identity as a community” and “form the center of a present way of life” and as such can be deemed indispensable to their collective social organization and therefore not superseded by the passage and transformations of time. *Id.* at 19.

<sup>287</sup> Lyons, *supra* note 275, at 254.

<sup>288</sup> *See* Waldron, *supra* note 275, at 27 (differentiating JAS, a “prospective theory of justice” that prioritizes the claims of existing persons and discounts claims rooted in historical injustice, over retrospective theories that seek to redress historical injustices while discounting the interests of persons who have benefited from historical injustice).

non-Indians—rather than the Indians they have displaced, reduced, and greatly outnumbered—are the primary reference point for assessing the requirements of justice. For JAS theorists, even had non-Indians not come by their current entitlements through fraud and force they would presently be entitled to a share of Indian lands proportionate to their numbers by the simple virtue of their existence here in North America coupled with their legitimate need.<sup>289</sup> Thus, although they accept that symbolic recognition and remembrance of historical injustices inflicted upon Indians may often be morally appropriate and that Indians are entitled to a more equitable distribution of the panoply of resources generally available within society,<sup>290</sup> JAS theorists, protective of the interests of present possessors whom they hold blameless or at least legally and morally unaccountable for historical injustices,<sup>291</sup> categorically reject any and all proposals that would go so far as to “actually . . . rectify past wrongs” by either retransferring lands to Indian claimants or by paying their full, as distinct from symbolic, value in compensation.<sup>292</sup> Compensation is thus, at best, an act of grace unrelated to any moral or legal obligation; at worst it is an undeserved handout to the losers of a long-ago struggle for the continental landmass that, if employed injudiciously, may threaten non-Indians with personal financial loss and justifiably provoke resentment.

With regard to Indian claims for ethnocide and denial of the right to self-determine, JAS theorists, although they accept in theory that individuals have the

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<sup>289</sup> *Id.* at 25 (insisting that “[Indians] would have had to share their lands, whether the original injustice had taken place or not.”); Lyons, *supra* note 275, at 370–75.

<sup>290</sup> See Lyons, *supra* note 275, at 268 (allowing that Indians are entitled to some redress for systematic discrimination and to a “fair share of . . . resources as well as to social and economic opportunities”). Although his broader theory is best characterized as falling within the parameters of the Justice as Compensation paradigm, Will Kymlicka adopts the language of JAS theorists in calling for remediation of current Indian material inequalities on distributional and equitable grounds, rather than in redress of past injustice. WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 219–20 (1995) (elaborating an “Equality Argument” that maintains what is due to Indians is reparation not for what was taken in the past but for what is missing presently).

<sup>291</sup> See Lyons, *supra* note 275, at 268 (“Most [non-Indians] have had little, if anything, to do with dispossession of Native Americans . . .”); Stephen Kershnar, *Reparations for Slavery and Justice*, 33 U. MEM. L. REV. 277, 299 (2003) (“[L]imitation on ownership has to be strict enough so that goods stolen 400 years ago . . . are capable of being legitimately owned today.”).

<sup>292</sup> Waldron, *supra* note 275, at 7; Lyons, *supra* note 275, at 270 (calling for largely symbolic compensation to Indian claimants in lieu of land restoration); THOMPSON, *supra* note 284, at 90–91 (describing compensation available under JAS theory as politically limited by the requirement that it not disrupt the social “status quo”). In other words, JAS seems to be saying that because “there is neither wealth nor wisdom enough in the world to compensate in money for all the wrongs of history,” why should we bother to compensate anyone? See Editorial, *Strange Precedent*, N.Y. TIMES, Sept. 9, 1969, at A28.

basic human need to belong to groups “united by some common links—especially language, collective memories, continuous life upon the same soil,” and perhaps “race, blood, religion, [and] a sense of common mission,”<sup>293</sup> reject Indian tribes as mere “partisans of small-scale community” lacking in any entitlement to “special support or assistance or to extraordinary provision or forbearance”<sup>294</sup> from the U.S. Rather than encourage an “artificial” commitment to tribalism, JAS theorists would require Indian cultures to “wither away,” to “amalgamate with other cultures” and to “adapt themselves to geographical or demographic necessity.”<sup>295</sup> Further, rather than accept that Indian culture and the right to self-govern as distinct tribal communities are worthy of preservation and that injuries to either give rise to obligations to afford redress, JAS theory demands that Indians submit to a “‘mongrelization’ of [their] identity” and assimilate into the body politic in service to a cosmopolitan vision that broadens the scope of individual life possibilities and serves as a more “authentic response to the world in which we live . . . .”<sup>296</sup> Although JAS theory does not go so far as to immunize ethnocide and forcible denial of the right of Indian tribes to self-determine, it suggests strongly that the historical processes responsible for the loss of culture and the right to self-govern as discrete and insular communities are at worst of trivial moral or legal consequence and at best are even promotive of the individual rights and life possibilities of individual Indians.

In sum, JAS theory holds that while the U.S. may be obligated to negotiate toward a settlement that would offer some symbolic redress for expropriation, genocide, and ethnocide,<sup>297</sup> any retrospective proposal to restore lands, pay market value for expropriations, or transform existing legal regimes to lend genuine political and material support to Indian self-determination would inflict greater injustices upon living non-Indians than the historical injustices visited upon long-dead Indians it would be intended to redress while simultaneously interfering with the opportunities of living individual Indians to partake of the superior virtues of Western liberal cosmopolitanism.

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<sup>293</sup> Benjamin Disraeli, *Karl Marx and the Search for Identity*, in ISAIAH BERLIN, *AGAINST THE CURRENT* 252, 257 (Henry Hardy ed., 1980).

<sup>294</sup> Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751, 762, 778 (1992).

<sup>295</sup> *Id.* at 787–88.

<sup>296</sup> *Id.* at 788.

<sup>297</sup> Lyons, *supra* note 275, at 270 (accepting the notion of a political resolution of Indian claims by federal intervention).

### B. *Justice as Compensation*

For Justice as Compensation [“JAC”] theorists, a much more parsimonious approach to justice requires, quite simply, that where land has been acquired unjustly through fraud or force it must, regardless of whether or not it has been subsequently transferred lawfully, either be restored to its rightful owner or be paid full compensation.<sup>298</sup> Where sacred lands are concerned, the obligation to restore is at a zenith, and where restoration is pragmatically imprudent or otherwise not consistent with the requirements of justice inasmuch as it would require the dispossession of non-Indians,<sup>299</sup> Indians must be granted rights-of-way to such sites.<sup>300</sup> By accepting the duty to restore or compensate and thereby settling the normative question, JAC theorists are free to direct their energies to prudential issues such as membership in the remedial class, the form compensation is to assume, and the identities of the parties from whom restoration or compensation must issue. JAC theorists accept the argument that the historic deprivation of Indian lands is causally related to the denial of the Indian right to self-determine and to the material deprivation currently experienced by Indian tribes and individuals, and consequently view compensation for expropriation as “just an example of ordinary corrective justice” that, coupled with “some form of group-based political autonomy”—whether exemptions from general tax legislation or other group-specific entitlements—befits the redress of Indian claims.<sup>301</sup>

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<sup>298</sup> See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 152 (1974) (stating that justice in property entitlements can only be the result of just acquisition and just transfer or full compensation for unjust expropriation); Corlett, *supra* note 283, at 149–50; Posner & Vermeule, *supra* note 13, at 733.

<sup>299</sup> See, e.g., Ross Poole, *Justice or Appropriation? Indigenous Claims and Liberal Theory*, 101 *RADICAL PHIL.* 5, 7 (2000) (accepting the general obligation to restore lands or compensate their former owners but mitigating this duty by noting that “there is no way in which indigenous people could have preserved their relationship to the land unchanged,” that “[g]iven the needs of the rest of the world, some sharing of land and resources was required,” and that “sometimes the needs of many count against the rights of the few”); KYMLICKA, *supra* note 290, at 219–20 (stressing that to require a restoration, as opposed to a compensation, remedy “would create massive unfairness, given that the original European settlers and later immigrants have produced hundreds of millions of descendants, and this land is the only land they know”).

<sup>300</sup> See THOMPSON, *supra* note 284, at 63 (incorporating the obligation to grant easements to sacred sites not susceptible of restoration as part of a theory of justice in regard to Indian land claims).

<sup>301</sup> See Posner & Vermeule, *supra* note 13, at 733–34, 741.

Nevertheless, many who would otherwise recognize the duty to afford redress to Indians for land expropriation point to relevant treaties and statutes,<sup>302</sup> the Indian Claims Commission ["ICC"],<sup>303</sup> and a host of federal Indian benefits programs legislated and appropriated under the trust responsibility<sup>304</sup> as evidence that compensation has already been paid and claims have been (at least partially) settled.<sup>305</sup> Even those JAC theorists who would accept that further measures of

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<sup>302</sup> See *Cherokee*, 30 U.S. at 48 (Baldwin, J., concurring) (noting that although they ceded Indian territories to the U.S., many Indian treaties either recognized Indian title to unceded lands, provided tribes in lieu lands west of the Mississippi River, and granted compensation); *Sioux Nation*, 448 U.S. at 424 (holding that 1877 act removing Black Hills from Lakota ownership was a taking of recognized title under the Fifth Amendment and upholding Court of Claims judgment for monetary damages); 43 U.S.C. §§ 1601 *et seq.* (2000) (providing \$1 billion compensation to Alaskan Natives for takings of 335 million acres); Yamamoto, *supra* note 21, at 484 n.22 (listing compensations of takings of Indian lands including U.S. \$23 million to Ottawa, \$81 million to Klamath, \$31 million to Chippewa, \$12.3 million to Seminole, and \$105 million to Sioux) (citation omitted).

<sup>303</sup> In 1855 Congress created the Court of Claims to award compensation for property seized by the U.S. See Act of Feb. 24, 1855, ch. 122, 10 Stat. 612, 612–614 (1855). Congress soon precluded claims based on Indian treaties from its jurisdiction. Act of Mar. 3, 1863, ch. 92, §9, 12 Stat. 765, 767 (1863). Indians remained without a forum until 1946, when, embarrassed by Nazi comparisons of *Lebensraum* and death camps to Manifest Destiny and reservations, Congress created the ICC, providing a forum for adjudication of U.S. treaty violations and broad moral “claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.” 25 U.S.C. § 70a (1976). The ICC was charged with assessing damages in accordance with the specific factual history of the tribe, relative U.S. responsibility, and price per acre at the time of expropriation. 25 U.S.C. §§ 70–70v(3) (1976). Although the ICC found that 35% of the continental U.S.—750 million acres—is legally Indian land, it adopted procedural and evidentiary rules favoring the U.S., which defended each claim as an adversarial, rather than a remedial, proceeding. Newton, *supra* note 78, at 776–84. Moreover, the ICC read the “fair and honorable dealings” clause out of its organic statute, the text of which prohibited in natural restitution. *Id.* at 778. Ultimately, before its legislative demise in 1978 the ICC redressed less than 1/3 of land seizures with cash only, most at rates far below a just level of compensation. See BURNETTE & KOSTER, *supra* note 178, at 121 (calculating median payment at \$225/Indian individual). Equation of money with justice soon cast the ICC as another assimilative vehicle; many defiant tribes “refused to touch a cent . . .” Atkinson, *supra* note 44, at 400–04. For a discussion of the ICC, see generally H.D. ROSENTHAL, *THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION* (1990).

<sup>304</sup> Under the trust doctrine, the U.S. funds and participates in the management of a welter of complex statutory programs, involving education, health, social services, economic development, and resource management, on Indian reservations. See *supra* note 219 (listing representative programs).

<sup>305</sup> See, e.g., Chad W. Bryan, *Precedent for Reparations? A Look at Historical Movements for Redress and Where Awarding Reparations for Slavery Might Fit*, 54 ALA. L. REV. 599, 600 n.15 (“[T]he federal government has paid reparations to [Indians]”); Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. REV. 309, 381–82 (2003) (describing the Alaska Native Claims Settlement Act as

compensatory relief are still due Indian claimants insist that amounts be negotiated through the political process rather than determined in accordance with some rational, objective framework.<sup>306</sup> Some are likely to insist that a “commitment device” be engineered that would definitively and finally resolve Indian land claims and prevent their subsequent reopening even if justice should be determined to so require at some later date.<sup>307</sup>

Moreover, JAC theory is largely silent as to the remediation of the elements of ethnocide and denial of the right to self-determine. Whether as the result of a presumption that cash cannot compensate these losses, a limited remedial reach, a philosophical commitment to assimilation akin to that held by JAS theorists, or an ignorance of these equally, if not more, compelling elements of the Indian claim, JAC theory, a mode of redress morphologically identical to reparations, is ultimately a narrowly-tailored approach to justice.

### C. Justice as Restoration

Justice as Restoration [“JAR”] aims at a more holistic approach to the remediation of historic injustices. For proponents of JAR, in-kind compensation, even if theoretically equivalent in value to that which was taken, is insufficient to rectify the original injustice occasioned by its expropriation; restoration of the illicitly appropriated property itself is essential to “set unjust situations right.”<sup>308</sup> Only by restoring land can the ongoing injustice of the original expropriation be

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an act of reparations and empowerment); Harris, *supra* note 21, at 445 (claiming Indians have been compensated for land seizures and implying that Indian claims have thus been adequately settled); Posner & Vermeule, *supra* note 13, at 695 (describing the ICC as a reparations program).

<sup>306</sup> See, e.g., James Tully, *Aboriginal Property and Western Theory: Recovering a Middle Ground*, 11 SOC. PHIL. & POL’Y, Summer 1994, at 153, 157 (advocating that indigenous property claims be negotiated with, rather than unilaterally resolved by, states).

<sup>307</sup> Posner & Vermeule, *supra* note 13, at 745 (insisting that compensatory mechanisms incorporate a “commitment device” that would “entrench” a settlement against future legislation mandating additional payments that would “overcompensate” Indians).

<sup>308</sup> Rodney C. Roberts, *Justice and Rectification: A Taxonomy of Justice*, in INJUSTICE AND RECTIFICATION, *supra* note 283, at 15 (“[J]ustice requires first and foremost that we restore the exact same thing whenever possible.”). JAR theorists envision harm as resulting not merely from the expropriation of private titles but also from the unjust seizure of Indian rights to freely elect whether and how to dispose of their sovereignty over the lands in question: compensation may suffice for the injury to private landholdings, but only restoration can reinvest Indians with their rights of sovereignty over aboriginal lands. See Corlett, *supra* note 283, at 152 (stating that JAR depends upon “property sovereignty or occupancy rights therein” rather than upon private “ownership rights”) (emphasis omitted).

terminated.<sup>309</sup> Moreover, and, from a legal perspective, quite importantly, JAR theorists would reverse the presumption inherent in the arguments propounded by JAS, and to a lesser extent JAC theorists, that non-Indian occupants of what was once Indian land are to be regarded as secure in their right to possession on the ground that they have acquired moral rights by accretion through the passage of time that are now immune from attack. On the contrary, JAR theory rejects the argument that justice is perishable and maintains instead that the burden falls upon the U.S. to justify the entitlements of the present inhabitants of land seized from Indian tribes: Indian land is thus presumptively Indian land irrespective of the length of time it has been out of Indian possession.<sup>310</sup> Accordingly, when JAR theorists “have good reason to think that appropriate reparation should take the form of returning some of the land that was unjustly taken, then the entitlements of present owners should give way.”<sup>311</sup>

Even more significantly, JAR does not limit its remedial scope to the issue of land rights: rather, the remedial focus of JAR extends to those “injustices that may in fact loom larger in the minds of the victims or their descendants—murder, torture, enslavement, discrimination and denigration.”<sup>312</sup> Because the restoration of land rights alone is inadequate to the project of restoring moral parity between the Indians and the U.S., JAR theorists insist that a full moral, as distinct from a merely legal, accounting and settlement of claims necessitates that the U.S. first publicly acknowledge and apologize for specific past acts and then accept some form of social punishment (even if sanctions are limited to critical moral judgments).<sup>313</sup> Many particularized JAR theories rely on truth and reconciliation commissions [“TRCs”],<sup>314</sup> tribunals that investigate the gross human injustices of

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<sup>309</sup> See Susan Dodds, *Justice and Indigenous Land Rights*, 41 INQUIRY 187, 195 (1998) (“Rather than trying to imagine how things might have been had an injustice not occurred, we should focus on stopping the continuation of injustice; thus we should give back the land.”).

<sup>310</sup> THOMPSON, *supra* note 284, at 89; see also Corlett, *supra* note 283, at 160–61 (contending that non-Indians have “at best . . . trumping or overriding moral claims” and attaching no presumption of validity to the title of current possessors).

<sup>311</sup> THOMPSON, *supra* note 284, at 93. Some JAR theorists would accept conveyance of other lands as substitute for reconveyance of expropriated lands. *Id.* at 59. However, in the main, JAR is insistent upon full and complete restoration.

<sup>312</sup> *Id.* at xiv. Some JAR theorists refer to these injuries as “spirit injuries,” defined as a combination of physical, emotional, and spiritual harms that cause the “slow death of the psyche, the soul, and the persona” at the individual level and lead to the “devaluation and destruction of a way of life or of an entire culture” at the level of the group. Adriene Katherine Wing, *Healing Spirit Injuries: Human Rights in the Palestinian Basic Law*, 54 RUTGERS L. REV. 1087, 1089 (2002) (citations omitted).

<sup>313</sup> Corlett, *supra* note 283, at 153.

<sup>314</sup> Since 1974 more than twenty TRCs have been initiated on nearly every continent in states as diverse as Argentina, Bolivia, Chad, Chile, El Salvador, Ethiopia, Germany, the Philippines, Malawi, Rwanda, South Africa, Uganda, and Zimbabwe, and still more have been

the previous regime and construct and publicize an unflinching historical record,<sup>315</sup> as integral to this process.<sup>316</sup>

Furthermore, JAR contends that theories which purport to remedy the results of a genocidal and ethnocidal history solely “through the language of missing property”<sup>317</sup> fail to reach and redress moral and other non-material harms while missing transformative opportunities whereby to reconcile victims and wrongdoers and lay the foundation for a peaceful and cooperative joint future. Accordingly, in conjunction with land restoration and apologies, JAR theorists call for rehabilitative measures designed to heal the injured psyches of individuals and to nurture the capacity of victim groups to engage in meaningful self-determination.<sup>318</sup> Some JAR theorists cast promotion of self-determination as a necessary condition precedent to the moral relegitimization of the nation.<sup>319</sup> Still, although some JAR theorists advocate expansive proposals that would reinvest a significant degree of land and political autonomy in beneficiary groups and liberate them from the control of the majoritarian legal and political system either through limited legislative dispensations or through some process of formal secession,<sup>320</sup> and while in the context of Indian claims they are more inclined to

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demanding for Bosnia, Mexico, South Korea, Honduras, and Sri Lanka. KENNETH CHRISTIE, *THE SOUTH AFRICAN TRUTH COMMISSION 2* (2000). Though a lack of cash and courage has hampered them, several TRCs have aided reconciliation processes. *See id.* at 54–55 (tbl. 2.1), 58–59 (tbl. 2.2) (providing dates, objectives, and accomplishments).

<sup>315</sup> TRCs typically publish an open record or final report, and in the interests of transparency public hearings are often broadcast on national media. *See* Jamie L. Wacks, *A Proposal for Community-Based Racial Reconciliation in the United States Through Personal Stories*, 7 VA. J. SOC. POL’Y & L. 195, 205–07 (2000).

<sup>316</sup> For some JAS theorists, TRCs are less central to justice and simply “reduce the number of lies that can be circulated unchallenged in public discourse.” Michael Ignatieff, *Articles Of Faith*, 96 INDEX ON CENSORSHIP, Sept. 1996 at 110, 113 (1996).

<sup>317</sup> Anthony J. Sebok, *Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two*, 58 N.Y.U. ANN. SURV. AM. L. 651, 657 (2003).

<sup>318</sup> Roy L. Brooks, *Rehabilitative Reparations for the Judicial Process*, 58 N.Y.U. ANN. SURV. AM. L. 475, 476–77 (2003).

<sup>319</sup> JAR theorists in particular link the moral legitimacy of states in the world community to the degree to which they distribute justice to all their domestic social groups and in particular to racial, ethnic, and religious minorities. *See* Yamamoto et al., *supra* note 28, at 1272 (elaborating this linkage). Questions such as the justice of the process whereby states acquired their landmass and the degree to which they permit such groups to establish and maintain autonomous political, economic, and cultural forms or organizations are central to this inquiry. *See, e.g.*, Corlett, *supra* note 283, at 147 (contending that the “moral legitimacy of a country” is contingent upon the degree to which its land base was justly acquired); ROBINSON, *supra* note 21, at 208 (contending that without reparations, “America can have no future as one people”). For further discussion, see *supra* Part V.

<sup>320</sup> *See* Posner & Vermeule, *supra* note 13, at 735 (discussing proposals to grant African Americans either an autonomous territory in the U.S. or offer voluntary repatriation to Africa).

consider the merits of expansive self-determination proposals than they are in regard to other groups lacking in the ties of culture, religion, and political association that constitute Indian tribes,<sup>321</sup> most propose far more limited self-determination agendas that provide beneficiary groups a package of grants, subsidies, and tax incentives.<sup>322</sup>

#### D. *Analysis*

At its core, JAS theory is a not terribly subtle justification for conquest and forced assimilation. While JAS theorists may consider this characterization as reductionist and reflexively dismissive of the obvious merits of their theory—namely, its pragmatic and utilitarian approach to preserving the interests of the non-Indian majority—stripped of its academic veneer JAS theory is little more than the medieval dogmas once enunciated by conquistadors as justification for their adventures in the Americas. The indispensability thesis central to JAS theory—that formerly Indian lands are indispensable not to Indian survival, as Indians have somehow survived without them, but to non-Indians currently in possession, who would suffer impoverishment and uprooting were they stripped of title—actually marshals the fact that Indians have managed to survive expropriation, genocide, and ethnocide as evidence against their claim: had Indians been extinguished as the consequence of the expropriation of their lands, then and only then would JAS theorists concede that Indian lands were indispensable to Indians, and even then there would be no claimants left for the benefit of whom justice might be done. In other words, Indians have proven that they can do without Indian lands, but non-Indians either cannot or should not have to make the same showing. The only explanations JAS theory offers to support its historical agnosticism and differential treatment are two: (1) that was then, and this is now; and (2) the fundamental precept of Western liberal jurisprudence, that like cases are decided alike, does not apply to Indian claims.

Moreover, JAS theory deliberately ignores millennia of Indian stewardship of lands and resources, consistent with their religious and social obligations to preserve entitlements for the benefit of future generations, in presuming that Indians might have parted with their land by some other process than force or fraud and that as a result it is impossible to link Indian disenfranchisement with historical injustice for which non-Indians must answer. Although it is at least theoretically possible that Indian lands might have at some point in history passed

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<sup>321</sup> *Id.* at 741.

<sup>322</sup> See Erin Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. MEM. L. REV. 367, 404 (2003) (discussing legislative proposals to afford grants and tax relief as pragmatic means whereby to enhance the self-determination of South African blacks).

from Indian proprietorship and become *Indianrein*,<sup>323</sup> as the history and philosophy of the relationship of Indians to their land demonstrates there is far more reason to build the presumption that, absent non-Indian deceit and violence, Indians would remain possessed of their lands as caretakers for future generations into a theory of justice, and a much more compelling argument that those who dispossessed Indians of title ought to be obligated to justify their actions. It is difficult to ascribe the refusal to recognize this nexus to historical myopia rather than to a deliberate agenda that preserves the status quo and privileges majoritarian claims to an invaluable resource upon which nearly all other contemporary entitlements hinge.

In other words, rather than present a theory of justice, JAS theorists elaborate a rationalization for genocide and ethnocide that suggests to Indians that “our culture is superior to yours, that’s why we won the war, and to the victors go the spoils, so either content yourselves with scraps we throw you savages or, better yet, shed your anachronistic Indianness and embrace our modern civilization, but either way stop bringing up the past—it poisons our national body politic and scares us nice non-Indian people.” Simply put, JAS, almost absolutely indifferent to the present effects of past injustice, categorically rejects any moral or legal obligations flowing from conquest and genocide. In the face of the claim that the theft of Indian land and the murder of Indian people are neutral facts, Indians might conclude that the only path to justice is down the very same road whereby their rights to land and self-determination were taken.<sup>324</sup>

JAC theory, in contrast, rejects two premises put forth by JAS theorists, namely, that history is dead insofar as the obligation to render justice for past wrongs is concerned, and that the passage of time can and has rendered good a thief’s title.<sup>325</sup> As such, it deserves to be taken seriously as a theory of justice.

<sup>323</sup> *Indianrein* is a corruption of *Judenrein*, a term used by Adolf Hitler and the Nazis to refer to territory purged of Jews. Simon Wiesenthal Center, Museum of Tolerance, available at <http://motlc.wiesenthal.com/pages/t035/t03532.html> (last visited February 24, 2005).

<sup>324</sup> Although one of the principal proponents insists that JAS theory does not create an “incentive for wrongdoers to seize others’ lands confident in the knowledge that if they hang on to them wrongfully for long enough their possession may eventually become rightful,” it is not apparent how, if it aims to be evaluated as a universal moral argument, JAS theory could proscribe the Indian reconquest of their lands. Waldron, *supra* note 275, at 25.

<sup>325</sup> At common law, a thief’s title to property is void, and the thief cannot convey good title even to a subsequent good-faith purchaser. *See, e.g.,* Schrier v. Home Indem. Co., 273 A.2d 248, 250–51 (D.C. 1971). The rule is intended to protect property against thievery; for if a thief could convey good title

there must be an end of all social commerce between man and man, unless private possessions be secured from unjust invasions: and, if an acquisition of goods by either force or fraud were allowed to be a sufficient title, all property would soon be confined to the most strong, or the most cunning; and the weak and simpleminded part of mankind (which is by far the most numerous division) could never be secure of their possessions.

Compensating Indians would alleviate grinding poverty and enhance the material conditions of their existence, and, if accompanied by expressions of regret and remorse, might demonstrate to future generations the continuing vitality of moral duties to refrain from genocide, land theft, and ethnocide.<sup>326</sup> The infusion of significant sums into tribal institutions might even reduce dependence upon the U.S. by creating the financial preconditions for genuine self-determination and enabling tribes to pursue programs of land restoration and economic development.

However, JAC theory is morphologically similar to reparations, and thus far too quick to assume that cash and Indian land are commensurable<sup>327</sup> and far too susceptible to counter-claims that, even if money may in respect to some tribal claims be a roughly adequate remedy, sufficient compensation either has already been paid or will be paid to discharge the obligation to remedy all the past injustices visited upon all Indians. Simply put, money can play at best an indirect part in the satisfaction of the harms of which Indians complain: although a diversity of opinion exists within Indian Country, most Indians desire above all not to be made whole financially but rather to exercise their rights to self-determine and to express their unique cultures and religions upon their sacred ancestral lands.<sup>328</sup> Only land restoration and legal transformations that permit the (re)development of separate political identities can actualize these fundamental rights and relieve the economic deprivation and emotional pain Indians bear intergenerationally. While cash would improve Indians' bargaining position in regard to reclamation of lands and reduce their sociopolitical dependency upon the U.S., there is no amount of money that can compel unwilling sellers, public or private, to reconvey formerly Indian lands, and no dollar figure for which tribes would be willing to trade their right to self-govern. Cash, however beneficial to its recipients, cannot restore to Indians the capacity to self-determine on their aboriginal landmass.

Furthermore, JAC theorists who suggest that Indian claims have been retired misunderstand the nature of the federal trust responsibility. Payments under the

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3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 145 (1765)

<sup>326</sup> See generally Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 421–24 (1992) (describing the capacity for compensatory remedies to accomplish moral instruction and correction).

<sup>327</sup> The “incommensurability thesis holds that people cannot always value options along a common metric,” that policy options cannot always be reduced to evaluation in rational terms, and that not all goods will be exchanged by all persons or groups for money. ERIC A. POSNER, LAW AND SOCIAL NORMS 186–93 (2000).

<sup>328</sup> See STEPHEN CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE 152–56 (1988) (surveying answers to the question “What do Indians want?” across a range of political, economic, social, and legal variables and finding a general consensus in favor of land restoration and some form of self-determination despite a diversity of opinions).

trust doctrine are categorically *not* compensation for injuries but rather *consideration* for the voluntary cession of lands and other resources. Moreover, compensation paid by Congress through the ICC or other mechanisms represents at best a tiny fraction of the value consequences of expropriation, genocide, and ethnocide.<sup>329</sup>

Moreover, even if Indian tribes could somehow be persuaded to surrender their claims to lands and rights for cash, the fair value would be so great as to threaten the national fisc and spark a racialized political firestorm.<sup>330</sup> Indian tribes presently control only 52 million acres, or 2.6%, of the U.S. continental landmass. The ICC, charged with assessing relative U.S. responsibility for the expropriation of Indian lands, estimated that 35% of the two billion acres that comprise the U.S.—a total of 750 million acres—is legally Indian land.<sup>331</sup> Assuming, *arguendo*, that the median value of an acre of land in the U.S. is approximately \$1000,<sup>332</sup> the fair market cost to compensate Indians for its expropriation would exceed \$750 billion, an amount that, if paid, would have macroeconomic consequences.<sup>333</sup> Even assuming that nothing close to fair market value would be paid as compensation for takings of Indian land,<sup>334</sup> and even if off-sets were applied to reduce the award by the amounts paid under the trust doctrine or by the ICC, the enormity of any proposal that would offer only “payment on the cheap” would still be so great as to almost certainly preclude its payment. If one factors into the compensatory scheme additional monies for the wrongful deaths of at

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<sup>329</sup> See, e.g., Jo Carrillo, *Land Claims and Reparations*, 51, 54 in READINGS IN AMERICAN INDIAN LAW: RECALLING THE RHYTHM OF SURVIVAL (Jo Carrillo ed. 1997) (detailing sharp limitations on the compensatory regime established by ICC and noting how few tribes ever received compensation).

<sup>330</sup> See Meredith Lee Bryant, *Combating School Resegregation Through Housing: A Need for a Reconceptualization of American Democracy and the Rights It Protects*, 13 HARV. BLACKLETTER L.J. 127, 151 (1997) (“[A]ny . . . attempt at putting a dollar figure on past racial harms often yields an amount too large or otherwise politically unfeasible.”).

<sup>331</sup> Newton, *supra* note 78, at 776–84.

<sup>332</sup> In 2003, the average price per acre of farmland in the U.S. was more than \$1000. See Statement of Keith Collins, Chief Economist, U.S. Department of Agriculture Before the Senate Committee on Appropriations Subcommittee on Agriculture, Rural Development and Related Agencies, May 15, 2003, *available at* <http://www.usda.gov/agency/oce/speeches/collinsmay152003.pdf>. Although some of the acreage in the U.S. is desert, otherwise not arable, or of lesser value, much of it, particularly where suitable as residential or commercial real estate, is worth a great deal more.

<sup>333</sup> See Yamamoto, *supra* note 21, at 515 (conceding that the \$20 billion in compensation to Japanese Americans was a “small blip on the radar of the [U.S.] economy” but that compensation of Indians would have a much more profound effect).

<sup>334</sup> See Newton, *supra* note 119, at 460 (analyzing historical compensations of takings of Indian land and finding, based on historical experience, that nothing close to fair market value is likely to be accorded Indian claimants).

least five million ancestors of present Indian claimants<sup>335</sup> at a paltry rate of \$100,000 for each decedent—and JAC theory is further to be faulted for failing to extend its remedial reach to genocide—the total cost to taxpayers would exceed a trillion dollars. Those ignorant of the historical predicate behind the demand for justice might mistakenly equate compensation with revenge;<sup>336</sup> others, merely self-interested, may be unwilling to effect such a radical redistribution of wealth. Either way, many Indians, concerned that application of JAC theory is likely to thrust Indians and non-Indians into contending camps and lock them in political and legal combat in which anything goes in the fight over the wealth and power of the state,<sup>337</sup> join with non-Indians in opposing this approach to justice.

Finally, JAC theory completely fails to account for the most important variable in the remedial equation: law. Under the doctrine of plenary power, Congress has nearly absolute and unreviewable dominion over Indian tribes, and, in concert with the political question doctrine, plenary power precludes judicial undoing of fraudulent treaties, proscribes the review of takings, insulates violations of treaty provisions, and withdraws Indian property, culture, religion from the protection of the Constitution.<sup>338</sup> Moreover, that which Congress can give, Congress can take away. Any settlement of Indian claims must therefore be understood as dependent not upon the honor of the U.S. but rather upon the inconstant will of a majority of its legislative branch. Under the current legal regime, should a future Congress elect to reclaim monies paid as compensation, take property purchased with such monies without paying compensation, or even terminate each and every Indian tribe, dissolve each and every reservation, and criminalize each and every aspect of Indian culture, nothing—nothing—save for any resulting moral outrage at such a naked assertion of power will stand in its way. In other words, federal Indian law—already barren terrain for the expression of Indian claims—is structurally incapable of according Indians the sort of commitment device that might ensure the finality of any compensation agreement, even in the decidedly unlikely event that an agreement could ever be fashioned that would reach most, or even some, of the elements in the Indian

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<sup>335</sup> See Sterba, *supra* note 47 (enumerating Indian victims of genocide).

<sup>336</sup> See Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1389 (2003) (suggesting that when compensatory remedies are “pressed too far” they can begin to approximate revenge rather than “justice”).

<sup>337</sup> If past is prologue, even if a battle for reparations were to result in Indian victory, an increase in Indian economic prosperity, without reform of the laws and institutions that suppress Indian autonomy, will invite a corresponding increase in the degree of external interference with and manipulation of tribal institutions. See LOPAC & CLOW, *supra* note 129, at 5.

<sup>338</sup> Newton, *supra* note 119, at 453 (noting that for all parties save for its indigenous peoples, the U.S. accepts the constitutional obligation to remedy takings of land in violation of law by restitution either in natura or in damages); see also *supra* Part II.C.1.b (describing lack of constitutional protections afforded Indian religions and cultures).

claim. Power is still the only currency fully negotiable in intercourse between the U.S. and Indians.

Of the three theory clusters, only JAR embraces restoration as the method of redress appropriate in respect to Indian land claims, and only JAR is theoretically amenable to consideration of the non-material injuries that occupy a central place in the Indian claim for redress. Furthermore, only JAR would hold the U.S. accountable under moral, as opposed to strictly legal, principles, and only JAR would even attempt to induce the U.S. to acknowledge and repudiate past acts of egregious injustice, as opposed to simply internalizing their costs. Quite distinct from JAS and JAC theories, JAR recognizes that justice is not merely a settlement of historical accounts but an opportunity to reconcile with Indians and to relegitimize the nation in its relations at home and abroad, and of the various theoretical offerings only JAR hints at an institutional framework wherein to attempt this.<sup>339</sup> Finally, JAR is, if not positively encouraging, at least not as hostile as are the other theoretical clusters to the notion that self-determination, in whatever form it comes to assume, is the legitimate objective of Indians in their relations with the U.S., and that the U.S. has an obligation to assist them in this endeavor.

Still, while JAR is the most normatively attractive of the three theoretical clusters, JAR theory is not the final stop on the theoretical journey to justice for Indians. JAR theory is susceptible to criticism on several grounds. As compelling as the argument that non-Indian land owners are obligated to vacate their entitlements in favor of the descendants of their Indian predecessors-in-title may be, principles of equity, as JAS theory is quick to assert, should proscribe the wholesale evacuation of millions of acres of land and the forced relocation of innocent and newly-homeless non-Indians to places uncertain. Even if equity alone is not sufficient to counsel prudence, the prospect that non-Indians threatened in the security of their property interests might organize to induce political action resulting in further abridgement of Indian resources and rights<sup>340</sup> must be accounted for in any theory of Indian justice. If the only remedy for a

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<sup>339</sup> See *supra* at notes 314–16 and accompanying text (discussing TRCs in the context of the resolution of claims).

<sup>340</sup> See WARD CHURCHILL, *STRUGGLE FOR THE LAND* 377 (2002).

[E]very major Indian land recovery initiative . . . the Western Shoshone, those in Maine, the Black Hills, the Oneida claims in New York State are prime examples . . . has been met with a propaganda barrage from right-wing organizations ranging from the Ku Klux Klan to the John Birch Society . . .

*Id.*

past injustice is a present injustice, a perpetual cycle of bloody conflict over land is inevitable.<sup>341</sup>

However, the most radical of JAR theorists are practically oblivious to the broad externalities the restorative element of their philosophy might spawn: despite warnings that it is now much too late to “give back Manhattan,”<sup>342</sup> some insist that nothing short of the dissolution of the U.S. will suffice if we are to “tak[e] seriously . . . morality and justice.”<sup>343</sup> If politics is the art of the possible,<sup>344</sup> a theory that insists on the dismemberment of the modern-day U.S. or other forms of “radical social surgery”<sup>345</sup> is too fantastic to be given serious consideration as a political proposal.

Furthermore, if JAR may conceivably go too far in pressing for land restoration, like JAC theory it does not go far enough toward facilitating Indian self-determination because it does not recognize, let alone engage, federal Indian law as the primary variable preventing the balancing of the moral equation. Compensation and apologies, gestures potentially part of an amicable settlement, do not contribute directly to the reinvestiture of sovereignty in Indian tribes. Only a comprehensive program of legal reform that dispenses with doctrines and precedents perpetuating the denial of Indian rights will create the preconditions for Indian self-determination.<sup>346</sup> As law, more than any other social variable, has

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<sup>341</sup> See PETER S. TEMES, *THE JUST WAR 175–76* (2003) (warning of this risk in regard to the Palestinian-Israeli conflict).

<sup>342</sup> See Martha Minow, *Why Retry? Reviving Dormant Racial Justice Claims*, 101 MICH. L. REV. 1133, 1139 (2003) (warning proponents of racial justice to be wary of proposals that demand the politically impossible, such as the restoration of Manhattan to Indian sovereignty nearly four centuries after its sale for unconscionably low consideration).

<sup>343</sup> Corlett, *supra* note 283, at 155; see also CHURCHILL, *supra* note 340, at 382 (calling for land restoration even if it should lead to the destruction of the U.S. “megastate”); Noel Pearson, *Reconciliation: To Be or Not To Be: Separate Aboriginal Nationhood or Aboriginal Self-Determination and Self-Government Within the Australian Nation?*, 3 ABORIGINAL L. BULL. 14, 15 (1993) (noting that many JAR theorists regard any compromise on land restoration as a betrayal of the indigenous cause); Russell Means, *TREATY Program* (advocating total restoration of Indian lands), available at <http://www.russellmeans.com> (advocating total resotration of Indian lands).

<sup>344</sup> See R.A. BUTLER, *THE ART OF THE POSSIBLE* xi (1971) (describing politics as the “art of the possible.”).

<sup>345</sup> See Lyons, *supra* note 275, at 249 (using this phrase to describe extreme land restoration proposals).

<sup>346</sup> Events in the Balkans, the former Soviet Union, Africa, and elsewhere raise “radical questions about the legitimacy of law and the nature of legal order.” David Dyzenhaus, *Introduction to LAW AS POLITICS: CARL SCHMITT’S CRITIQUE OF LIBERALISM* 13 (David Dyzenhaus ed., 1988). Indigenous peoples across the globe, burdened by legal precedents and doctrines that perpetuate the injuries of a historical era now condemned and lamented, have added their voices to recent debates. See W. Michael Reisman, *Protecting Indigenous Rights in*

(re)produced the subordination of Indians,<sup>347</sup> legal reform occupies central position in a theory of Indian justice.<sup>348</sup> Thus, while much of JAR theory is germane, neither it nor the other theories surveyed accord the full measure of relief or provide as accurate a diagnosis of the problem as is necessary to generate effective solutions. Part III offers a theoretical alternative.

#### IV. JUSTICE AS INDIGENISM: AN AMERICAN INDIAN THEORY OF JUSTICE

“Complaint is just toward friends who have failed in their duty; accusation is against enemies guilty of injustice.”<sup>349</sup>

##### A. General Theoretical Premises

Because the past and present effects of a rapacious, bloody, and dishonorable history are factual and moral predicates to the Indian claim for redress, the theory of Justice as Indigenism<sup>350</sup> (JAI) is committed to the premise that the development and application of a theory of Indian justice must not and cannot be

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*International Adjudication*, 89 AM. J. INT'L L. 350, 362 (1995). The basis for critical revision of U.S. law is no less compelling: doctrines given permanent place in the legal pantheon reduce tribes to mere wards under the trust of a fickle Congress with plenary power to terminate their legal existence. See *Johnson v. M'Intosh*, 21 U.S. 543, 574 (establishing Indian tribes as diminished sovereigns); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (establishing trust responsibility to protect Indian “wards”); Philip P. Frickey, *Commentary: Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1765 (1997) (“The Constitution became possible only by virtue of colonization, and the document rests awkwardly on top of that history.”). The liberal impulse to escape politics through law is *apropos* in redress of claims wherein the law itself is not implicated as an instrument of subordination and claimants seek incorporation within and equality before, rather than wholesale revision of, the legal regime. However, with respect to Indian claims reform efforts are directed to the assumptions of Indian inferiority that are inherent in the current law.

<sup>347</sup> See Robert A. Williams, Jr., *Columbus' Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 51 (1991) (detailing legal subordination of indigenous peoples).

<sup>348</sup> In the U.S., almost every important political question becomes a judicial question. ALEXANDER DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1832); ELY, *supra* note 107 at 136–45 (noting strong U.S. preference for political, rather than judicial, resolution of minority rights questions).

<sup>349</sup> Tecumseh, Shawnee, *quoted in* HIFLER, *supra* note 34, *excerpted at* [http://thunderfox.com/DailyFeast/2004\\_06\\_01\\_archive-DailyFeast.html](http://thunderfox.com/DailyFeast/2004_06_01_archive-DailyFeast.html) (last visited Mar. 9, 2004).

<sup>350</sup> The title of the theory of Justice as Indigenism is indebted to Ward Churchill, who coined the phrase “indigenism” to refer to the “complex of ideas, sentiments, and understanding which motivates the whole of the [movement for justice for Indians], here in North America.” CHURCHILL, *supra* note 340, at 367.

undertaken except in full cognizance of the history of U.S.-Indian relations.<sup>351</sup> Although other groups have claims upon the U.S., JAI rests upon the additional premise that Indians, by virtue of their existence on American soil prior to the founding of the U.S. and the unbidden arrival of all other social groups<sup>352</sup> as well as the unavailability of a “homeland” abroad to which they could seek shelter from the vicissitudes of U.S. majoritarian politics and law,<sup>353</sup> are entitled to primacy, if not special consideration, in the examination and evaluation of their claims for redress.<sup>354</sup>

Third, JAI ventures into terrain heretofore unmapped by insisting that a major project of legal reforms designed to cabin plenary power, restore a meaningful measure of self-government to Indian tribes, and make the nation safe for the peaceful coexistence of basic value-differences between peoples is a necessary, if not sufficient, step toward the attainment of justice for Indians. Legislation and even constitutional amendments to strengthen protection of Indian cultural and property rights, tighten judicial canons of construction, and incorporate legal

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<sup>351</sup> See Tyron J. Sheppard & Richard Nevins, *Constitutional Equality—Reparations At Last*, 22 U.W.L.A. L. REV. 105, 123–24 (1991) (noting that to obtain redress and prevent future harm it is necessary to “identify the . . . wrong” and “produce a report designed to influence the public . . . to accept the theory that statutes, ordinances, and other official actions [are] the . . . source of the [harms.]”); see also Report to the President from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals, Oct. 7, 1946, available at <http://www.yale.edu/lawweb/avalon/imt/jackson/jack63.htm> (last visited March 7, 2005) (advocating documentation of atrocities “with such authenticity and in such detail that there can be no responsible denial of these crimes in the future . . .”).

<sup>352</sup> See John M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL’Y REV. 95, 138 (1998) (“Unlike most other ethnic groups, whose ancestors came to the [U.S.] understanding that they would be participating in a multicultural community, the ancestors of native people made no such commitment . . .”); ANGIE DEBO, A HISTORY OF INDIANS IN THE UNITED STATES ix (1970) (“The dominant race can never forget that [Indians] were here first . . .”).

<sup>353</sup> See Carole Goldberg-Ambrose, *Not “Strictly” Racial: A Response to “Indians as Peoples”* 39 UCLA L. REV. 169, 184 (1991) (“Unlike other American ethnic groups, Indians cannot rely on perpetuation of their tradition in a home country abroad.”).

<sup>354</sup> See, e.g., Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 358 (1997)

Any discussion of law, its uses, and its limits in America presupposes the right of those engaged in the debate to stand on American soil and resolve the questions. Yet . . . [b]ecause the sovereignty of native people was never legitimately extinguished, any conclusions the rest of us may come to about law and social change are subject to the special priority of [Indians].

*Id.*; THOMPSON, *supra* note 284, at xi (conceding that doing justice for Indians may “clash with a duty to make society more equitable for all citizens” but suggesting Indians have claims to remedial priority).

principles protective of the rights of Indians are within the contemplation of this indigenist approach to justice.

Fourth, although it asserts the primacy of Indian rights and challenges the legitimacy of U.S. dominion over Indians, JAI rejects the substitution of one ethnocentric perspective on justice for another: without compromising Indian rights to lands and self-determination, JAI amalgamates indigenous traditions and values and treats reconciliation between disparate yet interdependent peoples, rather than prescription of a formula for the distribution of social resources or the administration of punishment or vengeance, as the appropriate teleology of a theory of justice for Indians.<sup>355</sup> For JAI, the healing of the American nation and the joint authorship of a peaceful and harmonious future—not simply the redress of Indian claims—are crucial objectives.

Fifth, although it rejects the tendency to essentialize Indians as an undifferentiated population with a uniform bloc of interests, JAI contends that a pan-Indian consensus does in fact exist as to a set of shared objectives, the attainment of which is central to the project of Indian justice, and that the most important of these are a just resolution to Indian land claims and the investment of the notion of Indian self-determination with real meaning.<sup>356</sup> At the same time, JAI is specifically tailored to the requirements of justice for Indians, and generalization to the question of justice on behalf of other groups must proceed with caution and the benefit of rigorous contextual research and analysis.

Finally, and perhaps somewhat paradoxically in light of the preceding proposition, JAI cautions that the application of a theory of Indian justice generates moral consequences not merely in the sphere of U.S.-Indian relations but internationally. JAI insists that if its political and legal system cannot or will not afford justice to its original inhabitants, the U.S., no matter how presently committed to justice on behalf of other foreign and domestic social groups, must concede that the aspirations of its founders to “establish Justice” in a constitutional republic in which “all men are created equal” before the law and into which they invested their “sacred Honor”<sup>357</sup> have been sacrificed at the altar

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<sup>355</sup> The claim that a theory of justice on behalf of indigenous peoples must “respond to voices” from within the indigenous community and not simply draw upon Western moral, legal, and political theory occupies a prominent place in the scholarship of several theorists as well as in this Article. *See, e.g.*, Poole, *supra* note 299, at 5.

<sup>356</sup> *See* CORNELL, *supra* note 328, at 152–56 (mapping interests of Indians across a series of issue-areas and dimensions). This Article is solely the assessment of the author and does not purport to stand as the official proposal of any Indian tribe or individual. Indian opinion ranges broadly, and while many Indians surely subscribe to the proposals and recommendations offered under the rubric JAI, some may prefer other approaches. Part of the process of doing justice by Indians will certainly be reconciliation between, and within, Indian tribes, and each and every Indian voice should be granted the opportunity to speak.

<sup>357</sup> *See* U.S. CONST. pmbl.; THE DECLARATION OF INDEPENDENCE para. 2, 32 (U.S. 1776).

of an avaricious Indian policy.<sup>358</sup> In other words, JAI theory posits that the legitimacy of the U.S. and its leadership in international relations is a function of the extent to which it affords, and is perceived to afford, justice to Indians.

*B. JAI Applied: The Redress of Indian Claims for Genocide, Ethnocide, and Land Expropriation*

As applied, JAI commits its practitioners to a sequential process consisting of seven distinct stages: acknowledgment, apology, peacemaking, commemoration, compensation, land restoration, legal reformation, and reconciliation. While each and every step marches closer toward Indian justice, failure to press onward to each subsequent objective foreshortens remedial possibilities. Only upon reaching the final destination—which is in reality the promise of a shared journey—can JAI be said to be complete.

*1. Acknowledgement: The American Indian Reconciliation Commission*

“[W]e should not fear to cast the light of day on this murky chapter of our nation’s past . . . .”<sup>359</sup>

Although most Americans disavow the malignant racism that inspired their forefathers,<sup>360</sup> they remain a remarkably presentist people, particularly with regard to the factual and moral understandings of the events marking the “discovery,” formation, and expansion of their nation.<sup>361</sup> This ahistoricism has dire consequences for Indian redress, particularly where claims are asserted on unfamiliar intellectual terrain and arise out of violations of complex historical

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<sup>358</sup> The notion that democratic legitimacy and the treatment of Indians are linked is not new. See, e.g., Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 YALE L. J. 348, 390 (1953) (“[O]ur treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.”).

<sup>359</sup> *Fort Sill Apache Tribe of Oklahoma v. United States*, 477 F.2d 1360, 1370 (1973) (Nichols, J., dissenting).

<sup>360</sup> While racism is still too much with us, there is reason to hope that its prevalence and intensity are in gradual decline. Still, Indian tribes and people remain targets of legal, political, and popular discourse that can properly be described by no other term. For an examination of the infiltration of anti-Indian attitudes into legal and political spaces, see Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 258–78 (1989).

<sup>361</sup> For too long, the American national myth has swept genocide, land theft, and ethnocide under the national rug. See Michael Schudson, *Dynamics of Distortion in Collective Memory*, in *MEMORY DISTORTION: HOW MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST* 346 (Daniel Schacter ed., 1995) (“If you recall the [Indian Wars] . . . as part of the history of nation-building, it is one story; if you recall it as part of a history of racism it is another.”).

agreements “rather than being ignited by the fire of the moment . . .”<sup>362</sup> Without a firm understanding of the nexus between past acts of injustice coupled with the present effects of a legal order erected to serve the conqueror on the one hand and the Indian claim for redress on the other, it is all too easy for existing theories of justice—particularly JAS, and to a lesser extent JAC—to treat Indian claims as pleas for distributional justice rather than as moral arguments demanding the internalization of the consequences of this unjust history. Displacement of a mythical version of national genesis in favor of the truth is therefore required in order to erode the theoretical bases of U.S. sovereignty and control over Indian people, culture, and land. Even for those non-Indians willing and eager to make amends, “legal amnesia” interposes between Indian claims for redress and a legal and political order that has denied justice for centuries.<sup>363</sup>

Therefore, the first step in applying JAI theory is the retelling and re-envisioning of U.S.-Indian relations from “objective” perspectives *as well as* from the cultural viewpoint of the victims of that history.<sup>364</sup> Indian claims stories—rich sources of oral history that contextualize and humanize the Indian experience while revealing the inadequacies of the record as it has been constructed—can be a powerful source of liberation for all Americans. To enable national demythification, Congress should pass legislation to establish and fund an independent TRC<sup>365</sup> charged with (1) investigating Indian claims afresh; (2)

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<sup>362</sup> Charles Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375, 378.

<sup>363</sup> See Aviam Soifer, *Objects in Mirror Are Closer Than They Appear*, 28 GA. L. REV. 533, 553 (1994) (labeling “failures of memory” that result in the discounting of Indian claims for redress “legal amnesia” and characterizing this process as an act of indeliberate injustice). Unconscious psychological processes shield individuals from the pain of awareness of past atrocities and prevent them from having to grapple with present obligations to provide redress. Martha Minow, *The Work of Re-Membering: After Genocide and Mass Atrocity*, 23 FORDHAM INT’L L.J. 429, 429 (1999).

<sup>364</sup> See Aviam Soifer, *Redress, Progress, and the Benchmark Problem*, 40 B.C. L. REV. 525, 526 (1998).

The prevailing presumption is that somehow, sometime—perhaps when we weren’t paying attention—sufficient justice and equality came to prevail. Therefore . . . we all now enjoy an equal, fair start in the cosmic race of life. We hold tightly to this credo as if it were self-evident, no matter what the actual evidence may be.

*Id.*

<sup>365</sup> See Wacks, *supra* note 315, at 221–24 (suggesting that although federal, state, and local governments would assist with funding and logistics, any TRC created to advance the cause of racial reconciliation in the U.S. must retain formal independence in order to preserve neutrality and functionality); see also Rose Weston, *Facing the Past, Facing the Future: Applying the Truth Commission Model to the Historic Treatment of Native Americans in the United States*, 18 ARIZ. J. INT’L & COMP. L 1017 (2001) (discussing proposal to create such a TRC).

allowing Indian voices to enrich and debunk the sanitized national record with their oral histories; and (3) persuading the U.S. to formally acknowledge the wrongs inflicted upon Indians over the period since 1776 and enable the telling of a new national creation-story.

Membership of the American Indian Reconciliation Commission (AIRC) would consist of equal numbers of Indians and non-Indians and include tribal chairpersons and nationally elected officials; jurists, lawyers, and scholars versant in federal Indian law, tribal legal systems, and indigenous rights regimes; and clergy. Drawing upon the experiences of precedent TRCs, AIRC would identify sites across the U.S., such as Indian reservations, major urban centers with significant Indian populations, and universities, where fora would be established to which tribes and individual Indians could submit requests to testify.<sup>366</sup> Requests might be reduced to writing on a standard form, filed with the closest forum, and considered by a committee established for that purpose.

AIRC would broadcast hearings and testimony on public media and a website, and transcripts would be circulated in newspapers to facilitate transparency and the wide dissemination of Indian stories. Although certain testimony, such as oral histories of the massacres of defenseless Indian civilians that have been passed down through the generations, might shock listeners,<sup>367</sup> since nothing could conceivably implicate living persons in any criminal activity AIRC need not keep secret witness identities, nor would it need to grant amnesty. Victims would receive a certificate recognizing their contribution to truth-telling and reconciliation.<sup>368</sup> Upon conclusion of its hearings, AIRC would send a Final Report to Congress and the President with nonbinding remedial recommendations, to include apologies, compensation, land restoration, and other measures to promote and protect self-determination.

## 2. Apologies

“Any good thing you say to me shall not be forgotten.”<sup>369</sup>

The second step in the application of JAI to the question of Indian justice is the grant of an apology to Indians. JAI assumes that the AIRC hearings are likely to cause many citizens to experience the moral taint of the history of U.S.

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<sup>366</sup>For those unable or unwilling to testify publicly, testimony might be taken through deposition, affidavit, or by other means.

<sup>367</sup>If testimony does not disturb, it does not serve truth-telling or deterrence. *See* Minow, *supra* note 364, at 429 (“[I]f we are not shocked . . . we have forgotten to remember, ‘Never again.’”).

<sup>368</sup>*See* Wacks, *supra* note 315, at 233.

<sup>369</sup>Ten Bears, Comanche, October 19, 1867 *available at* <http://www.comanchelodge.com/speech.htm> (last visited March 8, 2005).

treatment of Indians for the first time.<sup>370</sup> After persuading many citizens to acknowledge harm to Indian tribes and individuals, AIRC should next direct the U.S. to relieve the burden of its national guilt-complex<sup>371</sup> while advancing the process toward forgiveness by recommending in its Final Report that the U.S. government issue a formal apology, on behalf of the U.S. and all its citizens past and present, as symbolic recognition of the role of public and private actors in past acts of genocide, land theft, and ethnocide.<sup>372</sup> National church and corporate boards might apologize for acts in which these institutions were complicit.<sup>373</sup> An appropriate apology must incorporate recognition of a corresponding moral, if not legal, obligation to negotiate the next stage of JAI: peacemaking.

### 3. Peacemaking

“If their minds are clean, and if they are obedient and promise to obey . . . they shall be welcome.”<sup>374</sup>

#### a. Cultural Hermeneutics

If a theory of justice is to span the chasm between peoples, ideas, and objectives, its enunciation and implementation will require negotiation.<sup>375</sup>

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<sup>370</sup> “Moral taint” is defined as the complex of emotions and thoughts experienced by a group of persons who come to accept an “association with wrongful behavior over which they had no control and therefore for which, under traditional individualistic premises, they carry no blame.” Posner & Vermeule, *supra* note 13, at 709.

<sup>371</sup> WHITE, *supra* note 210, at 273.

<sup>372</sup> An apology need not address contemporary effects of past discrimination to initiate reconciliation; to do so might trench upon terrain too sensitive for a present-day majority whose willingness to concede national fallibility may be merely retrospective. An apology might track with the letter accompanying compensation to Japanese Americans:

The United States acknowledges the historic significance of its illegal and immoral actions and expresses its deep regret to the Indian people. Money and words alone cannot restore lost ancestors or lands, or erase painful memories; neither can they fully convey American resolve to rectify injustice, but the U.S. recognizes that serious injustices were done to Indians over the course of the creation and expansion of the U.S. In enacting a law calling for restitution and reconciliation and offering a sincere apology, your fellow Americans have, in a very real sense, renewed their traditional commitment to the ideals of freedom, equality, and justice. The Nation humbly asks for your forgiveness.

<sup>373</sup> Eric Yamamoto, *Rethinking Alliances: Agency, Responsibility, and Interracial Justice*, 3 ASIAN PAC. AM. L.J. 33, 70 (1995).

<sup>374</sup> The Law of Great Peace, Iroquois (1750).

<sup>375</sup> Currently, a federal statute prevents recognition of Indian tribes as nations with whom the U.S. may contract by treaty. See Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. §71 (1994)). Repeal of this statute—a demand of many Indian tribes—would revive

Although their resilience is unquestionable after a half-millennium of extreme challenges, Indian tribes are now too numerically and militarily inferior to impose solutions by force; on the other hand, reason, principle, moral obligations, and the aspirational values of a constitutional republic erected upon prior sovereigns, with whom it is interdependent, conspire to restrain the U.S.<sup>376</sup> While the conflict has been waged primarily on battlefields and in courtrooms, the origins are rooted largely in cultural differences difficult to exaggerate: the “problem of learning how meaning in one system of expression is expressed in another is one of the most difficult tasks we confront in a multicultural world.”<sup>377</sup> Recognition of mutual sovereignty—a companion obligation to the establishment of a multicultural ethic of respect—will require a cross-cultural hermeneutics, which in turn mandates the clearing of barriers to communication and the sharing of stories, fears, hopes, and dreams. By restoring a large measure of legal personality to Indian tribes,<sup>378</sup> identifying shared interests obscured by history and emotion, tempering tendencies toward extremism, and tutoring both parties in the common

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the principle of mutual sovereignty and infuse negotiations with the ethics of mutual respect and consent so vital to the process of atonement, forgiveness, and reconciliation. See Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963, 970–72, 979–80 (1996) (arguing that the historical treaty process should serve as a template for a contemporary framework of U.S.-tribal negotiations between mutual sovereigns).

<sup>376</sup> See ANAYA, *supra* note 102, at 130 (stressing that where a state acquired its sovereignty by displacing original sovereigns it incurs the obligation—moral if not necessarily legal—to “foster the capacity of Natives to govern their own communities as well as contribute to the development of all our peoples, indigenous or immigrant.”). Constitutional republics are particularly committed, at least as a matter of political theory, to tolerating dissent as a bulwark against repressive hierarchy. Daniel A. Farber, *Richmond and Republicanism*, 41 FLA. L. REV. 623, 635 (1989) (noting commitments of neo-republican governments to tolerance of dissent and negotiated compromise). Persuasion, in contrast to domination, is currency of the realm in the liberal constitutional republic, and the most convertible denomination is U.S. See DE TOCQUEVILLE, *supra* note 348, at 107 (stating that because in democracies the laws are reflective of the will of the people, those who wish to modify the laws must “either change the opinion of the nation, or trample upon its decision”).

<sup>377</sup> WILLIAMS, *supra* note 70, at 1039.

<sup>378</sup> See Frickey, *supra* note 346, at 1783–84 (arguing that negotiation on neutral sites, in contrast to adjudication in the courts of the conqueror, grants subordinated groups equal ownership of, and responsibility for, the resolution of their disputes with the dominant power); Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 35–37 (1997) (contending that because the exercise of majoritarian political preference dictates that tribal rights cannot be fairly adjudicated in courts of the United States, negotiation, though also risky, is the only path through the minefield of power and prejudice). Still, while the post-Cold War era is a fruitful moment to discuss enlargement of the international legal personality of non-state actors as international law becomes ever more concerned with the “ought” and not simply with the “is,” the U.S. has not committed to the vision of mutual sovereignty advocated by these Indian scholars.

humanity of each other, U.S.-Indian negotiations can usher in a new era of peace and justice. Fittingly, the ancient Indian method of dispute resolution known as Tribal Peacemaking (“TPM”)<sup>379</sup> can guide the journey toward greater mutual understanding and trust.

b. *Tribal Peacemaking (TPM)*

TPM heals wounds by publicly and ceremonially deploying spiritual<sup>380</sup> norms and collected tribal wisdom, listening compassionately to the widest possible circle of people, and reminding participants of their relational obligations to one another.<sup>381</sup> Rather than address only disputants, TPM balances the intellectual, emotional, and physical dimensions of the entire tribe on its journey toward restoration.<sup>382</sup> Despite its nonpunitive foundations,<sup>383</sup> TPM can provide effective redress for offenses as serious as robbery, rape, and murder.<sup>384</sup>

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<sup>379</sup> See Phyllis E. Bernard, *Community and Conscience: The Dynamic Challenge of Lawyers' Ethics in Tribal Peacemaking*, 27 U. TOL. L. REV. 821, 825 (1996) (defining TPM as “[a]ny system of dispute resolution used within [an Indian] community which utilizes non-adversarial strategies, [and] incorporates some traditional or customary approaches, the aim of which is conciliation and the restoration of peace and harmony.”) (citation omitted). TPM weds ancient and abiding values to dispute resolution techniques appropriate to the pluralist context in which tribes are now situated. It profoundly transformed Indian conceptions of justice since its reintroduction in the 1970s. Although the particular dispute resolution methods employed by any particular tribe are distinct as from every other in that they are the experiential products of the unique culture, history, and wisdom of that tribe, it is possible to describe TPM in theoretical abstract.

<sup>380</sup> TPM recognizes no separation of religious and secular, and supernatural power is directed to overcome disharmony and reestablish order. Philmer Bluehouse & James W. Zion, *Hozhooji Naat'aanii: The Navajo Justice and Harmony Ceremony*, 10 MEDIATION Q. 327, 331–32 (1993).

<sup>381</sup> See Dianne LeResche, *Editor's Notes, Native American Perspectives on Peacemaking*, 10 MEDIATION Q. 321, 321–22 (1993).

<sup>382</sup> *Id.* at 321–22. TPM is rarely used in disputes between members of different tribes. See Michael D. Lieder, *Navajo Dispute Resolution and Promissory Obligations: Continuity and Change in the Largest Native American Nation*, 18 AM. INDIAN L. REV. 1, 16 (1993) (noting that where outsiders are involved in disputes with members of Indian tribes, particularly where physical injuries are involved, the absence of common ties of kinship, religion, community, and ethos that drive the process of Indian dispute resolution and encourage parties to remove the conflict from the adversarial plane tend to preclude the success of such an enterprise); see also Daniel W. Van Ness & Pat Nolan, *Legislating for Restorative Justice*, 10 REGENT U. L. REV. 53, 53–55 (1998) (noting that while elements of TPM, termed “restorative justice,” have been introduced into non-Indian contexts such as family group conferences, “community injury,” and victim/offender mediation, these efforts have not met with anticipated success, largely because urbanized, atomized settings do not offer the “spiritual glue” of communal obligations to condition individual conduct). In essence, so central to the successful functioning is the commitment to shared tribal values and responsibilities that extension of TPM beyond the

*i. Procedures*

TPM reflects the interests of parties against the backdrop of tribal norms, and behavior-altering mechanisms—anger, shame,<sup>385</sup> embarrassment, and encouragement—modify negotiating positions and guide parties toward harmony. Neither lawyers nor judges are present. All who know the parties or are familiar with the history of the dispute are required to sit together in a circle.<sup>386</sup> The oral procedure is supervised by a “peacemaker” who is an exemplar of tribal virtues<sup>387</sup> yet possesses merely persuasive rather than compulsory powers: his obligations do not extend further than inducing people to talk to one another by exemplifying tribal values and ways.<sup>388</sup> The peacemaker is not neutral: he or she has the respect of the parties, who are frequently related to him or her by blood or marriage.<sup>389</sup> Thus, the parties are strongly inclined to follow proffered “guidance”<sup>390</sup>

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boundaries of the reservation or beyond the subject matter of disputes between tribal members is inherently problematic. Nonetheless, where individuals are linked not by membership in a political community but by common commitments to justice and to restoration, TPM retains its potential to heal. *See generally* William C. Bradford, *Reclaiming Indigenous Legal Autonomy on the Path to Peaceful Coexistence: The Theory, Practice, and Limitations of Tribal Peacemaking in Indian Dispute Resolution*, 76 N.D. L. REV. 551 (2000).

<sup>383</sup> “TPM is decidedly nonpunitive in its philosophical underpinnings . . . . In contrast to state adjudication, no central authority can directly apply coercion to enforce” the collective will. Bradford, *supra* note 382 at 582.

<sup>384</sup> *See* Lieder, *supra* note 382, at 17–18.

<sup>385</sup> *See* Carole E. Goldberg, *Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes*, 72 WASH. L. REV. 1003, 1015 (1997) (describing how, within the tightly interconnected tribe, the technique of shaming—calling down personal criticism upon one who deviates from group norms—can induce those who wish to remain accepted within the tribe to modify contrary positions in order to bring themselves into a state of harmony with others).

<sup>386</sup> *See* Bernard, *supra* note 379, at 830.

<sup>387</sup> *See* LeResche, *supra* note 381, at 321 (demonstrating that one of the most important criterion in the selection of “leaders” of traditional Indian tribal societies was skill in mediating intragroup hostility). Research suggests that selection as leaders of those with skill in dispute resolution may be a common characteristic of the tribal level of sociopolitical organization. *See, e.g.*, Walter Otto Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the “Gypsies,”* 103 YALE L. J. 323, 352–53 (1993) (identifying the main criteria for chiefdom among the Roma as “intelligence and a sense of fairness” in resolving group disputes).

<sup>388</sup> *See* Costello, *supra* note 181, at 887.

<sup>389</sup> *See* Bluehouse & Zion, *supra* note 380, at 329 (explaining that the “core of common law” of Indian legal systems is the “lineage system, a method of tracing relationships and adjusting disputes among people” with the assistance of clan and family members whose influence constituted a form of “engrained emotional cement”).

<sup>390</sup> *See id.* at 334–35. For the peacemaker there is explicit stress upon an affirmative, interventionist role in maneuvering parties back to harmony by reference to traditional values. In the language of mainstream alternative dispute resolution, the TPM peacemaker can be cast

encouraging them to live up to their communal responsibilities, grant apologies and restitution,<sup>391</sup> and depart “with their tails up [rather than one] with a tail up, one with a tail down.”<sup>392</sup>

## ii. *Peacemaker*

The peacemaker typically enters the peace circle<sup>393</sup> to lead a prayer summoning the aid of the supernatural and framing the attitudes of the parties. The peacemaker then listens to all subjective points of view to determine the reasons for disharmony. In loosely structured discussion, feelings and emotions are recognized as equally important to reason, and all persons are required to directly confront the full consequences of their actions, including the injustice done and the resultant harm.<sup>394</sup> Emphasizing future relations rather than the legal consequences of past events, the peacemaker (1) presents a lecture on how or why the parties have violated tribal values and breached tribal solidarity,<sup>395</sup> (2) leads a

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as a directive and activist mediator whose expertise in the particular substantive domain in which the dispute occurs permits him to thrust himself into the conflict and make judicious use of persuasion, influence, and judgments to achieve concrete settlement of an otherwise elusive problem. Nevertheless, TPM is neither mediation nor arbitration as understood by the Western mind as such terms do not capture its inherently spiritual, communal, and restorative essence. *Id.*

<sup>391</sup> See CORNELL & KALT, *supra* note 235 (noting that TPM almost never offers the guilt of the accused as the “question presented”; rather, the gap separating parties is generally the amount of restitution, either material or services, to be paid, and this amount is the subject of bargaining, negotiation, and intervention by the peacemaker).

<sup>392</sup> LeResche, *supra* note 381, at 322.

<sup>393</sup> The circle is sacred in many Indian religions as the circle of life, a “delicate thread that unites all living things.” Darla J. Mondou, *Our Land is What Makes Us Who We Are: Timber Harvesting on Tribal Reservations After the NIFRMA*, 21 AM. INDIAN L. REV. 259, 259 (1997). The path of life follows a circular progression and thus does not have a beginning and an end in linear time but is part of a journey connected to all other living things. Use of the circle in TPM expresses spiritual rootedness to all creation: every person sitting in the circle focuses upon the peacemaker who moves the dispute from the circumference to the center so all four quadrants (spiritual, emotional, physical, and intellectual) reenter balance and recomprise a united whole.

<sup>394</sup> “[TPM] addresses denial, minimalization and externalization in ways that [mainstream] systems cannot do. In a given [mainstream] system, proving the facts of a case is difficult and burdensome. In criminal systems with the privilege against self-incrimination, defendants cannot be compelled to discuss motives, attitudes, . . . or causes of misconduct. In [TPM], which does not utilize punishment, people are free to ‘talk out’ the problem fully and get at the psychological barriers which impede a practical solution.” Zion & Yazzie, *supra* note 33, at 81.

<sup>395</sup> See Cruz, *supra* note 143, at 581–82. Breaches of tribal solidarity are occasioned by individuals who place greater emphasis upon their needs and desires than they do upon the interests of the tribe. *Id.*

discussion of practical means whereby the parties can end the dispute, and (3) suggests how all can conform future conduct to values reflective of tribal relational aspects and rights to justice and harmony.

### iii. Remedies

Remedies are generally implemented without resistance. As agreements are the product of a consensus, the personal honor and communal obligation of the wrongdoer(s) is pre-enlisted in support of compliance. Further, TPM recruits extended family and friends as “probation officers” with “responsibility to the victims and communities to prevent the wrongdoer from causing further harm.”<sup>396</sup> Moreover, given the powerful psychological sanctions available to the tribe in the form of ridicule, ostracism, and banishment, a wrongdoer’s need to remain in good stead is easily exploited.<sup>397</sup>

### iv. U.S.-Indian TPM Conference (USITPMC)

The U.S.-Indian TPM Conference (“USITPMC”) would be conducted shortly after AIRC concluded its final report and before the drafting of proposed legislative reforms. USITPMC might enlist the most respected elder Indian and non-Indian statesmen as peacemakers to supervise, lead, and guide negotiations

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<sup>396</sup> Costello, *supra* note 181, at 899–900.

<sup>397</sup> Research at the intersection between political economics and anthropology suggests that the tribe performs an essential insurance function by facilitating survival tasks that can only be performed in teams: tribal members, in exchange for this insurance, grant their loyalty unreservedly. As a product of these mutually advantageous intratribal interactions and the ease of observing and transmitting information and norms within the small community, the problem of monitoring to prevent free-riding inherent in team production disappears. Not only does the tribe reduce or eliminate bad-faith incentives to opportunism or cheating, but expulsion, ostracism, and other forms of collective refusal to deal, are highly effective sanctions given the importance of individual reputation in a small interdependent circle, and are far more efficient than formal legal enforcement mechanisms. William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 245–47 (1979). Research into other tribal legal systems supports the finding that psychological pressure is at least as effective in securing compliance as the formal institutions of state coercion. See Weyrauch & Bell, *supra* note 387, at 358–59 (noting that among the Roma, the permanent sentence of *marime*—“impurity” requiring ostracism—is the equivalent of a death penalty sentence since the permanent outcast, subjected to the shunning of the entire Roma community, is frequently driven to suicide); see also Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Non-Legal Sanctions*, 63 U. CHI. L. REV. 133, 182 n.144 (1996) (describing how Amish wrongdoers make public confessions lest they be shunned, a fate which results in the deviant member becoming a social pariah with whom no one will eat, speak, or do business).

as to remedies for the redress of Indian claims.<sup>398</sup> Such persons would collect and merge spiritual and secular values common to both Indian and non-Indian cultures and urge negotiators to envision a future when all U.S. citizens, Indian and non-Indian, are full and equal members of one great nation. Peacemakers would urge the U.S. to confront again the history of genocide, land theft, and ethnocide, renew the apology to Indian tribes and people, and suggest remedies that would restore dignity and demonstrate a genuine desire to live up to the highest values enshrined in The Declaration of Independence. Peacemakers would also encourage Indian nations to express their suffering but to be forgiving and willing to start relations with the U.S. anew, freed of the burdens of a painful history. USITPMC might meet at a series of venues, including sacred tribal lands and U.S. retreats such as Camp David. Although the recommendations of USITPMC need not be binding, remedies agreed upon could be committed to paper and transmitted to Congress as the basis for legislative action.

#### 4. Commemoration

“It does not require many words to speak the truth.”<sup>399</sup>

The next step in the process of implementing JAI theory—commemoration of the history of genocide, land theft, and ethnocide—is necessary to ensure that future generations will neither forget nor perpetuate the injustice toward the original inhabitants of the U.S. Erection of monuments at sites of Indian genocide<sup>400</sup> and on the National Mall,<sup>401</sup> naming of public buildings and parks

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<sup>398</sup> Peacemakers would not be granted authority to commit their respective nations unless agreed to prior to USITPM.

<sup>399</sup> Chief Joseph, Nez Perce, *available at* <http://www.powersource.com/gallery/people/joseph.html> (last visited March 8, 2005).

<sup>400</sup> The value of memorials to the preservation of history and the attitudinal reform of citizens is inestimable. In 1881, the U.S. set aside land to honor U.S. soldiers of the 7th Cavalry who fell with Custer at the Battle of the Little Bighorn River in 1878. No mention was made of the Indian soldiers whose victory checked, even if for a short time, the advance of settlers into their lands. However, in 1991, the U.S. renamed Custer Battlefield as Little Bighorn Battlefield and hired an Indian as Superintendent, and in November 1999 ground was broken for the Indian Memorial at Little Bighorn Battlefield National Monument. The Indian Memorial will include a “spirit gate” to welcome all the dead which, according to its designer, will “symbolize the mutual understanding of the infinite all the dead *posses*.” See Bert Gildart, *Two Sides of Little Bighorn*, MIL. HIST. (June 2001), at 27–28. According to curator Kitty Deernose, “[e]veryone feels more welcome now . . . for the story now includes comments from those who won rather than by just those who lost. Ironically, people from all ethnic groups seem to like that.” *Id.* at 25. Many more such memorials could dot the U.S. landscape: AIRC should recommend sites to Congress where memorials to other gross injustices can be created.

<sup>401</sup> Critics might find in this an example of a “memorial fever” sweeping the nation and causing interest groups to “fiercely compete for space on the most hallowed memorial space in

after Indians of historical significance, and creation of a wing in the National Museum of the American Indian with specific focus on the gross human injustices suffered by Indian people will serve these transformative and deterrent purposes.<sup>402</sup> Posthumous pardons should be granted to Indians executed for resisting genocide and land expropriation.<sup>403</sup> Establishment and funding of cultural, historical,<sup>404</sup> linguistic, and religious centers<sup>405</sup> will regenerate sources of tribal cohesion while offering non-Indians the opportunity to adjust their perceptions of Indian culture and religion toward understanding and tolerance. While the object of JAI theory is to unite rather than to divide peoples, the mythical version of history from which the genocide, land theft, and ethnocide of Indians has been redacted no longer functions as political adhesive. Historical revision, in the most visible and tangible manner possible, is necessary to restore the gravitational force between disparate groups in the American polity, and, particularly where history has not been co-authored by subordinated groups, memorials are an appropriate way to initiate this process.

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the nation . . . ." Elaine Sciolino, *Fighting For Space in Memorial Heaven*, N.Y. TIMES, June 28, 2001, at A24 (noting critics who claim that a "growing tendency to memorialize individual groups" and to "carv[e] the nation in ever-thinner slices of hyphenated Americans divides rather than unites the country.").

<sup>402</sup> The National Holocaust Museum might serve as a model for a planned National Museum of the American Indian. See National Museum of the American Indian Act, 20 U.S.C. §§80q-80q-15 ("National Museum of the Indian Act") (Supp. 1990). Exhibits might include original copies of U.S-Indian treaties along with subsequent histories and specific dates and circumstances of U.S. breaches. Histories of tribes, from first contact to dispossession and genocide to the present, could be preserved in rich detail. Names of Indian individuals murdered might be inscribed on a national register, and certificates could be issued to descendants of each victim commemorating the circumstances of their deaths. Indian curators with tribal cultural and historical knowledge would play an important role in the establishment and development of all aspects of the Museum, which is scheduled to open in fall 2004.

<sup>403</sup> See Steven Braun, *Clemency for Hanged Man Delivers Justice Long Awaited*, L.A. TIMES, June 2, 2001, at A10 (noting Maryland gubernatorial grant of posthumous pardon to black man executed for rape of white woman in 1917 after a trial held in a climate of mob violence); Chomsky, *supra* note 60, at 13 (discussing execution of Dakota warriors for defending their territories from invasion by the U.S. in violation of a treaty).

<sup>404</sup> Existing institutions might be assisted in discharging this function, possibly as a central archive with satellite branches across the U.S. and in tribal colleges or in consortium with other institutions. See, e.g., the D'Arcy McNickle Center for American Indian History of the Newberry Library, the foremost institution for Indian studies at <http://www.newberry.org>.

<sup>405</sup> As the cost of higher education is one of the greatest obstacles to Indian students, scholarship grants to attend the thirty-four Indian tribal colleges and universities would be appropriate. The American Indian Higher Education Consortium, an organization founded in 1972 by presidents of tribal colleges to support higher Indian education, might be tapped to administer an Indian Educational Trust to benefit financially needy Indian students. See <http://www.aihec.org>.

In sum, commemoration will concretize the findings of AIRC and the USITPM and inscribe the unvarnished history of U.S.-Indian relations in the minds and hearts of successive generations of Americans, both Indian and non-Indian. Thus, commemoration functions as a sort of moral commitment device that speaks the message, “Never again,” in a language accessible to all.

### 5. *Compensation*

“Do not touch the money of the white man or his clothes. We do not fight for these things. The Seminole is fighting for his hunting grounds.”<sup>406</sup>

It is impossible to objectively quantify the value of the injuries inflicted upon Indian people over history, and morally odious to try.<sup>407</sup> Moreover, compensation cannot reach, let alone discharge, the wrongful deaths of ancestors, the denial of the use of tribal lands and resources, and the legal assaults on Indian religions, languages, and cultures. These harms can never be repaired with money, and JAI theory would regard any wealth transfer from the U.S. as a symbolic act undertaken in further recognition of moral responsibility, rather than a settlement of claims for loss, grief, and trauma. Although endowment of a fund sufficient to allow tribes to repurchase some lands and to serve as a social support net for the poorest Indian individuals, and in particular off-reservation Indians who do not presently enjoy the legal, medical, and educational entitlements their tribal counterparts receive,<sup>408</sup> would not be incompatible with the application of JAI theory to the question of justice for Indians—money is simply an unimportant, and potentially even a dispensable, element of JAI theory.

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<sup>406</sup> Osceola, Seminole, *quoted in* HIFLER, *supra* note 34, *excerpted at* [http://thunderfox.com/DailyFeast/2004\\_01\\_01\\_archive-DailyFeast.html](http://thunderfox.com/DailyFeast/2004_01_01_archive-DailyFeast.html) (last visited Mar. 9, 2005).

<sup>407</sup> The harm suffered is inherently inestimable to peoples for whom ancestors, land, and culture are spiritually interwoven and constitutive of identity in a manner irreducible to comprehension by Western legal minds. Moreover, any proposed sum might stoke the perception of greed or suggest that the real motivation for redress is vindictive and goad the majority into backlash.

<sup>408</sup> Wacks, *supra* note 315, at 209 (suggesting cash is the most desirable remedy for some of the poorest victims of injustices). The amount necessary to sustain such a trust fund, though significant, is certain to be far less than the \$1 trillion or more that could potentially be claimed as reparations. *See supra* notes 330–37 and accompanying text. A fund endowed with a per capita sum of \$10,000 for the nearly 2 million Indians would total \$20 billion. Some or all might be raised through grants in fee simple of federal surplus lands and resource rights to Indian tribes. Revenue-sharing from sales of leases of natural resource rights on former Indian lands, abeyance of taxation on Indian incomes (presently, most Indian income, whether earned on- or off-reservation, is taxable, see *Superintendent of Five Civilized Tribes v. Comm’r of Internal Revenue*, 295 U.S. 418, 421 (1935)), as well as other negotiated solutions might also be considered as compensatory remedies whereby to fund such a trust.

## 6. *Land Restoration*

“The ground on which we stand is sacred ground. It is the dust and blood of our ancestors.”<sup>409</sup>

One of the most difficult stages in applying JAI theory will be the process of land restoration. Scholars have posited that the diffusion of transnational rights-based arguments claiming the sanctity of private property and objections to unjust enrichment may have generated a more favorable political and legal climate for restitution of Indian lands.<sup>410</sup> However, even if preceding stages in JAI commit the U.S. and its people in theory to do “justice,” it will prove far more difficult in practice to reach an agreement with Indian tribes as to what measures must be implemented to yield a “just” result, and still more difficult to cobble together legislation implementing agreed-upon measures without catalyzing opposition. For much of the non-Indian majority, a land restoration agenda resonates not as the legal obligation of a constitutional republic descended heavily upon prior sovereigns but rather as an existential threat. Indeed, non-Indians are Americans too, and they have nowhere to go if transformations in land tenure regimes evict them from their homes. Broaching the subject of land restoration with a non-Indian can trigger defensive backlash: as a white businessman huffed, “I didn’t persecute anybody at Plymouth Rock . . . This is the 1990’s. We didn’t do anything to them, and we don’t owe them anything.”<sup>411</sup>

Nonetheless, while it concedes that centuries after the facts of expropriation it is “too late now to develop a theory of land law that would throw the whole structure of land title . . . into confusion,”<sup>412</sup> JAI straightforwardly insists that Indians are entitled to the restoration of their ancestral lands to the furthest limits of reason and equity.<sup>413</sup> A necessary precondition for the exercise of the powers of self-government, the generation of wealth, the propagation of culture, and the expression of religious belief is the secure possession of a physical space upon which to center these forms of human endeavor and from which it is possible to exclude others hostile to these activities. Where Indians have ceded lands in a process free from coercion, fraud, or duress, such cessions are to be respected categorically, along with the private entitlements of those individuals and

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<sup>409</sup> Plenty Coups, Crow (1909), *quoted at* [http://thunderfox.com/DailyFeast/2005\\_02\\_01\\_archive-DailyFeast.html](http://thunderfox.com/DailyFeast/2005_02_01_archive-DailyFeast.html) (last visited Mar. 9, 2005).

<sup>410</sup> See Newton, *supra* note 119, at 454.

<sup>411</sup> Timothy Egan, *Backlash Growing as Indians Make a Stand for Sovereignty*, N.Y. TIMES, Mar. 9, 1998, at A1.

<sup>412</sup> *Wik v. Queensland*, 134 A.L.R. 637 (1996).

<sup>413</sup> See CHURCHILL, *supra* note 340, at 376 (stating that “the beginning point for any indigenist endeavor . . . centers . . . in efforts to restore direct Indian control over the huge portion of the continental United States that was plainly never ceded by [Indians].”).

corporations currently in possession of such lands. However, where Indian lands were seized by force-of-arms or by coercive, duressive, or fraudulent dealings, or where the lands in question are uniquely sacred to a tribe, JAI requires as a general rule that those specific lands be restored to the ownership of the tribes from which they were taken. Only where this would prove so disruptive to the settled expectations of blameless present landowners that it would threaten social peace<sup>414</sup> or otherwise inflict gross injustice would alternative arrangements for remediation of Indian land claims be considered.

That restoration of rights in Indian lands will inflict unwarranted hardship on non-Indian possessors is not lightly to be presumed. Even if the U.S. becomes genuinely committed to this project of land restoration, no serious person believes that the U.S. is “about to divest itself or its non-Indian citizens of large acreage in the name of its own laws.”<sup>415</sup> One need not ascribe without qualification to the critical legal studies premise that “law is politics”<sup>416</sup> to recognize that the conceptual boundaries between law and politics break down rather easily in regard to the question of Indian rights in land. Moreover, although the “Great Fear”<sup>417</sup> of many non-Indian possessors of residential real estate, family farms, and small businesses is that the assertion of Indian claims to land will eventually lead to their ejection and impoverishment,<sup>418</sup> this concern need not be justified in

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<sup>414</sup> Because the prospect of wholesale evacuation of white landowners from Indian lands threatens the social peace, courts have been loathe to order that the remedy of ejectment is applicable to redress white encroachment on Indian lands. See *Cayuga Indian Nation of New York v. Cuomo*, 1999 WL 509442, at \*27 (N.D.N.Y. July 1, 1999), *Cayuga Indian Nation of New York v. Pataki*, 165 F.Supp. 2d 266, 357 (N.D.N.Y. 2001) (refusing to order ejectment of non-Indian possessors of land claimed by Cayuga Indians on grounds that the “public interest” would not be served by disrupting settled reliance expectations of non-Indian improvers of land and “prov[ing] all too vividly the old axiom: ‘Two wrongs don’t make a right,’” and that enforcement would be a practical impossibility). But see *Banner v. United States*, 238 F.3d 1348, 1354–56 (Fed. Cir. 2001), *aff’g* 44 Fed. Cl. 568 (Fed. Cl. 1999) (ejecting white possessors who refused to accept congressionally-ratified leases from Seneca Nation from Seneca land within limits of City of Salamanca and declining to compensate lessees for the lost value of improvements on ground that ownership of improvements on land belong to the owner, rather than the improver).

<sup>415</sup> CHURCHILL, *supra* note 340, 241(citing Brief for Petitioner in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985)).

<sup>416</sup> Attributed to Vladimir Lenin.

<sup>417</sup> CHURCHILL, *supra* note 340, at 376.

<sup>418</sup> The “new nightmare” that non-Indian possessors of real property experience upon the reawakening of Indian claims to land is succinctly described as follows: “At the door of your suburban house a stranger in a business suit appears. He says he is a Native American. Your land has been illegally acquired generations ago, and you must relinquish your home. The stranger refers you to his lawyer.” James Clifford, *Identity in Mashpee*, in Carrillo, *supra* note 329, at 217.

practice, for JAI theory unequivocally proscribes the involuntary dispossession of non-Indians, as well as the uncompensated takings of their improvements.<sup>419</sup> Although JAR theory is unabashedly disinterested in the fate of non-Indians now residing upon lands claimed by Indians, JAI, noting that “one incorporates these non-Indian interests as relevant to the question of justice” and notes that “one can search high and low, and never find an instance in which Indians have advocated that small property owners be pushed off the land in order to satisfy land claims,”<sup>420</sup> regards non-Indian interests as morally relevant.<sup>421</sup>

Accordingly, JAI insists that the transfer of sovereignty over territory need not disturb private land titles.<sup>422</sup> Indian tribes reinvested with powers of public sovereignty over lands now settled by non-Indians are free to recognize some or all of these private titles, and, despite the anomaly of *M'Intosh*,<sup>423</sup> neither public international law nor JAI theory encourages the notion that a change in sovereignty is destructive of the system of land titles established by the prior sovereign.<sup>424</sup> The public right of sovereignty, defined as the ultimate dominion over territory and the power to make and enforce laws, is conceptually and practically distinct from the private right of “ownership,” conceived as the power to make individual decisions as to the use and alienation of land.<sup>425</sup> As a general rule, JAI envisions that the process of land restoration will be undertaken in the least disruptive fashion possible: non-Indians are encouraged to remain in possession of their real property entitlements on the sole condition that they agree

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<sup>419</sup> See, e.g., *Banner*, 238 F.3d at 1348 (holding that the Seneca Nation of Indians was not entitled to be compensated for improvements made to leased land during its leasehold).

<sup>420</sup> CHURCHILL, *supra* note 340, at 383.

<sup>421</sup> The question of whether title to real property held by states, corporate parties, or absentee owners should be granted the same treatment might potentially be answered differently, although it is best left to negotiation. See Carrillo, *supra* note 329, at 21 (describing land claims settlement negotiations between Indian tribes in the Northeast and noting that Indian tribes excluded all but large tracts of undeveloped land held by states and timber companies from consideration as potentially subject to expropriation) (referencing *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899 (D. Mass. 1977)).

<sup>422</sup> See, e.g., *United States v. Percheman*, 32 U.S. 51, 54, 86–87 (1833) (Marshall, C.J.) (holding that at customary international law it was “very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign” and that “the whole civilized world would be outraged, if private property should be . . . annulled” upon the change in sovereignty).

<sup>423</sup> *M'Intosh*, 21 U.S. at 574 (holding that the private rights of Indians to hold and convey real property were “impaired” by the transfer of sovereignty to the U.S. through the discovery doctrine).

<sup>424</sup> See, e.g., 1 D.P. O'CONNELL, *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW* 101–41 (1967) (principles of customary international law presume that private law is undisturbed by a change in sovereignty).

<sup>425</sup> See THOMPSON, *supra* note 284, at 59–60 (differentiating sovereign from private rights in land); see also MICHAEL WALZER, *JUST AND UNJUST WARS* 57 (1977).

to live in peace with their Indian neighbors under Indian sovereignty.<sup>426</sup> Non-Indian titles would either be left totally undisturbed by the transfer in sovereignty or, at the very least, non-Indians would be entitled to just compensation and other relief for the taking of their property.<sup>427</sup>

Furthermore, should non-Indians elect not to accept Indian sovereignty subsequent to the program of restoration, JAI proposes that, rather than bring actions in ejectment, tribes consider either granting these parties long-term leases on fair market terms to be negotiated,<sup>428</sup> thereby granting de facto autonomy to the extent compatible with the exercise of Indian sovereignty over the remainder interests. Such lease agreements might incorporate terms providing compensation for lost rental earnings and damages for prior trespass and might have the effect of terminating all prior claims relating to the leased parcels.<sup>429</sup>

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<sup>426</sup> See CHURCHILL, *supra* note 340, at 390 (welcoming non-Indians to live under Indian sovereignty so long as they “accept[] the idea that [they are] placing [themselves] under unrestricted Indian jurisdiction and will thus be required to abide by native law.”).

<sup>427</sup> Responsibility for payment of just compensation to non-Indians should attach to the U.S., the party responsible for the original dispossession of Indians. This obligation, although it would not arise under the Fifth Amendment inasmuch as the expropriating party would be said to be the Indian tribe(s) in question, could be construed to inhere in the U.S. under the trust doctrine as part of its responsibility for enabling Indian self-government. See *supra* Part II.B.3 (describing the trust doctrine in U.S. law). In addition to direct compensation for acts of expropriation, non-Indians suffering loss of property interest might be granted other measures of relief, including tax remission on income or property situated elsewhere. CHURCHILL, *supra* note 340, at 108.

<sup>428</sup> See, e.g., Seneca Nation Settlement Act of 1990, 25 U.S.C. §§1774 et seq. (2000) (creating the framework for the negotiation of fair lease terms between the Senecas as lessors and non-Indian lessees for the purpose of resolving claims to Seneca lands and promoting reconciliation and economic development). Only the refusal to accept reasonable lease terms should trigger the exercise of U.S. powers of eminent domain to condemn properties held by non-Indians in lands restored to tribal sovereignty and restore these private titles to Indian tribes or Indian grantees, and this exercise of eminent domain should pass constitutional muster under the Fifth Amendment Public Use Clause. See, e.g., *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (holding that a state scheme to condemn private land titles and transfer them to private parties currently leasing same, where necessary to effectuate the public policy of eliminating a dysfunctional land tenure regime and reestablishing a functioning real estate market, satisfied the Fifth Amendment Public Use Clause).

<sup>429</sup> 25 U.S.C. § 1774b(b) (2000); see also CHURCHILL, *supra* note 340, at 107 (discussing similar settlement proposals in ongoing land claims battles between the Onondaga and the City of Syracuse); BRODEUR, *supra* note 274, at 106–07 (noting that the land claims settlement reached between Maine and the Passamaquoddy and Penobscot cleared titles and dismissed trespass claims against all private non-Indian property owners) (referencing Maine Indian Land Claims Settlement Act, 25 U.S.C. §§1721 et seq. (1980), Pub. L. No. 96–420 et seq. (1980)).

Still, where restoration would clearly inflict gross injustice upon blameless non-Indian possessors, and the land in question is not sacred, JAI is prepared to accept in-kind grants from federal landholdings in lieu.

More than 650 million acres of federal lands are held in public trust for purposes of grazing, forestry, wilderness, and other uses and managed by federal agencies, in particular the Bureau of Land Management.<sup>430</sup> Current federal law provides that the homeless receive first priority for use of “surplus” federal land and property.<sup>431</sup> The General Services Agency (“GSA”) administers conveyance of surplus federal land and orders sale when there is no federal use to the private sector for fair market value, either through sealed-bid competition, public auction, or mail auction.<sup>432</sup> Although Indian tribes are permitted to acquire surplus federal lands, the trust doctrine continues to impose, through extensive federal regulations and Secretarial oversight and veto power, obstacles to land acquisition.<sup>433</sup> A minimalist approach to expansion of the tribal land base might transform the role of the Secretary of the Interior in regard to surplus land acquisitions from gatekeeper to facilitator; the National Congress of American Indians Land Recovery Task Force has offered proposals to this end, but no implementing action has been taken.<sup>434</sup>

More extensive legislative proposals might provide that some or all of federal surplus lands be granted to Indian tribes in proportion to the acreage of their existing land claims against the U.S.<sup>435</sup> Millions of acres of Western States such as Nevada, currently under federal control, might be allotted to tribes for occupancy, resource extraction, rental, or even in fee simple. In lands granted in fee, the U.S. might negotiate the reservation of leases, easements, or other rights of usufruct for the benefit of non-Indians.<sup>436</sup> Although such a proposal might not

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<sup>430</sup> See <http://www.blm.gov/nhp> (describing the jurisdiction and missions of the Bureau of Land Management and illustrating lands under its management authority).

<sup>431</sup> Stewart B. McKinney Act, 42 U.S.C. §11411(b) (2000).

<sup>432</sup> 63 Stat. 377, 40 U.S.C. §124.

<sup>433</sup> See 25 C.F.R. § 151 (2004) (requiring Indians seeking the U.S. to acquire land for their benefit to undergo extensive application procedures).

<sup>434</sup> See 64 Fed. Reg. 17,574–17,588 (April 12, 1999) (proposing modifications to, inter alia, limit discretionary power of federal agencies and officials, particularly with respect to the purposes for which such lands are acquired).

<sup>435</sup> See generally PAUL CHAAT SMITH & ROBERT WARRIOR, *LIKE A HURRICANE: THE INDIAN MOVEMENT FROM ALCATRAZ TO WOUNDED KNEE* (1996) (describing early such discussions in late 1960s and 1970s).

<sup>436</sup> See Carlos Scott Lopez, *Reformulating Native Title in Mabo's Wake: Aboriginal Sovereignty and Reconciliation in Post-Centenary Australia*, 11 *TULSA J. COMP. & INT'L L.* 21, 78–79 (2003) (describing a joint sovereignty proposal that would enable restoration of land to indigenous peoples without denying non-indigenous peoples some rights in restored lands).

directly restore sacred lands, it would enable tribes to sell recently acquired federal surplus acreage and resources for the purpose of purchasing sacred lands.

The most expansive measure calls for the creation of a “Buffalo Commons” [“BC”] centered upon nearly 140,000 square miles of territory in 110 counties situated in a broad swath extending from Texas and New Mexico north to the Canadian border through Oklahoma, Colorado, Nebraska, Kansas, Wyoming, North and South Dakota, and Montana.<sup>437</sup> The vast majority of this territory consists of lands that were never lawfully ceded to the U.S. and to which Indian tribes therefore remain legally entitled.<sup>438</sup> To this land mass—currently occupied by a sparse and dispersed non-Indian population of only 400,000—advocates of the BC would seek to append the unceded lands of over a dozen other Indian tribes,<sup>439</sup> a land mass encompassing an additional 100 bordering counties, the Great Basin and Sonoran Desert, those parts of several other States (Utah, Nevada, Montana, Idaho, Washington, Oregon, and New Mexico) designated surplus federal lands or land otherwise held in public trust, adjacent grasslands, national forests, military bases, and existing Indian reservations. Tribes claiming lands not within the area described in the BC might negotiate with the U.S. the acceptance of grants of land within the BC in exchange for the surrender of claims, and tribes within the BC would negotiate arrangements for joint use of its resources.<sup>440</sup> Although proponents of the BC stress that it is possible to facilitate “the return of every square inch of unceded Indian Country in the United States without tossing a single non-Indian homeowner off the land on which they [sic] [now] live,” individual non-Indians electing not to remain living in and accept Indian sovereignty over this “North American Union of Indigenous Nations” would be paid just compensation for the cession of their property interests by the U.S.<sup>441</sup>

In sum, the recovery of a land mass sufficient to create the material preconditions for economic self-determination, religious freedom, and self-governance is crucial, and thus JAI proposes land restoration to the furthest limits possible short of imposing injustice on non-Indians. To this extent, it is far more

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<sup>437</sup> See CHURCHILL, *supra* note 340, at 384–87 (elaborating the “Buffalo Commons” proposal whereby to accomplish land restoration and enhance the prospects for Indian self-governance without compromising the rights of non-Indians).

<sup>438</sup> See *supra* note 303. Much of the land mass constituting what would become the core of the BC is the ancestral territory of a small number of tribes, including the Lakota, Pawnee, Arikara, Hidatsa, Crow, Shoshone, Assiniboine, Cheyenne, Arapho, Kiowa, Comanche, and the Jicarilla and Mescalero Apache. CHURCHILL, *supra* note 340, at 386.

<sup>439</sup> See *id.* at 387 (noting that the lands of the Blackfeet, Salish, Kutenai, Nez Percé, Yakima, Western Shoshone, Goshutes, Utes, Paiutes, Navajo, Hopi, Chiricahua Apache, Havasupi, Yavapai, and O’odam were never lawfully ceded to the U.S.).

<sup>440</sup> *Id.* at 386–87.

<sup>441</sup> *Id.* at 383, 387.

aggressive on the issue of land rights than JAS or JAC. Nevertheless, JAI is far more sensitive to the rights of non-Indians and to the political realities attendant to territorial questions—an issue of “high politics”—than is JAR. Although undoing the present consequences of historical force and fraud will invariably entail a major reallocation of some degree of public sovereignty to Indian tribes, JAI maintains that this process need not compromise the settled rights and expectations of blameless non-Indians and their descendants. Hundreds of millions of acres exist in connection with which there are few conflicting claims. By negotiating a creative strategy for identifying suitable and appropriate lands wherein to transfer some quantum of sovereignty, whether along the lines of the BC proposal or in some lesser degree, and by jointly committing to the preservation of the private property rights of non-Indian residents upon lands over which sovereignty is transferred or else accepting the responsibility to pay compensation for the taking of these rights, Indian tribes and the U.S. can author a restorative program that will prevent or internalize the demoralization costs associated with uncompensated expropriation past or present and preserve the political and territorial integrity of the U.S.

### *7. Legal Reformation*

If land restoration portends challenges, the penultimate step of JAI promises even more. Although the restoration of lands to tribes is a partial measure toward redress, JAI, unlike existing theories of justice, specifies a program of legal reformation as the critical stage in concretizing other remedies and, above all, in clearing away obstacles to the expression of Indian self-determination. Taken together, the legal doctrines of discovery and conquest, as incorporated in domestic law, as well as a judicially unenforceable trust doctrine, plenary power, and the subversion of Indian rights reserved under treaties, constitute an interconnected matrix of legal disability that refers Indian rights to property, culture, religion, development, and self-government, no matter how broadly any given generation of non-Indians might choose to construct and protect them, to perpetual reinterpretation, appropriation, and suppression by future non-Indian majorities and hostile judges. That a system of law imported and imposed by a settler state should hobble the rights of an indigenous people is an oft-repeated story across the globe; that this system must be transformed if the impediments are to be swept away and those rights secured to their bearers is a proposition that follows logically, but has largely gone unstated heretofore by theoreticians concerned with justice on behalf of Indians.<sup>442</sup> Accordingly, legal reform,

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<sup>442</sup> For an example of a judicial recognition of the proposition that legal reform is a necessary condition precedent to the security of indigenous rights in real property, see *Mabo v. Queensland*, 107 A.L.R. 1 (1992) (Austr.):

oriented toward the reservation of this bundle of Indian rights as against non-Indian majorities, occupies the apex of the remedial pyramid JAI directs its proponents to construct. Until Indians are free to engage in meaningful self-determination—in other words, until either the U.S. is prepared to grant a substantial measure of territorial autonomy or at the very least legally tolerate the coexistence of basic value and cultural differences that often spark conflict between Indians and non-Indians—the struggle to achieve the objectives of JAI will remain incomplete.

The first question that must be answered in designing an appropriate package of legal reform proposals is whether, and to what extent, the U.S. is willing to allow Indian tribes to invest the phrase self-determination with real meaning.

#### a. *Indian Self-Determination*

The customary international legal principle of self-determination provides that social, political, and economic institutions should be substantially and continuously guided not by alien or colonial powers, but by the will of the governed.<sup>443</sup> Under international law, states are duty-bound to promote the self-determination, and therefore the independent and unmediated social, political, and economic development of their indigenous peoples.<sup>444</sup> Taken to its logical extreme, obligations to enable self-determination may be construed to require

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The fiction by which the rights of indigenous inhabitants in land were treated as nonexistent was justified by a policy which has no place in the contemporary law of this country . . . Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.

*Id.*

<sup>443</sup>International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49–52, U.N. Doc. A16316, 993 U.N.T.S. 3, 6 I.L.M. 360 (1966), at Part I, Art. 1(1) (“All peoples have the right [to] . . . freely determine their political status [and] . . . development.”).

<sup>444</sup>*See, e.g.*, 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among states [“Friendly Relations Declaration”], G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, 123, U.N. Doc. (charging states with duty to respect self-determination), reprinted in 9 I.L.M. 1292 (1970); ILO Convention No. 169, *supra* note 33, at Art. 5(c) (requiring states to consult with indigenous peoples as to formation and endowment of indigenous institutions and programs); *Discrimination Against Indigenous Peoples: First Revised Text of the Draft Universal Declaration on Rights of Indigenous People*, at Art. 3, P5, U.N. Doc. E/CN. 4/Sub. 2/1989/33 (1989) (“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.”); *Western Sahara Case*, 1975 I.C.J. 12 (incorporating UNGA resolutions to “[f]ree association [and] voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes.”).

states to permit their indigenous peoples the right to secede from their parent states and to form independent states,<sup>445</sup> as well as to require other preexisting states to recognize these newly-independent states, particularly where the peoples in question are subject to alien domination or hobbled in the “meaningful exercise of its right to self-determination internally.”<sup>446</sup>

Thus, an Indian tribe with a population, territorial base, government, and the capacity to enter into international relations could, in theory, declare independence and gain international recognition.<sup>447</sup> Arguably, Indian nations, as a matter of international law, continue to possess the right that existed prior to contact with European discoverers to create their own forms of organization without reference to the states in which they are now situated.<sup>448</sup> Some Indian rights advocates suggest that only full tribal sovereignty in the form of independent nation-states recognized as such by other members of the international community can overcome the disabilities imposed by federal Indian law.<sup>449</sup> However, although the history of U.S.-Indian relations strongly suggests that Indian interests and those of the U.S. majority are not often commensurable, any proposal to compromise the territorial integrity of the U.S. is unlikely to be met with anything but the most hostile of responses in majoritarian political circles. The suggestion that tribal self-determination be bolstered with legal significance evokes reactions to “Indian separatism” verging on enmity, even

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<sup>445</sup>Paul H. Brietzke & Teresa L. Kline, *The Law and Economics of Native American Casinos*, 78 NEB. L. REV. 263, 338–39 (1999) (“[U.S.] notions of sovereignty echo those prevailing in international law prior to World War II: you cannot be a little bit sovereign, and entities like Indian tribes are entitled to little legal respect because they are not recognized as states.”).

<sup>446</sup>Secession of Quebec, 2 S.C.R. 217, 37 I.L.M. 1340, 1373 (1998).

<sup>447</sup>See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (1987) (“Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”); Inter-American Convention on Rights and Duties of States, 1933, 49 Stat. 3097, T.S. No. 8811, 119 U.N.T.S. 3 (Art. 9) (as amended by the Protocol of Amendment in 1967, 21 U.S.T. 607, T.I.A.S. No. 6487 (Art. 12)).

<sup>448</sup>Tully, *supra* note 306, at 156 (stating that to pretend otherwise is to “dispossess the aboriginal peoples of their property rights, forms of government, and authoritative traditions without so much as an argument.”).

<sup>449</sup>See, e.g., Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence’s Learning to Live with the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. 439, 445–49 (1988); Winona LaDuke, *Introduction to CHURCHILL*, *supra* note 340, at 12 (declaring that Indian tribes hold the right to secede from the U.S.).

when offered by the U.S. President.<sup>450</sup> A U.S. Senator angrily proclaims that “[c]itizens of the [U.S.] should not have their rights limited by separate governments within the [U.S.]”<sup>451</sup> In short, full independence is likely not negotiable, but a significant degree of political and legal autonomy may be.

In fact, most tribes do not define secession and independent statehood as the desired end-state of a program of self-determination, but rather as an intermediate status that would devolve degrees of political and legal power that has been arrogated to the U.S. and the States and allow tribes to “challenge . . . intrusions across the full spectrum of locations at which . . . injury is felt.”<sup>452</sup> A pragmatic approach, organized around issue-area autonomy, that would allow Indians to “recuperate” traditional laws and modalities of governance<sup>453</sup> and assert alternative institutional structures more consonant with their cultural imperatives represents an approach to self-determination that demands a lesser quantum of independence while departing sufficiently from the current paradigm to satisfy most tribes.<sup>454</sup>

Under this approach, which might well be implemented by the resumption of the treaty-making process, the presumption against autonomous tribal self-governance, gradually accreting since the early nineteenth century,<sup>455</sup> would be overturned, and tribes would once more be presumed to possess near-absolute territorial autonomy complete with the powers to create and enforce laws over all persons within their jurisdiction in respect to all issue-areas, save for commerce and the dimensions of external sovereignty—i.e., foreign relations and defense. Where Indian self-determination does not implicate the external powers of U.S. sovereignty, matters concerning whether and how Indians choose to hunt and fish, to produce the necessities of life, to raise children, to pass on knowledge to succeeding generations, to create and enforce law, and to worship ought simply to be of no concern beyond the territorial limits of Indian jurisdiction. Finally, under the pragmatic program of Indian self-determination, rather than shedding their allegiance to the U.S., individual Indians would, through participation in their own institutions and the elaboration of their own systems of social regulation and

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<sup>450</sup> See William J. Clinton, Remarks to Indian and Alaskan Native Tribal Leaders, 30 WEEKLY COMP. PRES. DOC. 941, 942 (May 6, 1994) (“This then is our first principle: respecting your values, your religions, your identity, and your sovereignty.”).

<sup>451</sup> Timothy Egan, *Backlash Growing as Indians Make a Stand for Sovereignty*, N.Y. TIMES, Mar. 9, 1998, at A1 (quoting Sen. Slade Gorton, R-Wash.).

<sup>452</sup> Herz, *supra* note 143, at 698.

<sup>453</sup> Poole, *supra* note 299, at 13.

<sup>454</sup> CHURCHILL, *supra* note 340, at 389 (speculating that most Indian tribes would prefer a form of commonwealth and home rule governance over total secession).

<sup>455</sup> See *Worcester*, 31 U.S. at 536–63 (holding that although tribes were subject to the plenary power of Congress they were immune from the reach of the states and sovereign in their internal affairs).

welfare, enjoy an enhanced bicultural identity while retaining their national identity as U.S. citizens.

In return for accepting external limitations upon their sovereignty, tribes would receive material support in reconstituting antecedent tribal institutions as well as specific legal guarantees committing the U.S. to specific undertakings necessary to preserve and protect tribal autonomy. An Omnibus Indian Rights Act ["OIRA"] and a series of constitutional amendments together constitute the package of legal reformation necessary to carry these guarantees into force.

b. *Omnibus Indian Rights Act*

Four primary reform measures, each centered upon a different functional area, must be completed to guarantee Indian self-determination: (1) the strengthening of protections of Indian religious and cultural rights; (2) the creation of specific and enforceable trust-based remedial programs for Indian beneficiaries; (3) the creation of new judicial institutions committed to resolving ambiguities and construing treaty terms in favor of tribal reserved rights and to the enforcement of the trust doctrine; and (4) the incorporation, by implementing legislation, of those principles of international law supportive of the rights of Indians as indigenous peoples.

With regard to Indian rights, process is at least as important as doctrine. Even if the entire corpus of case law burdening Indian cultural, religious, and property rights were to be stricken in a single legislative fiat, failure to alter the process by which laws are made in a democracy that enshrines the principle of majoritarianism would sow the seeds of future Indian disability in the soil of the newly amended legal system. Although the precise mechanisms whereby accomplishing Indian participation in the drafting of legislation trenching in Indian affairs is open to debate, and although mere participation does not preclude truncation of rights through judicial review, the representation of Indian interests in the U.S. legal process is essential. Substantively, OIRA might (1) craft explicit statutory exceptions to the Endangered Species Act for religious-based takings of endangered species, (2) mandate inclusion of Indian representatives in U.S. delegations to international organizations and quasi judicial bodies with competence over subject matter that implicates indigenous rights, including, e.g., the International Whaling Commission, the United Nations Human Rights Commission, and the Permanent Forum on Indigenous Issues; and (3) preempt State laws imposing penalties for religious-based use of controlled substances by including specific language in AIRFA to exempt Indian religions from State laws. If Indians, as part of their religious heritage, wish to hunt whales or ingest peyote, it should not be within the power of the States or of the federal government to interpose their contrary will, and only specific legislative enactments can sweep away the prohibitions that attach to such practices through laws of general application.

Second, the inclusion of specific trust-based programs within OIRA will free remedial funds from the strings of dependence. Recent federal block grants to tribes, though they have increased opportunities for economic development, have all too frequently been accompanied by a maze of regulations that defeats tribal initiative and substitutes legal accountability for cultural appropriateness.<sup>456</sup> A chapter of OIRA would streamline the grant process, reduce management costs, and liberate future remedial programs from unnecessary federal oversight. Greater consultation with tribes in the block-granting process would rationalize expenditures of funds and lead to greater, and more culturally relevant, economic development. Legislative deconstruction or decomposition of the BIA<sup>457</sup> and tribal governments,<sup>458</sup> as well as other measures that restructure U.S. relations with Indian tribes, may be necessary to carry this element of OIRA into effect in practice.

Third, because U.S. federal courts are precluded by institutional commitments to the legal doctrines of *stare decisis* and by the political principles of majoritarianism and separation of powers from asserting a principled defense of Indian reserved rights against legislative incursion,<sup>459</sup> a new judicial institution unfettered by such legal and political baggage may be necessary. A separate Court of Indian Affairs [“CIA”], with a bench populated in part by Indian judges schooled in the history of U.S.-Indian relations might be a fruitful avenue for

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<sup>456</sup> See, e.g., *supra* note 219.

<sup>457</sup> If the BIA still serves an important lobbying function by securing allocations of trust funding, its positive contributions are more than offset by negatives: most Indian scholars conclude that the BIA, a top-down institution, has undermined traditional tribal structures, co-opted tribal autonomy and resources, and reinforced a relationship of dependency. See, e.g., *AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY*, *supra* note 266, at 99–100. So long as Indian economic initiatives must travel through the BIA and external interests drive analyses of priorities, culturally appropriate development is subordinate to external process.

<sup>458</sup> Reformation of Indian institutions to enhance their benefit to Indian people requires considerations of the goodness of fit of goals and political and economic strategies. In some instances, the near-total reconstitution of tribal governments may be a necessary condition precedent to the creation of fully independent, culturally integrated, and functional Indian societies. Friedman, *supra* note 40, at 575 (correlating an increase in the incorporation of the principle of indigenous self-determination in formal institutions with increases in indigenous health and social welfare). Rather than accepting as permanent fixtures the tribal governments and constitutions created by the IRA and modified by subsequent federal legislation and regulation, Indian people, as part of their rights to self-determination, must be permitted to define their governance structures and processes as they see fit. Federal financial assistance in this reconstruction is welcome where it aids, rather than derails, Indian self-determination.

<sup>459</sup> See *supra*, Parts II.B.2–5.

further investigation and discussion.<sup>460</sup> The CIA might be created by Congress as an Article III court with appellate jurisdiction to hear cases sounding in federal Indian law and competence to award restitution of Indian lands and rights. Moreover, to resituate the trust doctrine on a more stable moral and legal foundation and create judicially enforceable obligations to Indians, cases concerning breaches of the trust might be heard by the CIA under a grant of original jurisdiction, and the political question doctrine might be declared inapplicable with respect to Indian claims.<sup>461</sup> The trust doctrine has decayed into a relic of colonialism and paternalism, rife with the potential for abuse and dereliction: if it is to be reimagined as a judicially-enforceable guarantee of Indian welfare, an institutional approach less captive to majoritarianism than the current system of Article III courts must be introduced.<sup>462</sup> Corresponding measures to strip doctrinal defenses otherwise available to the U.S. will be necessary; amendments to the Federal Tort Claims Act should also be considered as part of the jurisdictional provision authorizing the CIA.<sup>463</sup> Finally, to assist the CIA in the reformation of the trust doctrine, OIRA might authorize an Indian Assembly, consisting of representatives from all Indian nations and created outside the U.S. political and legal framework, to serve as a quasi-legislative body that would negotiate directly with Congress and executive agencies as to broadening the substantive contours of the trust and developing more robust methods of enforcement.

Further, administrative agencies, particularly those that distribute benefits to tribes, should create rules that Article I courts, when adjudicating cases affecting Indian rights, appoint a special master fluent in Indian legal issues to hear the merits. To provide institutional support for this remedial proposal, OIRA might endow pan-Indian legal organizations, such as the Native American Rights Fund, the Institute for the Development of Indian Law, and the University of New

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<sup>460</sup> See VINE DELORIA, JR. & CLIFFORD M. LYTLE, *The Future of Indian Nations*, in *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* 262 (Vine Deloria, Jr., ed., 1984) (proposing such a Court).

<sup>461</sup> See *supra* notes 96–107, and accompanying text (noting narrow grounds under which suit by Indian claimants for breach of duty under the trust doctrine can be maintained against the U.S.). Although opinion is divided as to whether the trust doctrine ought to be preserved with enhanced judicial enforcement provisions or jettisoned entirely as a colonialist remnant, a pan-Indian consensus supports major revision.

<sup>462</sup> For an argument that reimagination of the trust doctrine as a “vibrant federal trust . . . that serves as an essential complement to the shared federal-Indian goal of self-determination” is possible within the framework of federal Indian law, see Raymond Cross, *The Federal Trust Duty in an Age of Indian Self-Determination: An Epitaph for a Dying Doctrine*, 39 *TULSA L. REV.* 369, 373 (2003).

<sup>463</sup> See Bradford, *supra* note 2 at 78–91 (discussing doctrinal defenses to Indian claims for redress).

Mexico Indian Law Program, with funds to draw additional Indians into the legal profession, thereby enhancing the autonomous Indian capacity to frame and defend Indian rights and interests in the panoply of U.S. courts.<sup>464</sup> Similarly, because the investiture of tribal colleges and charter schools for Indian children with sufficient funds to allow their expansion, curricular development,<sup>465</sup> and maturation is also essential if the next generation of Indian leaders is to develop the legal sophistication necessary to part with non-Indian intermediation,<sup>466</sup> OIRA might make additional funds available for this purpose. Since passage of the proposed bundle of legislation will be hotly contested and require political horse-trading, inclusion of language committing the U.S. to a general process of legislative reform at the outset may suffice.<sup>467</sup>

Finally, the positive legal reforms proposed in OIRA may be inadequate, standing alone, to secure to Indians the guarantees of genuine self-determination. In addition, the ongoing normative process of interpreting federal Indian law, conducted by the political, as well as the legal branches of government, may require reinfusion with the spirit of the medieval ecclesiastical humanism that “perceived a normative order independent of and higher than the positive law or decisions of temporal authority” and “provided the jurisprudential grounds . . . to withhold the imprimatur of law from acts of earthly sovereigns found to violate th[is] moral code.”<sup>468</sup> Accordingly, a conference of jurists, scholars, and practitioners—assisted by the American Legal Institute—might be convened to

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<sup>464</sup> See Nader & Ou, *supra* note 164, at 21–22.

<sup>465</sup> A UNESCO study indicates that fewer than 150 of the several hundred Indian languages have survived in any form. See Virginia Fention, *Study Warns 3,000 of World's Languages Could Go Silent*, BOSTON GLOBE, Feb. 21, 2002, at A18; see also Michael Krauss, THE WORLD'S LANGUAGES IN CRISIS Language No. 68–1 at 4, 5 (1992) (estimating that 135 of the 155 Indian languages still spoken in the U.S. are essentially moribund). Teaching tribal language and culture to the youngest Indian schoolchildren is an important antidote to the poison pill of ethnocide. See Native American Languages Act of 1990, 25 U.S.C. § 2901 (2000) (committing U.S. to preservation of Indian languages). Programs established in metropolitan education centers to instruct off-reservation and non-member Indians in tribal languages, cultures, and histories would be of similar remedial benefit.

<sup>466</sup> See Daniel Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893, 931–32 (1994) (suggesting that ethnic colleges and universities can play an important role as institutions of community-enhancement and development); see also Suagee, *supra* note 164, at 746 (noting that tribal colleges, the leading institutions of higher learning on reservations, are essential to Indian capitalization and self-determination).

<sup>467</sup> The following clause might suffice: “The Congress of the United States (1) pledges to pass necessary legislation to permit Indian tribes and Indian people to reconstitute their political and economic institutions as they see fit without external interference as befits the right of foreign sovereigns and in keeping with their extensive human rights as indigenous peoples.” Bradford, *supra* note 2 at 162 n.765.

<sup>468</sup> ANAYA, *supra* note 102, at 10.

restate a corpus of federal Indian law ameliorated by the influence of this far more humanist tradition. This Restatement of Federal Indian Law might strike a balance between majoritarianism and moral obligations to afford justice more favorable to Indians, thereby rendering a more normatively attractive foundation upon which to base the future legal and political relationship between the U.S. and Indian tribes.

*c. Constitutional Amendments*

Even if Indian self-determination is buttressed by a comprehensive OIRA, the project of legal reformation may be incomplete. Constitutional amendment[s] may be necessary to: (1) renounce plenary power or permit devolutions of power that enhance tribal autonomy and sharply limit the subject matter and issue-areas in which Congress may treat Indian tribes as domestic dependencies; (2) recognize Indian property as within the full meaning of the protections of the Fifth Amendment Takings and Just Compensation Clauses of the U.S. Constitution; and (3) restore or confirm the status of Indian tribes as entities superior to the States in the federalist hierarchy.

Precedent exists with the inter-American system for constitutional amendment in recognition of indigenous rights to self-determination: several American states have expressly adopted constitutional or statutory provisions implementing elements of international declarations regarding indigenous peoples.<sup>469</sup> If plenary power were abridged by constitutional amendment to recognize tribal autonomy in all issue-areas, save for defense, foreign relations, and the power to regulate commerce with Indian nations—the sole power constitutionally committed to Congress by the text of the Constitution—arguments for its retention would be easier, normatively speaking, to marshal. Only by narrowly restricting plenary power through a constitutional amendment clarifying the limits of the Indian Commerce Clause can the exercise of Indian rights to religion, culture, economic development, and the creation and application of law be authoritatively withdrawn from the vagaries of the U.S. political process. It is not inconceivable that devolution of power to Indian tribes might pave the road to an eventual resumption of treaty-making with Indian nations and the incorporation of the substantive guarantees of proposed

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<sup>469</sup> See, e.g., CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 25 (guaranteeing that interpretation of the Constitution does not abrogate or derogate from aboriginal rights); ARG. CONST. at § 75 (1994) (recognizing indigenous peoples, their distinctive cultural identities, and their ancestral land rights, and directing the legislature to act accordingly); NICAR. CONST. art. 5 (as amended 1995) (affirming that the indigenous people of Nicaragua have the right to live and develop according to their customs, language, beliefs, and aboriginal rights to land).

constitutional reforms within new sacred texts pledging a union of Indian and non-Indian peoples.<sup>470</sup>

A more radical transformative proposal might shift central administrative authority over tribes from Congress to UN trusteeship under an Article 73 mandate for the international community to aid non-self-governing Indian tribes in reacquiring their lands and developing their rights to and capacities for self-determination.<sup>471</sup> Although this measure more directly challenges U.S. authority than a narrowing of the definition of the Indian Commerce Clause in keeping with the limited textual support for plenary power offered in the Constitution, precedents support internationalization of domestic trust responsibilities under similar circumstances.<sup>472</sup> The juxtaposition of this internationalization proposal to the proposal to limit the definition of plenary power might well render the latter more politically palatable.

Second, Indian property is not within the full protection of the Fifth Amendment to the U.S. Constitution inasmuch as Congress may lawfully take Indian title, provided that title has not been “recognized” by treaty or statute, without paying compensation.<sup>473</sup> An amendment to include the phrase “nor Indian property, regardless of whether it has been recognized by the United States,” between the words “private property” and “be taken for public use” in the Fifth Amendment would remove this legal disability and act as a bulwark against takings and as a limitation on the depreciation of Indian resources.

Third, although nothing in the U.S. Constitution mandates that Indian tribes are inferior to State and federal governments, practice has rendered them so, and a

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<sup>470</sup> Morally central to JAI is the idea, rooted in universal principles of natural law, that treaties impose moral obligations to act in fairness and good faith. *See WILLIAMS, supra* note 70, at 112 (noting the Indian philosophy that treaties with the U.S. are “multicultural agreements that impart duties of good faith and fair dealing.”); EMMERICH DE Vattel, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW*, bk. II, ch. XII, 163 (C.G. Fenwick trans., 1916) (1758).

<sup>471</sup> ANAYA, *supra* note 102, at 83–84. Article 73 of the UN Charter provides for the establishment of international trustees to aid peoples who have yet to “attain[] a full measure of self-government” while protecting and promoting their “political, economic, social, and educational advancement.” U.N. CHARTER, art. 73. For a discussion of whether revivification of the concept of trusteeship under international law might serve as a bulwark to protect groups against the assertion of state sovereignty, see WILLIAM BAIN, *BETWEEN ANARCHY AND SOCIETY: TRUSTEESHIP AND THE OBLIGATIONS OF POWER* 140–92 (2003).

<sup>472</sup> *See, e.g.,* Karl J. Irving, *The United Nations and Democratic Intervention: Is “Swords into Ballot Boxes” Enough?* *DENV. J. INT’L L. & POL’Y* 41, 69 (1996) (noting establishment under international law of ad hoc trust administrations under League of Nations and U.N. systems in, inter alia, Crete, China, South America, the Middle East, the South Pacific, Europe, and Africa).

<sup>473</sup> *See supra* note 120 and accompanying text (detailing the legal inferiority of Indian property rights within the U.S. Constitutional order).

constitutional amendment to specify their co-equality with, at a minimum, States, would free Indian tribes of the obligation to submit their rights to self-determine to hostile State review.<sup>474</sup> In recent years the executive branch has verbally supported an enhanced tribal position in the federalist system,<sup>475</sup> but practice has not followed promise. Indian tribes remain the least powerful in the tripartite system of federal, State, and tribal governments, and moral and legal obligations arising under the trust doctrine are subject to majoritarian preference at multiple levels of governance. More expansive reform proposals that would relate Indian tribes to the surrounding States by altering the current federalist structure, such as a separate Indian legislature with power to veto State legislation, or the set-aside of seats in Congress for Indian representatives, though perhaps radical departures from the domain of the politically possible, may merit further consideration if only to illuminate the reasonableness of more limited measures.

### 8. *Reconciliation*

“We took an oath not to do anything wrong to each other or to scheme against each other.”<sup>476</sup>

The final stage of JAI theory is distinguished from the preceding stages in that it imposes a duty not upon the U.S., but upon Indian people. The execution of the first six stages of JAI will “portend[] changes in power and well-being”<sup>477</sup> for some non-Indians, and may well compromise the universalist approach to conceiving of, promoting, and protecting rights.<sup>478</sup> JAI will therefore invite

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<sup>474</sup> See Stephanie Dean, *Getting a Piece of the Action: Should the Federal Government Be Able to Tax Native American Gambling Revenue?*, 32 COLUM. J. L. & SOC. PROBS 157, 157 (1999) (describing subjection of Indian gaming to veto through state compacting processes); see also *supra* Part II.C.1.b (describing restriction of Indian religion by operation of state laws).

<sup>475</sup> See Clinton, *supra* note 450, at 942 (“We must . . . become full partners with the tribal nations.”).

<sup>476</sup> Goyothlay (a/k/a Geronimo), Chiricahua Apache, *quoted in* HIFLER, *supra* note 35, *excerpted at* [http://thunder-fox.com/DailyFeast/2002\\_12\\_01\\_archive-DailyFeast.html](http://thunder-fox.com/DailyFeast/2002_12_01_archive-DailyFeast.html) (last visited Mar. 8, 2005).

<sup>477</sup> Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 110 (1990). As non-Indians possess the bulk of political power and legal reform is largely a democratic process, the fundamental question is “How much power over Indian people and governments are non-Indian people prepared to cede?”

<sup>478</sup> See Rupa Gupta, *Indigenous Peoples and the International Environmental Community: Accommodating Claims Through a Cooperative Legal Process*, 74 N.Y.U. L. REV. 1741, 1766 (1999) (noting that even liberal states have been unable to resolve tension between majoritarianism and group rights of discrete and insular minorities); see also W. Michael Reisman, *Autonomy, Independence and Responsibility*, 103 YALE L.J. 401, 412–15 (1993) (noting that addition of indigenous rights to the equation complicates the intellectual and

contestation over its form, pace, and scope.<sup>479</sup> However, if the U.S. acknowledges, recognizes responsibility for, and repairs the gross injustices suffered by Indians over the course of its creation and expansion, JAI obligates Indians to find it in their hearts and minds to forgive. If the U.S. restores a meaningful measure of land to Indian tribes and amends its legal and political order to ensure respect for and protection of fundamental Indian rights to self-determination, a new regime of peace and justice worthy of emulation and export must be rewarded with the most precious gift Indians can bestow: forgiveness. By forgiving the U.S. and all its people in a solemn ceremony<sup>480</sup> broadcast globally to symbolize the dawn of the new relationship, Indians will finally be allowed to heal, and all Americans will be released from the chains of history and freed to forge a better tomorrow. The U.S. and Indian tribes are not only intertwined geographically and historically, they are interdependent. Indian autonomy and prosperity on the one hand, and U.S. legitimacy and global leadership on the other, are inseparable, with each a necessary condition for the full realization of the other.<sup>481</sup> Just as the political and economic development of its “domestic dependent nations” is tied to U.S. leadership of the global political economy, so also is the moral legitimacy of the U.S. linked to its respect and promotion of the rights of Indians to self-determine. If U.S.-Indian relationships advance on the basis of a recognition of, and respect for, mutual sovereignties, with disputes

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governance task of determining when, how, and to what extent minority groups claiming rights to self-determine may “discharge themselves from the reach of general community norms” without compromising the liberal project of promoting universal human rights).

<sup>479</sup> Critics of JAI may excoriate the call for legal reform as a “result-oriented modification of legal doctrine” that would “deconstruct[] neutral principles” to exempt minorities “from the ordinary application of the laws.” Jeffrey J. Pyle, *Race, Equality and the Rule of Law: Critical Race Theory’s Attack on the Promises of Liberalism*, 40 B.C. L. REV. 787, 803–04 (1999). Talismanic fixation on a facially neutral legal order stymies reform on behalf of indigenous groups worldwide. See, e.g., *New President Submits Bill in Indian Rights*, BOSTON. GLOBE, Dec. 6, 2000, at A8 (outlining etiology of legislative stalemate in Mexico over Indian rights bill). Moreover, such critics would ignore the fact that Indians have long been regarded as *sui generis* under federal law. See, e.g., *Worcester*, 31 U.S. 515, 542–43 (1832).

<sup>480</sup> See Marg Huber, *Mediation Around the Medicine Wheel*, 10 MEDIATION Q. 355, 358 (1993) (offering traditional Indian medicine wheel ceremony as a model for contemporary intergroup peacemaking).

<sup>481</sup> The concept of interdependence between nations is well-developed in international relations theory. See ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE* 8 (1989) (defining “interdependence” as a condition where the reciprocal effects of transactions across political boundaries constrain choices). Similarly, it is a cardinal tenet of liberal political theory that institutionalization of democratic principles enhances social stability and economic development. See, e.g., UNESCO, Report of the International Panel on Democracy and Development, Boutros Boutros-Ghali, Chair, Dec. 16, 2002 at 34 (linking economic development with democracy) available at <http://www.unesdoc.unesco.org/images/0013/001323/132343e.pdf> (last visited Jan. 29, 2005).

resolved not by coercion and domination, but by negotiation and harmonization, a new era of just peace, worthy of emulation and export, will follow.

## V. CONCLUSION

An unwillingness to grant redress to victims of gross human injustice is perhaps the greatest source of national delegitimization.<sup>482</sup> Failure to do justice festers in the national conscience as “toxic guilt” that degrades the attractive force of citizenship.<sup>483</sup> By initiating intergroup dialogue and denaturing pernicious group attachments in favor of mutual identification with past tragedies as well as a collective stake in the future, the process of redress can encourage a politics of reidentification in which relegitimized national citizenship and universal concepts of justice become chief repositories of individual loyalties and a nation is born again.<sup>484</sup>

Despite its imperfections, the U.S. is an exceptional nation, and the greatest exponent of liberty the world has ever known. Still, its moral legitimacy has of late been called into question by those critical of its recent intervention in Iraq who accuse the U.S. of attempting to establish global hegemony<sup>485</sup> and undermine human rights.<sup>486</sup> Even if one rejects both charges as entirely without merit—and there is good reason to do so—in its current geopolitical posture, the U.S. has drawn upon itself increased scrutiny of its own record regarding the promotion and protection of rights. Accordingly, failure to afford the full measure of justice due its indigenous peoples casts a shadow over U.S. foreign relations

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<sup>482</sup> See FOREST MARTIN ET AL., *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE* 1076 (1997) (noting that failure to grant redress is itself a cause of political instability and further violations of human rights); see also CHRISTIE, *supra* note 314, at 93 (suggesting that national legitimacy is reflective of the degree of peacefulness of the process whereby disputes between social groups are resolved).

<sup>483</sup> Tsosie, *supra* note 67, at 1664–66.

<sup>484</sup> Robert Meister, *Forgiving and Forgetting: Lincoln and the Politics of National Recovery*, in *HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA* 137 (Carla Hesse & Robert Post eds., 1999).

<sup>485</sup> See, e.g., Jay Bookman, *Bush's Real Goal in Iraq*, *ATLANTA J.-CONST.*, Sept. 29, 2002, at F1 (noting that critics contend U.S. policy in Iraq is “intended to mark the official emergence of the United States as a full-fledged global empire, seizing sole responsibility and authority as planetary policeman.”).

<sup>486</sup> See, e.g., Albert R. Hunt, *U.S. Can't Go It Alone*, *WALL ST. J.*, Apr. 25, 2002, at A19. One commentator goes so far as to characterize the U.S. conduct of the War on Terror as little more than a modernization of nineteenth century federal Indian policies of conquest, genocide, and arbitrary deprivation of liberty. See Anthony J. Hall, *From British Columbia to Kurdistan, Iraq, and the West Bank: Aboriginal Title as an Emerging Concept in International Law and Global Geopolitics* (unpublished paper presented at Green College, University of British Columbia, Feb. 25, 2004) (on file with author).

and makes it easier for its critics to ask the question, “Why do we invade Iraq to kick it out of Kuwait but not do justice at home?”<sup>487</sup> Now, only three short years after September 11th, the moral coherence of the nation in the watchful world it so frequently seeks to mold is at stake, and if Indians continue to slip through the interstices of law, policy, and convenience, communication of this fact cannot help but undermine the moral foundations of American authority and power.

However, just as the Japanese Civil Rights Act of 1988 signaled to rivals and detractors that the U.S. occupied the high moral ground in the long twilight struggle against Communism,<sup>488</sup> a serious commitment to justice on behalf of Indians might remind contemporary critics of the inherent goodness of the U.S. and legitimate its international leadership. As the renowned scholar of federal Indian law, Felix Cohen, noted more than a half-century ago, “[t]here is no nation on the face of the earth which has set for itself so high a standard of dealing with a native aboriginal people as the United States and no nation on earth that has been more self-critical in seeking to rectify its deviations from those high standards.”<sup>489</sup> It is thus quite opportune that, at a historical moment when these standards have been called into question, the long-simmering issue of justice for Indians presents a chance to publicly reaffirm our national moral character.

Still, although reparations talk is all the rage, this discourse does not translate well into the language in which Indian claims are phrased. Although compensation may well be the proper form redress should assume in relation to the crime of African American slavery, reparations is ill-suited as a remedy around which to construct a theory of justice for Indians, not because of the social resistance it would be likely to engender, but because money simply cannot reach, let alone repair, land theft, genocide, ethnocide, and, above all, the denial of the fundamental right to self-determination. Only a committed and holistic program of legal reformation as the capstone in a broader structure of remedies, including the restoration of Indian lands and the reconciliation between Indian and non-Indian peoples, can satisfy the preconditions for justice for the original peoples of the U.S.

Existing theories of justice for Indians either whitewash the historical conquest and forced cession of Indian lands in order to preserve the contemporary entitlements of non-Indians (JAS), mistakenly commodify former Indian lands, despite the inconsistency of this position with Indian cosmology, and treat them as already converted to cash paid through remedial trust-based programs (JAC); or offer land restoration proposals that would inflict grievous injustice upon blameless (if historically ignorant) non-Indians and catalyze reactionary anti-Indian politics across a much broader legislative spectrum (JAR). Worse, because

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<sup>487</sup> Similar issues are addressed in CHURCHILL, *supra* note 340, at 375.

<sup>488</sup> Yamamoto et. al, *supra* note 28, at 1276–77.

<sup>489</sup> Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 43 (1947).

these theories have no strategy to dislodge the impedimenta of federal Indian law and tame the plenary power of Congress, JAS, JAC (essentially an applied model of reparations), and JAR offer no proposals to assist tribes in reclaiming their inherent rights of sovereignty and self-governance and no visions for the restoration of harmony and peace between peoples.

Justice as Indigenism, by boldly declaring that the justice claims of the original inhabitants of the U.S. deserve priority in the remedial cue, that past injustices against Indians are as deserving of redress as if they were committed today, that Indians are presumptively entitled to the restoration of their lands and to the most extensive freedom from interference with their rights to self-determine compatible with the corresponding rights of non-Indians and the territorial integrity of the U.S., and that the canon of U.S. law governing relations with Indians must be fundamentally transformed if justice is to be done, lays out a far more ambitious project than any existing theory. Whether JAI will find favor beyond the boundaries of Indian Country is partly a function of the degree to which non-Indians prove willing to revisit and reconsider the history of U.S.-Indian relations, as well as the degree to which they will muster the courage to call into question the policies by which the U.S. acquired territory, distributed land titles, asserted dominion over Indians, and rationalized this entire process through the instrumentality of law. There will be those who categorically reject the Indian claim for justice, just as there will be those who adhere to existing theories as more “fair” or more pragmatic. Still, if propounding a theory of Justice as Indigenism accomplishes nothing more than promoting a more searching inquiry on the requirements of justice for Indians, it will have spelled progress, and until that day when they are free once again to self-determine on their aboriginal landmass, Indians will continue to vow to endeavor to persevere.<sup>490</sup>

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<sup>490</sup> The character Lone Watie, played by the Indian actor Chief Dan George in the 1976 film *The Outlaw Josey Wales*, relates to Josey Wales (Clint Eastwood) his visit circa 1850 to Washington, D.C., where Lone Watie met with the Secretary of the Interior. *THE OUTLAW JOSEY WALES* (The Malpas Company 1976). Upon telling the Secretary that his tribe’s land had been stolen by the U.S., Lone Watie is advised by the Secretary to “vow to endeavor to persevere.” After a pause, Lone Watie tells Josey Wales that “[a]nd when we had thought about it long enough, we declared war on the Union.” *Id.*