

BRINGING BALANCE TO MID-NORTH AMERICA: RE-STRUCTURING THE SOVEREIGN RELATIONSHIPS BETWEEN TRIBAL NATIONS AND THE UNITED STATES

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The relationships between Tribal Nations and the United States have evolved over time and often in a lopsided manner, with the branches of the U.S. government unilaterally dictating the relationship.¹ International norms require bilateral agreements between governments for full recognition of human rights and to promote peaceful relations. In the foundational Marshall Trilogy² cases, Chief Justice John Marshall emphasized the international characteristics of the interactions between Tribal Nations and the newly-formed United States nation-state.³ The idea of a smaller nation aligning with a larger nation as an international ally is a model worth exploring in analyzing contemporary Tribal Nations' alignments with the United States.⁴ Once the United States gained

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1. See KEVIN BRUYNEEL, *THE THIRD SPACE OF SOVEREIGNTY: THE POSTCOLONIAL POLITICS OF U.S.-INDIGENOUS RELATIONS* 10 (2007) (describing American colonial ambivalence as resulting from the various branches of the U.S. government inconsistently exercising colonial rule over indigenous peoples).
2. The Marshall Trilogy consists of the following three cases: *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).
3. See *Worcester*, 31 U.S. at 542–54; *Cherokee Nation*, 30 U.S. at 15–17; *Johnson*, 21 U.S. at 573–78.
4. See *Worcester*, 31 U.S. at 560–61.

The very fact of repeated treaties with [Tribes] recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the

military strength over Tribal Nations, the United States proceeded, by and large, to take unilateral action against Tribes in mid-North America. This article asserts that bilateralism is required for a peaceful, non-oppressive balance between Tribal Nations and the United States as sovereign governments.⁵

This article will explore the potential for United Nations (UN) oversight and assistance in righting the balance in relationships between Tribal Nations and the United States⁶ and propose alternatives to the current uneasy connection between Tribal Nations and the United States.⁷ By reviewing possible frameworks to re-envision the treaty and legal-agreement partnerships entered into by these two types of governments, the article will propose features for reframing the contemporary relationships.⁸ Regulation of trade and commerce has been at the heart of the historical relationships between the United States and Tribal Nations.⁹ This foundational element was skewed in the late 1800s and throughout the early to mid-1900s by U.S. federal policies aimed at socially reconstructing tribal culture and reforming tribal governments into U.S.-approved entities.¹⁰ Now, in the early 2000s, a return to an international framework may assist in healing the governmental, economic, and social injuries inflicted upon Tribal Nations by U.S. federal policies.¹¹

I. U.S. ASSUMPTION OF THE ROLE OF TRUSTEE OVER TRIBAL NATIONS

The relationship between Tribal Nations and the United States is founded on certain key legal developments and the contours of an ever-shifting policy of the United States towards tribal peoples in mid-North America. Prior to the formation of the United States, tribal peoples established, controlled, and regulated large commercial

right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe.

Id.

5. See ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800*, at 135 (1997).
6. See *infra* Part II.A–B.
7. See *infra* Part II.A–B, D.
8. See *infra* Part II.
9. See Angelique A. EagleWoman, *Tribal Nation Economics: Rebuilding Commercial Prosperity in Spite of U.S. Trade Restraints—Recommendations for Economic Revitalization in Indian Country*, 44 *TULSA L. REV.* 383, 390–91 (2008).
10. See *id.* at 390–93.
11. See *infra* Part II.A–B.

networks in the Western Hemisphere.¹² As European nations exported their centuries-old political rivalries to this hemisphere, they sought the allegiance of Tribal Nations to continue those rivalries stemming from the old conflicts of Europe.¹³ Tribal officials openly welcomed European officials into the commercial networks, political and social relations, and—at the heart of those relations—the kinship network amongst the tribal regions.¹⁴ At the same time, Europeans often interacted violently toward those Tribal Nations regarded as barriers to imperialistic aims.¹⁵

The United States, as the successor to the British presence in mid-North America, followed in England's footsteps by entering into international treaty agreements with Tribal Nations.¹⁶ The primary legal foundation for the relationship has been the normative force of treaty agreements entered into between Tribal officials and U.S. officials throughout the late 1700s and 1800s.¹⁷ Not all Tribal Nations entered into formalized treaties with U.S. officials.¹⁸ Many of those who did not enter treaty agreements established relationships through agreements sanctioned by the U.S. Congress or through the federal agency process of federal recognition administered by the U.S. Department of the Interior.¹⁹ The treaty negotiation process is

12. See EagleWoman, *supra* note 9, at 384–90.

13. See, e.g., CYNTHIA J. VAN ZANDT, BROTHERS AMONG NATIONS: THE PURSUIT OF INTERCULTURAL ALLIANCES IN EARLY AMERICA, 1580–1660, at 167–68 (2008) (detailing one of the Eastern regions of mid-North America as “one of the most fiercely contested by European powers” along the Delaware River valley).

14. See EagleWoman, *supra* note 9, at 388.

15. See, e.g., NED BLACKHAWK, VIOLENCE OVER THE LAND: INDIANS AND EMPIRES IN THE EARLY AMERICAN WEST 6–7 (2006) (noting that colonization was accomplished through violence).

16. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 17–27 (Nell Jessup Newton et. al. eds., 2005 ed.) [hereinafter COHEN'S].

17. See William Bradford, “Another Such Victory and We Are Undone”: A Call to an American Indian Declaration of Independence, 40 TULSA L. REV. 71, 76–77 (2004).

18. See *Pacific Regional Offices, Who We Are*, INDIAN AFF., <http://www.bia.gov/WhoWeAre/RegionalOffices/Pacific/WeAre/index.htm> (last visited May 14, 2012).

19. See *id.*

While the history of the Federal-Indian relationship in California shares some common characteristics with that of Native people elsewhere in the United States, it is different in many aspects. It includes the unprecedented magnitude of non-native migration into California after the discovery of gold in 1848, nine days before the signing of the Treaty of Guadalupe Hidalgo; the Senate's refusal to ratify the 18 treaties negotiated with California tribes during 1851–52; and the lawless nature of California's

foundational in the case law that has developed in U.S. courts because treaty interpretation has been critical to the analysis of many of the major resource and land disputes brought as legal actions involving Tribal Nations and the United States.²⁰

A. *Allotment and Assimilation Creating Refugee Status*

In contravention of the treaties negotiated for peaceful purposes, the United States employed military force over tribal peoples in the 1800s and 1900s to consolidate political and social power.²¹ In doing so, the United States also assumed the mantle of trustee over tribal lands still held in tribal ownership after vast tracts were taken in the implementation of the allotment policy.²² The treaty negotiations, and later the allotment policy, resulted in limiting the territorial and seasonal movement of tribal peoples.²³ For millennia, tribal peoples moved throughout their indigenous territories to harvest resources and engage in the annual hunting, fishing, gathering, and preservation cycles.²⁴ Without food sources, tribal peoples became instantly dependent on the U.S. rations provided as part of the payments for the millions of acres ceded in treaties and agreements.²⁵

As dependency for basic necessities set in, the U.S. government asserted political and social control. During this refugee-status time period, the darkest days of the Tribal Nations-United States policy era occurred. Known as the “assimilation and allotment era,” this period exemplified cultural genocide whereby tribal children were

settlement after the Treaty of Guadalupe Hidalgo, including State sanctioned efforts to “exterminate” the indigenous population.

Id.

20. See *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 661–69 (1979); KRISTEN T. RUPPEL, *UNEARTHING INDIAN LAND: LIVING WITH THE LEGACIES OF ALLOTMENT* 24 (2008).
21. See COHEN'S, *supra* note 16, at 69–71.
22. See Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 7 (1995) (“The modern legacy of allotment, the late twentieth century attack on tribal sovereignty, has its origins in the late nineteenth century federal policy toward the Indian nations. Ushered in formally by the General Allotment Act of 1887, the federal policy of assimilation and allotment of Indian lands in severalty dominated the federal-tribal scene for half a century. The allotment policy was officially repudiated in 1934, but it nonetheless continues to influence and inform the Supreme Court's Indian law jurisprudence today.”).
23. See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200–01 (1999).
24. See, e.g., *id.* at 200–02.
25. See DEAN CHAVERS, *RACISM IN INDIAN COUNTRY* 9 (2009).

separated from their home communities and forced to attend government and religious boarding schools in an effort to “kill the Indian and save the man.”²⁶ U.S. Indian agents ruled as dictators on tribal lands with the authority to withhold food rations from those objecting to abusive treatment.²⁷ As part of this colonizing control, the U.S. Congress unilaterally passed the 1924 Indian Citizenship Act,²⁸ thereby subsuming tribal citizens under the class of naturalized U.S. citizens.²⁹ Native peoples endured this harsh policy until it changed in the mid-1930s.³⁰

Since the 1930s, the majority of tribal governments have adopted the Bureau of Indian Affairs (BIA) boilerplate form of a constitutional structure loosely based on the U.S. structure.³¹ The Indian Reorganization Act of 1934 gave the Secretary of the Interior the authority to approve the reorganization of Tribes adopting the new constitutions.³² A core benefit of this constitutional adaptation has been the re-entry of Tribes into the commercial markets that were foreclosed when tribal peoples subsisted in a refugee status.³³ Through the 2000s, Tribal Nations have focused upon rebuilding cultural knowledge, formalizing instruction in tribal languages, establishing tribal educational facilities in tribal communities, and regaining an economic foothold for an acceptable quality of life for tribal peoples.³⁴

As a side effect of the 1924 Indian Citizenship Act, many federally funded programs intended to reach tribal citizens have been channeled through state funding agencies with few dollars actually

26. *See id.* at 10–11.

27. *See id.* at 13.

28. Act of June 2, 1924, ch. 223, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(a)(2) (1952)).

29. *See* Duane Champagne, *Rethinking Native Relations with Contemporary Nation-States*, in *INDIGENOUS PEOPLES AND THE MODERN STATE* 3, 10 (Duane Champagne et al. eds., 2005).

30. *See* ROBERT J. MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY* 170 (Bruce Johansen ed., 2006); Angelique EagleWoman, *Tribal Nations and Tribal Economics: The Historical and Contemporary Impacts of Intergenerational Material Poverty and Cultural Wealth Within the United States*, 49 *WASHBURN L.J.* 805, 818 (2010).

31. *See* TROY R. JOHNSON, *RED POWER: THE NATIVE AMERICAN CIVIL RIGHTS MOVEMENT* 28–29 (Paul C. Rosier ed., 2007).

32. 25 U.S.C. § 476(d) (2006); *see also* FELIX S. COHEN, *ON THE DRAFTING OF TRIBAL CONSTITUTIONS* 33 (David E. Wilkins ed., 2006).

33. *See* EagleWoman, *supra* note 30, at 818–19.

34. *See id.* at 832–36.

trickling down to Native people.³⁵ One of the efforts of the late 1970s was for Tribes themselves to begin to deliver services to tribal citizens by contracting for Bureau of Indian Affairs managed social service programs.³⁶ Tribal Nations continue to fight for control of the limited dollars available from federal programs to assist tribal citizens suffering from intergenerational poverty and their U.S.-imposed refugee status.³⁷

Few Tribal Nations have been able to reconstruct tribal economies that adequately support the tribal citizenry.³⁸ Because of land loss and the constant need for a defensive stance against state governments, local entities, private actors, and federal action, legal costs and negotiation efforts relentlessly drain tribal coffers.³⁹ A heavy priority for most Tribes is the repurchasing of homelands within treaty and federal agreement boundaries to consolidate

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35. See Pamela Friedman, *Tribal Welfare and TANF Reauthorization*, TANF REAUTHORIZATION RESOURCE, August 2002, available at http://76.12.61.196/publications/tribalwelfare_TANFreauthorization.htm (discussing TANF and other federal funding administered through states programs); *Severe Repetitive Loss Program*, FLA. DIVISION EMERGENCY MGMT., <http://www.floridadisaster.org/Mitigation/SRLP/index.htm> (last updated Apr. 11, 2011) (providing pass-through funds to eligible Tribes for FEMA approved and awarded projects through the Severe Repetitive Loss Program).
36. See Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 450f(a)(1) (2006)); *Division of Tribal Government Services*, INDIAN AFF., <http://www.bia.gov/WhatWeDo/ServiceOverview/TribalGov/index.htm> (last updated May 14, 2012).
37. See generally NAT'L CONG. OF AM. INDIANS, INDIAN COUNTRY BUDGET REQUEST - HONORING THE PROMISES: THE FEDERAL TRUST RESPONSIBILITY IN THE 21ST CENTURY - FY 2012, available at http://ott.ncai.org/fileadmin/Budget_2012/1-20-11_Budget_Doc_color.pdf.

Recent trends in Indian program funding show that federal resources that fulfill the trust responsibility must be protected and exempt from cuts and rescissions. The core funding used by tribal governments to deliver services is provided through the Bureau of Indian Affairs (BIA) and Indian Health Service (IHS). . . . [O]f the six largest agencies at the Department of Interior, funding for the BIA increased the least from FY2004 to FY2011. The increase is so small that it actually represents a funding decrease after accounting for inflation.

Id. at 16.

38. See EagleWoman, *supra* note 30, at 819-20.
39. Indian trust litigation has proven lengthy and very costly. See generally Armen H. Merjian, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and Cobell v. Salazar*, 46 GONZ. L. REV. 609 (2010/11) (providing in-depth background and analysis of one of the largest class action lawsuits filed against the Department of Interior).

business development areas, protect sacred sites, and provide for better service delivery to tribal citizenry.⁴⁰ The tribal homelands are the source of cultural regeneration, ceremony, and essence.⁴¹ Most Tribal Nations face the effects of intergenerational material poverty and the lack of basic infrastructure needs (such as telephone service, adequate housing, working indoor plumbing, wintertime heating in cold climates, adequate healthcare, adequate law enforcement services, and basic informational technology).⁴²

The federal government has a long-established special relationship with Native Americans characterized by their status as governmentally independent entities, dependent on the United States for support and protection. In exchange for land and in compensation for forced removal from their original homelands, the government promised through laws, treaties, and pledges to support and protect Native Americans. However, funding for programs associated with those promises has fallen short, and Native peoples continue to suffer the consequences of a discriminatory history. Federal efforts to raise Native American living conditions to the standards of others have long been in motion, but Native Americans still suffer higher rates of poverty, poor educational achievement, substandard housing, and higher rates of disease and illness. Native Americans continue to rank at or near the bottom of nearly every social, health, and economic indicator.⁴³

Thus, the refugee status continues as Tribal Nations are under the trusteeship of the U.S. government.⁴⁴

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40. See Timberly Ross, *Tribes Buy Back Thousands of Acres of Land*, NATIVE AMER. TIMES, Dec. 29, 2009, available at http://www.nativetimes.com/index.php?option=com_content&view=article&id=2812:tribes-buy-back-thousands-of-acres-of-land&catid=54&Itemid=30.
 41. See Timothy C. Seward, *Survival of Indian Tribes Through Repatriation of Homelands*, 21 NAT. RESOURCES & ENV'T 32, 32 (2007).
 42. See Bethany C. Sullivan, *Changing Winds: Reconfiguring the Legal Framework for Renewable-Energy Development in Indian Country*, 52 ARIZ. L. REV. 823, 826–27 (2010).
 43. U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY, at ix (2003), available at <http://www.usccr.gov/pubs/na0703/na0204.pdf>.
 44. See NAT'L CONG. OF AM. INDIANS, *supra* note 37, at 16; Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19

B. *Contemporary Dependency on Federal Funding and Colonization Under Federal Law*

Tribal Nations are extra-constitutional, meaning there is no role for tribal governments in the U.S. Constitution, and furthermore, the Tribes have never consented to participate in the U.S. constitutional structure.⁴⁵ Without identifying any constitutional foundation, federal courts classify the relationship between Tribes and the U.S. government as political, and affirm that the U.S. Congress has “plenary” authority over Tribes.⁴⁶ In the U.S. Constitution, the U.S. Congress has the ability “[t]o regulate Commerce . . . with the Indian tribes”⁴⁷ and this one phrase has been stretched into “plenary” authority over Tribal Nations.⁴⁸

In political terms, it would be apt to say that tribal governments and tribal citizens are colonized by the United States.⁴⁹ The United States, as a colonial power, maintains strategic political and economic control over resource-rich areas and island communities that facilitate U.S. military domination.⁵⁰ Tribal peoples in mid-North America have failed to disappear and have endured biological warfare (smallpox blankets), social and cultural genocide, poverty and disease, and political subversion into a trustee-guardian status of incompetency.⁵¹ As colonized peoples, Tribal Nations continue to

BYU J. PUB. L. 1, 19–25 (2004) (providing a theoretical and historical overview of the U.S. as trustee of tribal resources).

45. See Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 979 (2010).

46. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565–66 (1903); *United States v. Kagama*, 118 U.S. 375, 380–82 (1886); Laurence M. Hauptman, *Congress, Plenary Power, and the American Indian, 1870 to 1992*, in *EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION* 317, 318 (Oren Lyons & John Mohawk eds., 1992).

47. U.S. CONST. art. I, § 8, cl. 3.

48. See *United States v. Lara*, 541 U.S. 193, 200 (2004).

49. See T.S. Twibell, *Rethinking Johnson v. M'Intosh (1823): The Root of the Continued Forced Displacement of American Indians Despite Cobell v. Norton (2001)*, 23 GEO. IMMIGR. L.J. 129, 163–64 (2008).

50. See *Dependencies and Areas of Special Sovereignty*, U.S. DEPT' STATE (Nov. 29, 2011), <http://www.state.gov/s/inr/rls/10543.htm> (listing fourteen territories over which the United States asserts sovereignty).

51. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 43, at 18.

Because of DOI's [Department of Interior's] persistent mismanagement of IIM [Individual Indian Money] trust accounts, Native Americans have not received money that they rightfully and legally earned—money that could be used for education, health care, housing, and other needed services. Billions of

maintain their own government, culture, territory, and external relations, which are all of the characteristics of nation-states on the international level.⁵²

Through federal law and judicial decisions, the U.S. government has assumed the role of guardian and trustee over tribal peoples, tribal jurisdiction, and tribal resources.⁵³ In a political sense, this is known as colonization.⁵⁴ The federal government, administers tribal lands, rejects or approves tribal governmental decisions, and funds the administration of basic services for tribal citizenry meeting the requirements of “Indian” eligibility under federal regulations.⁵⁵

In terms of providing services to tribal communities, Tribes are still in a dependency position, at the mercy of annual federal funding appropriations.⁵⁶ Because Tribes have been limited in their governmental exercises of power, Tribes do not have the tax base that state governments and the federal government have. Tribal citizenry pay federal income taxes and when off-reservation, state sales taxes.⁵⁷ Tribal taxes are often heavily contested by tribal and non-tribal citizens.⁵⁸ States also share certain areas of concurrent taxing jurisdiction according to the U.S. Supreme Court, thereby undermining tribal tax revenue options.⁵⁹ When federal funding does

dollars owed over time have multiplied the government’s obligation to Native Americans and rendered them more reliant on the receipt of funds from external (non-tribal) sources.

Id.

52. See Patrice H. Kunesh, *Constant Governments: Tribal Resilience and Regeneration in Changing Times*, 19 KAN. J. L. & PUB. POL’Y 8, 41–44 (2009); Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 LNTS 19.
53. See *What We Do*, INDIAN AFF., <http://bia.gov/WhatWeDo/index.htm> (last updated May 16, 2012).
54. See Robert A. Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219, 258–65(1986).
55. See, e.g., 25 C.F.R. § 61.4 (2010), available at <http://www.gpo.gov/fdsys/pkg/CFR-2010-title25-vol1/pdf/CFR-2010-title25-vol1-chapI.pdf> (generally the default requirement for eligibility under the federal regulations is being of at least one quarter Indian blood); *What We Do*, INDIAN AFF., *supra* note 53.
56. See Letter from Nat’l Tribal Orgs. to President Obama (Sept. 9, 2010), available at http://www.ncai.org/fileadmin/appropriations/TBAC/TBAC_FY2012_Budget_Letter_9_9_10.pdf.
57. See *Jourdain v. Comm’r*, 617 F.2d 507, 509 (8th Cir. 1980).
58. See, e.g., *Merrion v. Jicarilla Apache Nation*, 455 U.S. 130 (1982).
59. See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 189, 195 (1989).

trickle down to tribal programs, the programs remain woefully underfunded.⁶⁰

When the trusteeship relationship results in abject intergenerational poverty and oppression, the relationship requires re-examination.⁶¹ The current relationship between Tribal Nations and the United States has reached the point at which an overhaul must occur. At some point, a colonized, impoverished, and culturally-identifiable group will seek to alleviate externally imposed oppression.

The problem of Indian poverty has persisted since the traditional tribal economies were destroyed and the reservations established in the nineteenth century. No solution has yet been found for most of the largest tribes, and Indian poverty and unemployment still dwarf those of the public at large.⁶²

One indirect consequence of the subjugation of Native peoples in mid-North America is the disproportionate number of Native peoples in state and federal prison populations;⁶³ high proportions of native peoples in juvenile detention facilities and programs;⁶⁴ and high crime rates in tribal communities.⁶⁵ Native ancestors did not negotiate treaties and agreements to achieve the substandard quality of life, the criminalization and victimization of Native peoples, and constant struggle for cultural survival endured by the majority of tribal citizens in the 2000s.

60. *Budget & Appropriations*, NAT'L CONGRESS AM. INDIANS, <http://www.ncai.org/policy-issues/community-and-culture/budget-appropriations> (last visited May 14, 2012).

61. See EagleWoman, *supra* note 30, at 825–29.

62. Kevin Gover, *Federal Indian Policy in the Twenty-first Century*, in AMERICAN INDIAN NATIONS: YESTERDAY, TODAY AND TOMORROW 187, 198 (George Horse Capture et al. eds., 2007).

63. See NAT'L CONG. OF AM. INDIANS, INDIAN COUNTRY FY 2011 BUDGET REQUEST 13.

64. See NANCY RODRIGUEZ, A MULTILEVEL ANALYSIS OF JUVENILE COURT PROCESSES: THE IMPORTANCE OF COMMUNITY CHARACTERISTICS 19, 21 app. B, tbl.1, 3 (2008), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/223465.pdf> (explaining that, in the study, American Indian juveniles were detained disproportionately and at a higher rate than their white counterparts).

65. See *Tribal Crime and Justice*, NAT'L INST. OF JUST., <http://www.nij.gov/topics/tribal-justice/welcome.htm> (last modified May 25, 2010) (citing examples of higher crime rates for Native Americans, such as one survey suggesting that Native Americans “experience almost twice as much violence as the U.S. resident population”).

II. RE-STRUCTURING THE TRIBAL NATIONS-U.S. RELATIONSHIPS: INTERNATIONAL PROCESSES AND CONTEMPORARY TREATY-MAKING

This section will examine and discuss potential avenues for re-structuring of the Tribal Nations-U.S. relationships. With 566 federally recognized Tribal Nations and over 20 state-recognized Tribes, there is no standard relationship between Tribal Nations and the United States.⁶⁶ For the purposes of this discussion, the relationships between the various Tribal Nations and the United States will be discussed generally.

The first potential formal process for re-structuring the relationships between the Tribal Nations and the United States is the process available through the United Nations Trusteeship system.⁶⁷ Second, the relationships may be viewed through a process of registering amenable Tribal Nations with the United Nations Decolonization Committee.⁶⁸ Third, the myth of the incorporation of Tribal Nations into the United States through U.S. Supreme Court opinions will be explored.⁶⁹ Finally, a return to the international treaty-making process between twelve geographically determined confederations of Tribal Nations and the United States will be discussed.⁷⁰ This article serves as a discussion piece for these models that rely on tribal leadership to determine the best option for the long-term re-structuring of the Tribal Nations-U.S. relationships.

In discussing the re-structuring of the relationships between Tribal Nations and the United States, the baseline would normally be the current structure of those relationships. But because of the incoherence of the present structure with an overarching trustee relationship imposed by the United States, it is difficult to clearly articulate the relationship. In legal principles, a trust-guardian relationship is characterized by certain legal duties and obligations on the part of the trustee to the guardian or beneficiary.⁷¹ However, in

66. *What We Do*, INDIAN AFF., *supra* note 53.

67. *See infra* Part II.A.

68. *See infra* Part II.B.

69. *See infra* Part II.C.

70. *See infra* Part II.D.

71. *See* RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).

A trust, as the term is used in this Restatement when not qualified by the word “resulting” or “constructive,” is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the

U.S. Supreme Court discourse, there have rarely been grounds for a Tribal Nation to seek enforcement of legal duties and obligations or to recover from a breach of such responsibilities when the United States acts as trustee.⁷² Therefore, the U.S. domestic trustee role is, in its present form, hard to characterize.⁷³ A more apt model may be the formal, internationally recognized trusteeship relationship defined by the United Nations.

A. *The Potential Re-Activation of the UN Trusteeship System for Tribal Nations*

The United Nations Trusteeship Council was created under the UN Charter for those territories that were non-self-governing in 1945.⁷⁴ Chapter XII of the UN Charter established the International Trusteeship System overseen by the Council.⁷⁵ As originally defined, there were eleven territories placed under this trusteeship system after World War II.⁷⁶ The territories had to fall into one of the following categories to be within the system:

- a. territories now held under mandate;
 - b. territories which may be detached from enemy states as a result of the Second World War; and
 - c. territories voluntarily placed under the system by states responsible for their administration.
2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be

benefit of charity or for one or more persons, at least one of whom is not the sole trustee.

Id.

72. *See, e.g.*, *United States v. Navajo Nation*, 556 U.S. 287, 289 (2009) (denying the Navajo Tribe's claim of compensation against the federal government based on a breach of trust by the Secretary of the Interior).

73. *See Supreme Court Agrees to Hear Jicarilla Apache Nation Trust Case*, INDIANZ.COM (Jan. 10, 2011), <http://64.38.12.138/News/2011/000065.asp>.

74. *See Trusteeship Council*, UNITED NATIONS, <http://www.un.org/en/decolonization/its.shtml> (last visited May 15, 2012).

75. *International Trusteeship System*, UNITED NATIONS, <http://www.un.org/en/decolonization/its.shtml> (last visited Jan. 28, 2012).

76. *Id.*

brought under the trusteeship system and upon what terms.⁷⁷

On November 1, 1994, the last trusteeship territory, Palau, gained independence.⁷⁸ On May 25, 1994, the Trusteeship Council by resolution ended its annual meeting obligation, thereby allowing the Council to meet on an as-needed basis.⁷⁹ Thus, the Trusteeship System is inactive at present, but, as an entity created by the UN Charter, remains a component of the UN governance structure.⁸⁰

The UN Trusteeship Council could consider including those Tribal Nations that would seek, by agreement, to be placed within the formal trusteeship system as Trust Territories with the United States as trustee. The Council is comprised of the permanent members of the UN Security Council: China, France, Russian Federation, United Kingdom, and the United States.⁸¹ The United States would also be the party to submit the requesting Tribal Nations to consideration for inclusion within the UN Trusteeship system.⁸² This would further involve the United States for the benefit of the Tribal Nations. On the other hand, the United States also would have the option to refuse to submit Tribal Nations' requests. With the United States as a member of the Council, there should be ample opportunity for the United States to participate in the process and address any apprehensions over the re-structuring. This would also provide international norms and standards, now lacking within federal Indian law, for the Tribal Nations-U.S. relationships.

The benefits of inviting UN Trusteeship Council oversight into the supervision of the Tribal Nations-U.S. relationships are threefold. First, international attention would be focused on the re-structuring of the relationships between Tribal Nations and the United States, which would likely lead to improved conditions for tribal peoples. Second, the Council could apply international human rights norms and indigenous legal principles. Last, there is a recognizable conclusion

77. U.N. Charter art. 77.

78. *Trusteeship Council*, UNITED NATIONS, <http://www.un.org/en/mainbodies/trusteeship/> (last visited May 15, 2012).

79. *Id.*

80. *But see* S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999) (placing Kosovo under a special supervised status); Ralph Wilde, *From Trusteeship to Self-Determination and Back Again: The Role of the Hague Regulations in the Evolution of International Trusteeship, and the Framework of Rights and Duties of Occupying Powers*, 31 LOY. L.A. INT'L & COMP. L. REV. 85, 135 (2009).

81. *Trusteeship Council*, *supra* note 78.

82. *See* U.N. Charter art. 77.

to the trusteeship, whereby the non-self-governing territory may become internationally acknowledged as self-governing.

International norms are the starting place for improving the relationships between Tribal Nations and the United States. Bringing international attention to bear on the re-structuring of these relationships would be a positive for either side of the governmental equation. Chief Justice John Marshall was the architect of the underpinnings of the categorization of Tribal Nations as “domestic dependent nations” under the laws of the United States.⁸³ In the final case of the Marshall Trilogy, *Worcester v. Georgia*, he opined that Tribal Nations had formed international alliances with the United States similar to models in Europe where a smaller sovereign allied with a larger sovereign.⁸⁴ This categorization was, in all actuality, a one-sided imposition by the U.S. Supreme Court on uninformed Tribal Nations across mid-North America.⁸⁵ By re-evaluating the relationships within current international standards of sovereignty, trusteeship, human rights, and indigenous protective principles, a new order may be established leading to a less authoritarian role for the United States over Tribal Nations.

One of the most applicable UN documents providing guidance on such a new order is the UN Declaration on the Rights of Indigenous Peoples (UN DRIP).⁸⁶ In December of 2010, United States President Barack Obama announced the conditional endorsement of the UN DRIP.⁸⁷ The United States was one of four nation-states voting to oppose the UN DRIP in the General Assembly along with Australia, New Zealand, and Canada.⁸⁸ With the U.S. endorsement, all four nations have now reversed their positions and endorse the UN DRIP, creating a worldwide consensus on the minimum human rights to be afforded to indigenous peoples.⁸⁹

83. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 13 (1831).

84. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551–57 (1832).

85. See Casey, *supra* note 22, at 409–10.

86. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

87. *President Obama Announces U.S. Support for United Nations Declaration on the Rights of Indigenous Peoples*, NAT'L CONGRESS AM. INDIANS (Dec. 16, 2010), [http://www.ncai.org/News-View.19.0.html?&no_cache=1&tx_ttnews\[pS\]=1295203454&tx_ttnews\[tt_news\]=767&tx_ttnews\[backPid\]=18&cHash=ba24991824](http://www.ncai.org/News-View.19.0.html?&no_cache=1&tx_ttnews[pS]=1295203454&tx_ttnews[tt_news]=767&tx_ttnews[backPid]=18&cHash=ba24991824).

88. Aliza Gail Organick, *Listening to Indigenous Voices: What the UN Declaration on the Rights of Indigenous Peoples Means for U.S. Tribes*, 16 U.C. DAVIS J. INT'L L. & POL'Y 171, 173 (2009).

89. NAT'L CONGRESS AM. INDIANS, *supra* note 87.

For Tribal Nations, the UN DRIP provides safeguards from unilateral nation-state action.⁹⁰ In the history of the relationships between Tribal Nations and the United States, the common theme has been unilateral actions of the United States to the detriment of Tribal Nations.⁹¹ The UN DRIP has introduced the standard of “free, prior and informed consent” into the actions of nation-states when those actions will impact indigenous peoples.⁹² This would be a significant improvement in the interactions in mid-North America for tribal peoples and governments. Applying these standards could be part of the progressive plan under the UN Trusteeship System for Tribal Nations involved in the process.

Further, under the UN Trusteeship System, those Tribal Nations seeking inclusion within the system would receive the benefit of the stated purpose of the system.⁹³ “Major goals of the System were to promote the advancement of the inhabitants of Trust Territories and their progressive development towards self-government or independence.”⁹⁴ Tribal Nations achieving self-government or independence would presumably be eligible for membership in the United Nations.⁹⁵

To date, such membership has been barred by the U.S. categorization of Tribal Nations as “domestic dependent nations.” The importance of admittance to the membership of the United Nations cannot be overstated.

Membership of States in the UN is a salient feature of contemporary statehood. Given the nearly universal membership of States in the UN, the existence of a State *outside* the organization is somewhat anomalous. The significance of universal membership is manifold. To achieve universality of membership the UN had to develop administrative processes governing the admission of States to membership under Article 4 of the *Charter of the United Nations* (UN *Charter*) and it, in time, ensured that such processes allowed for the admission of any and all States that sought membership. This has limited the capability of the UN to act in areas such as the promotion of democracy

90. See G.A. Res. 61/295, *supra* note 86, at 4.

91. See EagleWoman, *supra* note 30, at 814.

92. G.A. Res. 61/295, *supra* note 86, arts. 4, 5.

93. See *Trusteeship Council*, *supra* note 78.

94. *Id.*

95. See *id.*

and rule of law: membership of States not committed to advances in such areas impedes the more rigorous promotion of such values. However, universal membership has enhanced the capability of the UN to act as a diplomatic forum and to set norms and standards that have global reach, i.e. to socialize States, at least in the sense of establishing such minimum norms and minimum standards as can be agreed upon by the fundamentally diverse members of the organization. As membership in the UN has become a *de facto* legitimization of statehood, the agency of the UN lies not in deciding whether or not a State should be granted admission to the General Assembly; it now is required to admit a State solely by virtue of its being a State. The agency of the UN is in its capacity to regulate the normative content of the State, i.e. to render decisions as to whether or not the entity seeking admission to the UN actually constitutes a State.⁹⁶

With graduation from the UN Trusteeship process, Tribal Nations would likely have the opportunity to once more join the global commercial and political arena as full actors. Considerable efforts would need to be marshaled to reinvigorate the UN Trusteeship process and receive approval from the UN Security Council to proceed through this mechanism.⁹⁷ This may be the most difficult route in terms of utilizing global political capital to re-structure the relationships between Tribal Nations and the United States government (in part because the United States has veto power in the UN Security Council), but in the end, it would prove to be immeasurably worthwhile.

B. Tribal Nations Formally Registering with the UN Decolonization Committee

A second re-structuring process for the relationships between Tribal Nations and the United States would be for Tribal Nations to formally register with the UN Decolonization Committee.⁹⁸ In December 2010, the General Assembly celebrated the fiftieth anniversary of the passage of the Declaration on the Granting of

96. Thomas D. Grant, *Regulating the Creation of States from Decolonization to Secession*, 5 J. INT'L L. & INT'L REL. 11, 13 (2009).

97. See U.N. Charter ch. XII; *The United Nations and Decolonization*, UNITED NATIONS, <http://www.un.org/en/decolonization/index.shtml> (last visited May 15, 2012).

98. See UNITED NATIONS, *supra* note 96.

Independence to Colonial Countries and.⁹⁹ This Declaration has been recognized as one of the leading factors in the admittance of many of the nation-states forming the United Nations General Assembly.¹⁰⁰

The Declaration affirmed the right of all people to self-determination and proclaimed that colonialism should be brought to a speedy and unconditional end. It states that the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, contravenes the UN Charter and impedes the promotion of world peace and cooperation.¹⁰¹

In the commemoration of the anniversary it was observed “that since 1945, more than 80 former colonies had become independent, joining the UN as sovereign States.”¹⁰² To implement the decolonization process, a special committee was formed in 1961 and tasked with monitoring the process of decolonization for those territories eligible for inclusion on the committee’s list.¹⁰³

At present, the list of non-self-governing territories has sixteen territories listed, with the United States as the colonizer of three of those listed: United States Virgin Islands, American Samoa, and Guam.¹⁰⁴ If the Tribal Nations in mid-North America were added to the list, it would expand considerably with the 566 federally-recognized Tribal Nations (and potentially the state-recognized Tribes, numbering in the twenties).¹⁰⁵ In November of 1988, the UN General Assembly, by resolution, declared the first International Decade of the Eradication of Colonialism,, in December 2000, the

99. *Ban Marks 50th Anniversary of UN Declaration that Helped Propel Decolonization*, UN NEWS CENTRE (Dec. 14, 2010), <http://www.un.org/apps/news/story.asp?NewsID=37067&Cr=decolonization&Cr1=>.

100. *See id.*

101. *Id.*

102. *Id.*

103. *See The United Nations and Decolonization: Committee of 24*, UNITED NATIONS, <http://www.un.org/en/decolonization/specialcommittee.shtml> (last visited May 15, 2012).

104. *The United Nations and Decolonization: Non-Self Governing Territories*, UNITED NATIONS, <http://www.un.org/en/decolonization/nonselfgovterritories.shtml> (last visited May 15, 2012).

105. *See What We Do*, INDIAN AFF., *supra* note 53; *Federal and State Recognized Tribes*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/tribal/list-of-federal-and-state-recognized-tribes.aspx> (last updated Feb. 2012).

General Assembly proclaimed the second such decade, and on January 20, 2011, the third decade was proclaimed.¹⁰⁶

The benefits for Tribal Nations to be listed on the Decolonization list are similar to those to be reaped from inclusion within the UN Trusteeship System. Tribal Nations included in the UN decolonization process would be assisted in strengthening internal and external sovereignty to gain independence from the United States as a colonizing power.¹⁰⁷ Under the Principles approved by the UN General Assembly for non-self-governing territories, each territory can choose its path to self-governance. "Principle VI. A Non-Self-Governing Territory can be said to have reached a full measure of self-government by: (a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State."¹⁰⁸ By asserting a full measure of self-government, Tribal Nations would be able to remove the U.S.-domestically-imposed trustee system over tribal resources and peoples. With independence, Tribal Nations would also presumably be eligible for inclusion into the international arena as separate nation-states as part of the UN General Assembly.

It is likely that the United States would not agree to include the 566 plus Tribal Nations located within U.S.-claimed boundaries on the Decolonization Committee list. One of the arguments that could be anticipated is that because there are so many separate Tribal Nations, the process would severely undermine the ability of the United States to remain a consolidated nation-state.¹⁰⁹ Thus, this option may garner strong opposition from the United States. The counter-argument is that the relationships with Tribal Nations will continue to exist and require renegotiation with the United States regardless of whether Tribal Nations are considered non-self-governing territories.¹¹⁰ As long as the uneasy alliances of contemporary times are in place, there will be a push from tribal

106. Third International Decade for the Eradication of Colonialism, G.A. Res. 65/119, U.N. Doc. A/RES/65/119 (Jan. 20, 2011).

107. Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter, G.A. Res. 1541 (XV), U.N. Doc. A/4684 (Dec. 15, 1960), available at <http://daccess-ods.un.org/TMP/7021780.01403809.html>.

108. *Id.*

109. See Peter P. d'Errico, *Introduction: Native Americans in American Politics*, in *ENCYCLOPEDIA OF MINORITIES IN AMERICAN POLITICS* 569, 578 (Jeffrey D. Schultz ed., 2000). See generally *American Indians and Alaska Natives*, *supra* note 105; NAT'L CONF. ST. LEGISLATURES, *supra* note 105.

110. See *infra* Part II.D.

peoples in mid-North America for self-determination, and this too could undermine the ability of the United States to remain a consolidated nation-state. In the end, it is in the best interests of the United States and the Tribal Nations to address the deteriorating state of inter-governmental interactions sooner rather than later.

C. *The Myth of Incorporation Through U.S. Jurisprudence*

Through judicial decisions, U.S. federal Indian law has developed to place considerable emphasis on the idea that Tribal Nations have somehow become incorporated into the U.S. structure.¹¹¹ Beginning in 1831, when the Marshall Court coined the phrase “domestic dependent nation” in *Cherokee Nation v. Georgia*, the U.S. judiciary has propagated the myth that Tribal Nations are somehow informally incorporated within the United States.¹¹² Tribal Nations have been subjected to the domestic legislation and policies of the United States without being formally included in the policymaking process. This imposition of domestic law has transformed the bilateral treaty relationships between Tribal Nations and the United States into the unilateral, oppressive system in which the United States dictates to Tribal Nations. In the late 1800s, the U.S. Supreme Court condoned federal legislative efforts that unilaterally abrogated treaties with Tribal Nations and asserted federal control over tribal peoples.¹¹³ By the late 1900s, the U.S. Supreme Court took the lead in developing judicially constructed limitations on tribal-government authority within tribal territories.¹¹⁴

Beginning with the 1978 *Oliphant v. Suquamish Indian Tribe* decision,¹¹⁵ the U.S. Supreme Court has embarked on a campaign to limit tribal governmental action by applying its “incorporation” myth along with the corollary “implicit divestiture doctrine.”¹¹⁶ This doctrine is based on the Court’s professed unilateral interpretation of the scope of tribal governmental authority when exercised within a

111. See *infra* notes 112–133 and accompanying text (tracing the United States Supreme Court jurisprudence on the sovereignty and jurisdiction of Tribal Nations in relation to the Federal government).

112. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 13 (1831).

113. See, e.g., *United States v. Kagama*, 118 U.S. 375, 379–86 (1886).

114. See, e.g., *Williams v. Lee*, 358 U.S. 217, 220–23 (1959) (explaining that while Congress has stipulated that a state may assume jurisdiction of Indian Reservations located within its jurisdiction, until a state does so by an affirmative act, the tribal courts of an Indian nation are vested with authority over Reservation affairs).

115. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

116. See *id.* at 209; Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 397 (2007–2008).

“dependent” status.¹¹⁷ In *Oliphant*, the U.S. Supreme Court held that Tribal Nations in general, and the Suquamish Tribe in particular, lacked authority to criminally prosecute non-Indians in tribal courts due to Congress’s “unspoken assumption” that “Indian tribal courts were without jurisdiction to try non-Indians.”¹¹⁸ The Court’s interpretation has led to characterizing Tribal Nations as embodying only a form of “quasi-sovereignty” due to “incorporation into the territory of the United States.”¹¹⁹

The Supreme Court’s incorporation myth and implicit divestiture doctrine have been employed after *Oliphant* to openly question contemporary exercises of inherent tribal governmental sovereignty.¹²⁰ Only once has the U.S. Congress, under pressure from Tribal leadership, stepped in to modify the U.S. Supreme Court’s trammeling of tribal governmental authority and only to acknowledge the continued existence of tribal criminal authority over all Indians within the tribal territory.¹²¹ The U.S. Supreme Court’s response to this modification of its holding in *Duro v. Reina*,¹²² which rejected tribal criminal authority over members of other Tribes, was a divided and philosophical quagmire about the underpinnings of U.S.

117. See Fletcher, *supra* note 45, at 986–88; John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the Cohen’s Handbook Cutting Room Floor*, 38 CONN. L. REV. 731, 735–36 (2006).

Judicial divestiture of tribal sovereignty through an announcement of “unspoken” Congressional intent or assumed tribal consent creates a host of institutional problems for the Supreme Court. The strongest criticism of such decision-making is that the Court is undertaking a naked power grab — or, as Frank Pommersheim aptly puts it, asserting “judicial plenary power” in Indian affairs.

Fletcher, *supra* note 45, at 988.

118. *Oliphant*, 435 U.S. at 201–03.

119. *Id.* at 208–09.

120. See *Nevada v. Hicks*, 533 U.S. 353, 358–59 (2001) (finding that the implicit divestiture doctrine operated to divest the Fallon Paiute-Shoshone Tribal Courts of jurisdiction over an action against state wardens allegedly destroying a tribal member’s property on tribal trust land); *Montana v. United States*, 450 U.S. 544, 564–67 (1981) (applying the implicit divestiture doctrine to tribal regulation of non-Indian hunters on fee lands within the Crow Reservation to divest the Crow Tribe of such authority).

121. See Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856 (1990) (codified as amended at 25 U.S.C. § 1301(2) (2006)) (adding “means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;”); Bethany R. Berger, *United States v. Lara As a Story of Native Agency*, 40 Tulsa L. Rev. 5, 11–17 (2004).

122. *Duro v. Reina*, 495 U.S. 676 (1990).

Supreme Court authority in the area of Indian affairs.¹²³ In *United States v. Lara*,¹²⁴ a lawsuit challenging the validity of Congress's attempt to overrule *Duro*, the majority opinion of five justices, which Justice Stevens joined, recognized that the defendant "point[ed] to no explicit language in the Constitution suggesting a limitation on Congress' institutional authority to relax restrictions on tribal sovereignty previously imposed by the political branches."¹²⁵

The majority opinion drew sharp criticism from the dissenting justices, who were unwilling to circumscribe judicial decision-making power in Indian affairs.¹²⁶ Justice Souter, joined by Justice Scalia, argued that Tribal Nations may not regain inherent authority through federal legislation once divested by the U.S. Supreme Court through application of the implicit divestiture doctrine:

I would therefore stand by our explanations in *Oliphant* and *Duro* and hold that Congress cannot reinvest tribal courts with inherent criminal jurisdiction over nonmember Indians. It is not that I fail to appreciate Congress's express wish that the jurisdiction conveyed by statute be treated as inherent, but Congress's cannot control the interpretation of the statute in a way that is at odds with the constitutional consequences of the tribes' continuing dependent status.¹²⁷

The dissent failed to demonstrate what part of the U.S. Constitution holds Tribal Nations in a dependent status or what consequences flow at all from the Constitution to Tribes.¹²⁸ In the end, the *Lara* majority opinion is just another unsurprising U.S. judicial decision that is anchored in the idea that the U.S. Congress has plenary authority to adjust tribal governmental status.¹²⁹ This one decision, where the Court upheld Congress' response to Tribal Nations' efforts to effectively govern some of the criminal activity

123. See Alex Tallchief Skibine, *Duro v. Reina and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767, 767, 770–71 (1993).

124. *United States v. Lara*, 541 U.S. 193 (2004).

125. *Id.* at 204.

126. *Id.* at 226–32 (Souter, J., dissenting).

127. *Id.* at 231.

128. *Id.* at 226–32.

129. See, e.g., *id.* at 200 (majority opinion).

occurring in tribal homelands, has been the exception to the U.S. Supreme Court's colonial jurisprudence in recent decades.¹³⁰

In a recent 2008 decision authored by Chief Justice John Roberts, the U.S. Supreme Court has delineated the scope of tribal governmental authority in the narrowest manner since the formation of the United States:

As part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers, see *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 201 (1985), to determine tribal membership, see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978), and to regulate domestic relations among members, see *Fisher v. District Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 387–389 (1976) *per curiam*. They may also exclude outsiders from entering tribal land. See *Duro v. Reina*, 495 U.S. 676, 696–697 (1990). But tribes do not, as a general matter, possess authority over non-Indians who come within their borders: “The inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Montana*, 450 U.S. at 565. As we explained in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), the tribes have, by virtue of their incorporation into the American republic, lost “the right of governing . . . person(s) within their limits except

130. See *id.* at 212 (Kennedy, J., concurring); *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 327–28 (2008) (parallel citations omitted); Berger, *supra* note 121, at 22–23. For further information on the high rates of violence in Indian Country due to unpredictable federal, state, and tribal criminal jurisdiction, see Laura E. Pisarello, *Lawless by Design: Jurisdiction, Gender and Justice in Indian Country*, 59 EMORY L.J. 1515, 1515–17 (2010).

Jurisdictional laws prevent tribal governments from promoting public safety in Indian Country and create insurmountable barriers to law enforcement and other services, thereby exacerbating crime against American Indians. Many victims do not know whether to call 911, the sheriff's department, or local tribal law enforcement to report a crime. Confusion over jurisdiction may lead police and courts to ignore crimes even when they actually have exclusive jurisdiction. This combination of problems robs all American Indians of effective protection against violence, but it is especially problematic for American Indian women, who suffer sexual violence at alarming rates.

Id. at 1525 (footnotes omitted).

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themselves.” *Id.* at 209 (emphasis; internal quotation marks omitted).¹³¹

It is worth noting that, for each proposition listed, there are no federal laws cited, only U.S. Supreme Court opinions that build upon each other to eviscerate tribal governmental authority.¹³²

These interpretations, created from U.S. Supreme Court decisions, leave Tribes in the unattractive position of being at the mercy of U.S. judicial decisions handed down to carve out further portions of inherent tribal sovereignty. No people or government in the world would choose to live under such arbitrary conditions, at the whim of an external body and system with such power.¹³³

1. Historical Promises of Alliances and Representation Within the U.S. Union

The U.S. federal system is built upon a confederacy model. This model was borrowed from the Iroquois League of Nations and admired by founders of the United States, including Benjamin Franklin, Thomas Jefferson, and George Washington.¹³⁴ By adopting a confederacy model of separate states with a central federal government, the former British colonies rejected the political system of monarchy followed by their ancestors for past millennia.¹³⁵ Rejecting the monarchy of previous eras did not, however, lead to

131. *Plains Commerce Bank*, 554 U.S. at 327–28 (parallel citations omitted).

132. *Id.*

133. For recent reports stating that no Native American has ever been appointed to a federal appellate court or the U.S. Supreme Court, see Susan Montoya Bryan, *American Indians Ask for Voice on Federal Court*, SEATTLE TIMES (July 2, 2010), http://seattletimes.nwsourc.com/html/nationworld/2012260512_apusindianjustice.html; Heather Dawn Thompson, *A Native on Supreme Court*, INDIANZ.COM (May 15, 2009), <http://64.38.12.138/News/2009/014569.asp>.

134. See H.R. Con. Res. 331, 100th Cong. (1988) (sponsored by Rep. Morris K. Udall) (acknowledging the contribution of the Iroquois Confederacy of Nations to the development of the United States Constitution and reaffirming the continuing government-to-government relationship between Indian tribes and the United States established in the Constitution); S. Con. Res. 76, 100th Cong. (1988) (sponsored by Sen. Daniel K. Inouye); Cynthia Feathers & Susan Feathers, *The Iroquois Influence on American Democracy*, GOV'T L. & POL'Y J., Spring 2006, at 5, 5; Maria Morocco, *Rediscovering the Roots of American Democracy*, HUMAN RTS., Fall/Winter 1990, at 38, 39.

135. U.S. CONST.; THE DECLARATION OF INDEPENDENCE paras. 2–5 (U.S. 1776); Morocco, *supra* note 134, at 38.

acceptance of Native people into the newly formed United States of America.¹³⁶

In the early history of interactions between the U.S. government and the Tribal Nations, European racism prevailed.¹³⁷ Racist attitudes toward the Tribes created barriers to any meaningful inclusion of tribal governments or representatives into the newly formed U.S. federal or state system.¹³⁸ The very foundation of federal Indian law in the *Johnson v. M'Intosh* decision portrayed tribal peoples as unworthy of maintaining property ownership over their lands due to their being "fierce savages."¹³⁹ This characterization was utilized to pronounce the "doctrine of discovery," asserting superior Euro-American title to mid-North America.¹⁴⁰ European racism led to the denial of human rights and disrespect for the agreements entered into with tribal peoples.¹⁴¹

The Delaware Nation and the Cherokee Nation both had treaties allowing for a tribal delegate to engage with the U.S. Congress. The Delaware Treaty of 1778, the first treaty between the United States and a Tribal Nation, contained a provision for the formation of a state by the Delaware as the head of the entity and furthermore, to have representation in the U.S. Congress.¹⁴² Article 6 provided:

And it is further agreed on between the contracting parties should it for the future be found conducive for the mutual interest of both parties to invite any other tribes who have been friends to the interest of the United States, to join the present confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation in Congress¹⁴³

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136. HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492–PRESENT 72, 86 (1999).
137. See Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567, 572–73 (1995).
138. See *id.*
139. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 590–91 (1823).
140. See Rebecca Tsosie, *How the Land Was Taken: The Legacy of the Lewis and Clark Expedition for Native Nations*, in AMERICAN INDIAN NATIONS: YESTERDAY, TODAY AND TOMORROW 240, 242 (George Horse Capture et al. eds., 2007).
141. See Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 617–20 (2009).
142. Treaty with the Delawares, United States-Delawares, art. VI, Sept. 17, 1778, 7 Stat. 13, available at <http://digital.library.okstate.edu/kappler/Vol2/treaties/del0003.htm>.
143. *Id.*

The language of this treaty exemplifies the bilateral nature of the early interactions between Tribal Nations and the United States.

The Cherokee-United States Treaty of 1785 also provided for a delegate to the U.S. Congress.¹⁴⁴ Article 12 provided: “That the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to Congress.”¹⁴⁵ When the U.S. Congress sought to unilaterally provide that the Tribal Nations in the Indian Territory must elect a delegate, the representatives from the Five Civilized Tribes provided written opposition to such direction from the United States:

The bills under consideration make no provision for the assent of the Cherokees or any other Indian nation to be affected by them. Indeed they are just the reverse; so that if either one of them becomes a law the Indian nations within its purview will be compelled by its term to elect and send a Delegate to Congress, whether they choose to do so or not. Furthermore, the treaty quoted applies only to the Cherokees, and does not apply to the Choctaws, Chickasaws, Creeks, and Seminoles, and they have never assented to its provisions. . . . If the Cherokees should ever be entitled to a Delegate in Congress by virtue of Congressional action, as their treaty provides, they should exercise their own choice as to availing themselves of the privilege that might thus be given, and should, moreover, control their own elections for the purpose, at which no voters should be allowed except bona fide citizens of the nation; and such elections should not be interfered with or controlled in any manner by the Secretary of the Interior or any other officer of the United States, because the Cherokee Nation is not a Territory of the United States, nor are its citizens to be considered as citizens of the United States.¹⁴⁶

144. Treaty with the Cherokee, United States-Cherokee, art. XII, Nov. 28, 1785, 7 Stat. 18, available at <http://digital.library.okstate.edu/kappler/Vol2/treaties/che0008.htm>.

145. *Id.*

146. *Objections of the Indian Delegations to a Bill Authorizing an Indian Delegate to the U.S. House of Representatives (Cherokee, Creek, Seminole, Choctaw, and Chickasaw Peoples, 1878)*, in DOCUMENTS OF NATIVE AMERICAN POLITICAL DEVELOPMENT: 1500s to 1933 151, 152–53 (David E. Wilkins ed., 2009).

The unilateral action of the U.S. Congress demonstrates the colonial mentality of federal officials attempting to dictate the means of political representation negotiated for by the Cherokee Nation in the Cherokee Treaty of 1785.¹⁴⁷ The united front presented by the Cherokee, Creek, Seminole, Choctaw, and Chickasaw Nations in Indian Territory provides an insight into their concerns over protecting tribal sovereignty from U.S. political encroachment.¹⁴⁸ But Tribal Nations would no longer be able to assert that tribal citizens were not to be considered U.S. citizens after passage of the U.S. Indian Citizenship Act in 1924, some 46 years after the opposition letter was sent.¹⁴⁹

The Cherokee, Creek, Seminole, Choctaw, and Chickasaw Nations also bound together in the face of an impending federal deadline to terminate their governments; they jointly proposed admitting Indian Territory into the United States as the new state of Sequoyah.¹⁵⁰ The State of Sequoyah was never conceptualized as a true incorporation of tribal governance within the U.S. Union and would have entered under the dictates of federal law.¹⁵¹ But Oklahoma, instead of Sequoyah, entered the Union in 1907 and continues to attempt to assert jurisdiction over the Tribal Nations subsumed in the state boundaries.¹⁵² Although the state of Sequoyah did not enter the United States confederacy, the practice of Tribal Nations forming confederacies remains staunchly in place.¹⁵³ And the concept of an indigenous component of an Anglophile government has been recently realized in Canada.

2. A Canadian Model of Indigenous Incorporation—the Canadian Territory of Nunavut

An example of an indigenous polity formally incorporating into the structure of a larger nation-state is the Canadian Territory of

147. *See id.*; Treaty with the Cherokee, *supra* note 144, at art. XII.

148. Stacy L. Leeds, *Defeat or Mixed Blessing? Tribal Sovereignty and the State of Sequoyah*, 43 TULSA L. REV. 5, 5 n.2, 7–9 (2007).

149. H.R. Res. 6355, 68th Cong. (1924) (enacted); *see also* Leeds, *supra* note 148, at 6 n.3.

150. *See* Leeds, *supra* note 148, at 7–9.

151. *See* Leeds, *supra* note 148, at 7–8.

152. *See, e.g.*, Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995); Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993); Okla. Tax Comm'n v. Citizen Brand of Potawatomi Indian Tribe, 498 U.S. 505 (1991); *see also* Leeds, *supra* note 148, at 6 (explaining that the Sequoyah movement was defeated when Oklahoma entered the union).

153. *See* Steve Russell, *Sequoyah Rising: Doing What We Can with What We've Got*, 19 KAN. J.L. & PUB. POL'Y 1 (2009).

Nunavut, which entered the Canadian confederacy as a hybrid indigenous government and local Canadian government.¹⁵⁴ As a hybrid entity, a fair amount of criticism has been leveled against the formation of Nunavut both from indigenous peoples and from non-indigenous peoples.¹⁵⁵

The Nunavut Territory has been heralded by some as the culmination of self-governance for indigenous peoples.¹⁵⁶ Established on April 1, 1999, the Nunavut Territory is governed by an Inuit majority under Canadian law. as a public government.¹⁵⁷

Ultimately true self-determination requires a measure of autonomy, of self-government. It is important to reflect continuously about the indigenous concepts of government, autonomy, and tribal sovereignty. An example of the farthest reaching success, of the reclaiming of sovereign powers by indigenous nations is the Inuit territory of Canada, Nunavut, split from the Northwest Territories in 1999.¹⁵⁸

The aboriginal-based territory was born out of the practical reality of a large Inuit land claim settlement with Canada.¹⁵⁹ Culminating in the Nunavut Land Claim Settlement Act, the Inuit had invested approximately sixteen years into resolving land title and aboriginal rights to their indigenous homelands.¹⁶⁰ With the passage of the settlement legislation, the next step was the October 30, 1992, political accord between the Inuit, the Canadian federal government, and local territorial leaders.¹⁶¹

One of the drawbacks of the Nunavut structure as a model for Tribal Nations is that the Nunavut Territory lacks the status of a Canadian province, and thereby is under greater control of the federal

154. See Charles J. Marecic, *Nunavut Territory: Aboriginal Governing in the Canadian Regime of Governance*, 24 AM. INDIAN L. REV. 275, 275, 289 (2000).

155. See *id.* at 275–76.

156. *Id.* at 275.

157. *Id.* at 288–89.

158. Monsignor Franklyn M. Casale, *The President's Welcome Address*, 2 INTERCULTURAL HUM. RTS. L. REV. 1, 3 (2007).

159. See Alexandra Kersey, *The Nunavut Agreement: A Model for Preserving Indigenous Rights*, 11 ARIZ. J. INT'L & COMP. L. 429, 429, 435 (1994).

160. See *id.* at 435.

161. *Id.* at 441.

Canadian government.¹⁶² As a Canadian territory, Nunavut has only those powers delegated by the federal government, and from the time Nunavut was created, it was automatically subject to duplicates of Northwest Territories ordinances.¹⁶³ In practice, the Premier of Nunavut, who oversees the day-to-day operations of the territory, is appointed by the Commissioner of Nunavut, a federally-appointed official, upon the recommendation of the the Nunavut legislature.¹⁶⁴ On November 19, 2008, the second territorial leader of Nunavut, Eva Aariak, was sworn into office as premier.¹⁶⁵

The other major drawback of this model is that by transforming into a Canadian territory, the Inuit of Nunavut have relinquished their aboriginal rights in exchange for a European-based system of governance.¹⁶⁶

Although the creation of Nunavut appears to be a victory in self-government, the Inuit have in fact ceded their aboriginal rights and title in exchange for a grant of rights from the Canadian government—something that could, in theory, open the door to a future constitutional amendment that would revoke the viability of Nunavut's semi-autonomy. This is significant in that the Inuit must take great care as to how they proceed within Nunavut's internal structure as

162. See, e.g., *Fisheries Issues Narwhal Tusk Ban Without Consulting Inuit*, NUNAVUT TUNNGAVIK INC. (Dec. 15, 2010), <http://www.tunngavik.com/2010/12/15/fisheries-issues-narwhal-tusk-ban-without-consulting-inuit/> (objecting to a ban imposed upon seventeen Nunavut communities by the Canadian Department of Fisheries and Oceans without consulting the Inuit).

163. See Nunavut Act, S.C. 1993, c. 28, art. 29 (Can.), available at <http://laws.justice.gc.ca/eng/acts/N-28.6/page-4.html#h-13>.

164. See *Fact Sheet: Role of the Premier of Nunavut*, GOV'T NUNAVUT, <http://www.assembly.nu.ca/sites/default/files/Role%20of%20the%20Premier%20of%20Nunavut%20-%20English.pdf> (last visited May 16, 2012).

165. *Eva Aariak, Premier of Nunavut*, GOV'T NUNAVUT, <http://www.gov.nu.ca/en/EvaAariak.aspx> (last visited May 16, 2012).

166. See *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada (Nunavut Land Claims Agreement)*, Can.-Nunavut, May 25, 1993, § 2.7.1 [hereinafter NLCA], available at http://www.nucj.ca/library/bar_ads_mat/Nunavut_Land_Claims_Agreement.pdf; see also *id.* § 2.7.3 (providing that the Inuit will not be denied aboriginal status as a people under Canadian Laws).

well as with regard to Nunavut's political relations with the Canadian federal government.¹⁶⁷

Furthermore, recent reports have indicated that the government of Nunavut has been underfunded as a public government.¹⁶⁸ Chronic problems persist for the Inuit in securing public service employment within the territory and substantial funding needs are unmet to provide bilingual education to assist in changing the dependency cycle for many of the Inuit.¹⁶⁹ While the Nunavut Territory provides an incorporation model for an indigenous peoples' governance within a British-derived nation-state in North America, significant challenges lie ahead before the Inuit people can fully realize their right to self-determination.

Formal incorporation of Tribal Nations into the U.S. system through a statehood process similar to that undertaken in Nunavut would likely be rejected out of hand by Tribal Nations, in part because of the troubles experienced by the Inuit. And the last admission to the U.S. Union was the state of Hawai'i on August 21, 1959, which continues to be heavily contested by a significant population of the indigenous peoples of Hawai'i.¹⁷⁰

3. The Contemporary Status of Tribal Nations

Eventually, Tribal Nations must leave the shadowland they have been relegated to by U.S. federal Indian law and policy.¹⁷¹ This will require tribal leadership to assert that tribal sovereignty has a tribal definition that is not externally defined.¹⁷² For far too long, the

167. Ursula Kazarian, *The Forgotten North: Peoples and Lands in Peril*, SUSTAINABLE DEV. L. & POL'Y, SPRING 2008, at 46, 49 (footnotes omitted).

168. See Rami Shoucri, *Weaving a Third Strand into the Braid of Aboriginal-Crown Relations: Legal Obligations to Finance Aboriginal Governments Negotiated in Canada*, 6 INDIGENOUS L.J., 2007, no. 2, at 95, 118.

169. See THOMAS R. BERGER, CONCILIATOR'S FINAL REPORT: NUNAVUT LAND CLAIMS AGREEMENT IMPLEMENTATION CONTRACT NEGOTIATIONS FOR THE SECOND PLANNING PERIOD 2003–2013, at 17, 39 (2006), available at <http://www.ainc-inac.gc.ca/al/lde/ccl/fagr/nuna/lca/nlc-eng.asp>.

170. See, e.g., David Barnard, *Law, Narrative, and the Continuing Colonialist Oppression of Native Hawaiians*, 16 TEMP. POL. & CIV. RTS. L. REV. 1, 12 (2006).

171. See Note, *International Law as an Interpretive Force in Federal Indian Law*, 116 HARV. L. REV. 1751, 1755–61 (2003).

172. See Joanne Barker, *For Whom Sovereignty Matters*, in SOVEREIGNTY MATTERS: LOCATIONS OF CONTESTATION AND POSSIBILITY IN INDIGENOUS STRUGGLES FOR SELF-DETERMINATION 1, 20–22 (Joanne Barker ed., 2005) (“The almost aggressive self-definition of indigenous peoples by sovereignty is in large part a response to their continued experiences of exploitation and disempowerment under processes of

various branches of the U.S. government have dictated to Tribal Nations on matters of political governance, resource management, and even the relationship between tribal citizens and tribal governments.¹⁷³ Since the U.S. Supreme Court handed down its *Johnson v. M'Intosh*¹⁷⁴ opinion in 1823, European superiority has been the primary justification for the mistreatment of Tribal Nations.¹⁷⁵ Almost two hundred years later, this justification still undergirds the relationships between the United States and Tribal Nations through the imposed trustee status over tribal governments and peoples.¹⁷⁶

Tribal Nations have indigenous homelands that are not part of the federal or state territories. Through the U.S. trust land management system, the title of the majority of the tribal homelands is held in trust status with the federal government and is expressly exempt from state governance as tribal aboriginal lands under federal governance.¹⁷⁷ Yet the Supreme Court continues its onslaught to redefine the aboriginal land rights and homelands of Tribal Nations through the rhetorical myth of the incorporation of the tribal lands into the U.S. territory.¹⁷⁸ In decisions regarding the land rights of Tribal Nations, the Court has resorted to retroactive reinterpretation of allotment statutes from the late 1800s to destroy territorial boundaries and to bar on-going land-rights claims by Tribes.¹⁷⁹ In the last fifty years, extinguishment of tribal title seems to be the primary theme in the

globalization. Fiercely claiming an identity as sovereign, and including multiple sociocultural issues under its rubric, has been a strategy of not merely deflecting globalization's reinvention of colonial processes but of reasserting a politically empowered self-identity within, besides, and against colonization." (footnotes omitted)).

173. See, e.g., COHEN's, *supra* note 16, § 4.07(3)(b)(ii)(B), at 340–43 (describing the transformation of Alaska Natives into native stockholders in state corporations under the Alaska Natives Claims Settlement Act).
174. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).
175. See generally Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 4–5 (2005) (discussing how *Johnson v. M'Intosh* established the "Doctrine of Discovery" as a legal principle).
176. See Natsu Taylor Saito, *The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty*, 51 CATH. U. L. REV. 1115, 1144–51 (2002).
177. See Stacy Leeds, *Moving Toward Exclusive Tribal Autonomy over Lands and Natural Resources*, 46 NAT. RESOURCES J. 439, 447 (2006).
178. See *supra* Part ILC.
179. See, e.g., *DeCoteau v. Dist. Cnty. Ct. for Tenth Judicial Dist.*, 420 U.S. 425, 445 (1975).

U.S. Supreme Court jurisprudence.¹⁸⁰ In this manner, the colonial enterprise of appropriating the lands of the indigenous peoples is still being carried out through the U.S. judiciary.¹⁸¹

Tribal Nations have been coerced to reform tribal governments when U.S. Indian policy has changed.¹⁸² A majority of Tribal Nations have adopted constitutions drafted by the U.S. Bureau of Indian Affairs throughout the 1930s and 1940s.¹⁸³ Under the U.S. trust system, federally-recognized Tribes have been characterized as “domestic dependent nations” and thus,¹⁸⁴ to have ceded a portion of their inherent sovereignty under the U.S. Supreme Court’s view that the U.S. Congress has “plenary” authority over Tribes.¹⁸⁵ Since the formation of the U.S., the Tribal Nations have been excluded from meaningful interaction with the United States confederacy and been subjected to paternalistic racist practices justified by notions of white superiority.¹⁸⁶ The current status of the relationships between Tribal Nations and the United States can be described as one of colonization by the United States. At this point in time, colonization has been denounced throughout the globe, yet it continues to exist for the indigenous peoples of mid-North America under the U.S. imposed trust relationship.

D. Confederated Tribal Nations Entering into a New Treaty with the U.S. Union

In alleviating the ills of the U.S. imposed trust relationship, the government-to-government nature of early interactions must be reasserted by Tribal Nations. Thus, a third potential way to restructure the relationships between Tribal Nations and the United States is to provide a process whereby the Tribal Nations, in confederated alliances, renegotiate tribal relationships with the United States in formal treaty-making processes. In 1871, the U.S. House of Representatives passed, as a rider to an appropriations bill,

180. See Carole Goldberg, *Finding the Way to Indian Country: Justice Ruth Bader Ginsburg’s Decisions in Indian Law Cases*, 70 OHIO ST. L.J. 1003, 1025 (2009); see also, e.g., *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333 (1998) (extinguishing title to lands in the Yankton Reservation).

181. See *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 214–18 (2005).

182. See COHEN’S, *supra* note 16, § 1.01, at 10.

183. See *id.* § 4.04(3)(a)(i), at 252–53 (explaining how the constitutions created by the U.S. government created challenges for the tribes).

184. See *supra* note 83 and accompanying text.

185. See *supra* Part I.B.

186. See, e.g., DANIEL R. MANDELL, *TRIBE, RACE, HISTORY: NATIVE AMERICANS IN SOUTHERN NEW ENGLAND, 1780–1880*, at 2–3 (2008).

a ban on further treaty-making with Tribes.¹⁸⁷ The constitutionality of that measure has yet to be tested, but it would appear to be in contravention of the U.S. President's constitutional treaty-making authority.¹⁸⁸ This internal domestic policy of the U.S. Congress would need to be repealed or overturned to allow contemporary treaty-making between the United States and Tribal Nations. Because of the history of sham proceedings and sleight of hand conducted by U.S. officials and representatives in treaty-making, it is imperative that the United States clarify its laws in a straightforward manner before entering new treaty negotiations with Tribal Nations.¹⁸⁹

By engaging Tribal Nation confederacies with the United States of America confederacy, a truly meaningful legal, relational framework may emerge for the next hundred years. For Tribal Nation alliances, the most common regional confederacies to date are the ones developed by the Bureau of Indian Affairs dividing Indian Country into twelve geographical regions, combining the Northeast and Southeast into the Eastern region.¹⁹⁰ The National Congress of the American Indians (NCAI) has mirrored this regional structure in its confederated model.¹⁹¹ The twelve NCAI regions, in alphabetical order, are: Alaska, Eastern Oklahoma, Great Plains, Midwest, Northeast, Northwest, Pacific, Rocky Mountain, Southeast, Southern Plains, Southwest, and Western.¹⁹² Thus, negotiating with the Tribal Nations as twelve regional groups would be less overwhelming compared to the potential negotiations resulting from treaty-making with each of the 566 federally-recognized Tribal Nations¹⁹³ and the approximately 23 state-recognized Tribal Nations.¹⁹⁴

187. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (1871) (codified at 25 U.S.C. § 71 (2006)).

188. See *United States v. Lara*, 541 U.S. 193, 218 (2004) (Thomas, J., concurring).

189. See Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 474–76 (2003).

190. See *Who We Are*, INDIAN AFF., <http://www.bia.gov/WhoWeAre/RegionalOffices/index.htm> (last updated May 24, 2012); BUREAU OF INDIAN AFFAIRS, U.S. DEPT OF THE INTERIOR, TRIBAL LEADERS DIRECTORY (2012), available at <http://www.bia.gov/idc/groups/public/documents/text/idc002652.pdf>.

191. See *Executive Committee*, NAT'L CONG. AM. INDIANS, <http://www.ncai.org/about-ncai/ncai-leadership/executive-committee> (last visited May 16, 2012).

192. See *id.*

193. See *What We Do*, INDIAN AFF., *supra* note 53.

194. See *Federal and State Recognized Tribes*, NAT'L CONF. ST. LEGISLATURES, *supra* note 105.

A return to treaty-making between a confederacy of twelve “aboriginal” regions and the United States would have a certain symmetry with the history of the original thirteen British colonies. The regional Tribal Nation alliances would need to collaborate. There are many Native organizations that do just that based on mutual needs and interests. The regional groupings would allow Tribal Nations to meet and address common concerns within a region prior to negotiating with the United States on any matter affecting the region. Presumably, the regional leadership would have the ability to pass uniform, overarching resolutions and legislation through a super-council structure similar to the National Congress of the American Indians.¹⁹⁵ Another way to compose this new structure would be to revise the NCAI Constitution and By-Laws to imbue the organization with the authority to act as a governing regional body.¹⁹⁶ As currently formed, the NCAI allows tribal governments and individual Indians to join as voting members, and non-Indian individuals and organizations can join as non-voting members.¹⁹⁷ There are currently many such organizations in place where Tribes regionally collaborate on resolutions. For example, the Columbia River Inter-Tribal Fish Commission (CRITFC) manages treaty-based fishing rights along the Columbia River.¹⁹⁸ The NCAI’s website provides a listing of a multitude of regional Indian organizations.¹⁹⁹ From the United Southern and Eastern Tribes to the All Indian Pueblo Council, Tribal Nations have been entering into alliances and confederacies in contemporary times carrying forward this tradition from the ancestral past.²⁰⁰

195. See *Constitution, By-Laws & Rules of Order*, NAT’L CONG. AM. INDIANS, <http://www.ncai.org/about-ncai/ncai-governance/constitution-bylaws-rules-of-order> (last visited May 16, 2012) (describing the powers of the NCAI in Article II § D); NAT’L CONG. OF AM. INDIANS, AN INTRODUCTION TO INDIAN NATIONS IN THE UNITED STATES 6, 12 (2003), available at http://www.ncai.org/about-tribes/Indians_101.pdf (explaining the structure and organization of Indian governments).

196. See *Constitution, By-Laws & Rules of Order*, *supra* note 195 (explaining the process of amending the Constitution in Article II § E).

197. *Id.* (detailing the different types of membership in Article III § B).

198. See *Columbia River Inter-Tribal Fisheries Enforcement*, COLUMBIA RIVER INTER-TRIBAL FISH COMM’N, <http://www.critfc.org/text/critfc/critfe.html> (last visited May 16, 2012).

199. See *Regional Intertribal Organizations*, NAT’L CONGRESS AM. INDIANS, <http://www.ncai.org/Regional-Indian-Organizations.191.0.html> (last visited May 16, 2012).

200. See *id.*; Cynthia Feathers & Susan Feathers, *The Iroquois Influence on American Democracy*, GOV’T, L. & POL’Y J., Spring 2006, at 5, 5.

Contemporary treaty-making would most likely center on the areas that have remained controversial as the United States has continued to expand and encroach on Indian Country. Treaty terms regarding the jurisdiction of Tribal Nations within their territories and limits on federal and state jurisdiction over those territories would necessarily be considered.²⁰¹ Taxation, commerce, and trade agreements would be likely issues for discussion.²⁰² The provision of federal economic rebuilding funds to alleviate the devastation suffered by tribal economies since the 1800s would be a significant matter for inclusion in a contemporary treaty instrument.²⁰³ For Tribal Nations, the return to treaty-making would signal the continuation of kinship alliances formed with the United States and promise hope for prosperous bilateral relationships into the future.²⁰⁴ The United States would benefit from increased commerce in areas where Tribal Nations are located—which would necessarily spill into the U.S. economy²⁰⁵—and stronger partnerships would grow when the Tribal Nations are freed from expensive and restrictive federal bureaucracy policies.²⁰⁶ And the restructuring would allow future

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201. See NAT'L CONG. OF AM. INDIANS, *Support for Full Tribal Participation in the Columbia River Treaty Reconsideration*, Res. No. PDX-11-029 (2011), available at http://www.ncai.org/attachments/Resolution_vjUhoCbwduELiVpgpAKDwMlvurneOSbEDGuxwzfnYEoWEgCrOk_PDX-11-029_final.pdf (showing NCAI efforts through treaty actions to mitigate U.S. encroachment); *Supreme Court Rules Against Tribal Jurisdiction in Lending Case: Plains Commerce Bank vs. Long Family Land & Cattle Company Next up: Carcieri v. Kempthorne*, NAT'L CONGRESS AM. INDIANS (June 25, 2008), [http://web.archive.org/web/20110711143055/http://www.ncai.org/News-View.19.0.html?&no_cache=1&tx_ttnews\[pS\]=1214888400&tx_ttnews\[pL\]=2678399&tx_ttnews\[arc\]=1&tx_ttnews\[tt_news\]=491&tx_ttnews\[backPid\]=18&cHash=9f5ef2d0d2](http://web.archive.org/web/20110711143055/http://www.ncai.org/News-View.19.0.html?&no_cache=1&tx_ttnews[pS]=1214888400&tx_ttnews[pL]=2678399&tx_ttnews[arc]=1&tx_ttnews[tt_news]=491&tx_ttnews[backPid]=18&cHash=9f5ef2d0d2) (explaining controversies over Tribal jurisdiction in recent Supreme Court cases).
202. See EagleWoman, *supra* note 9, at 422–24; *supra* notes 57–60 and accompanying text (discussing taxation).
203. See U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY, at ix, xii (2003), available at <http://www.usccr.gov/pubs/na0703/na0204.pdf>.
204. See OFFICE OF THE TREATY COMM'R, STATEMENT OF TREATY ISSUES: TREATIES AS A BRIDGE TO THE FUTURE 71–73 (1998), available at http://www.otc.ca/pdfs/OTC_STL.pdf; *Peacemaking Without Peace: The Indian Wars*, ENCYCLOPEDIA NEW AM. NATION, <http://www.americanforeignrelations.com/O-W/Peacemaking-Peacemaking-without-peace-the-indian-wars.html#b> (last visited May 16, 2012).
205. See, e.g., JONATHON B. TAYLOR, ECONOMIC IMPACT OF THE ST. REGIS MOHAWK TRIBE 2008, at 18 (2008), available at http://srmt-nsn.gov/_uploads/site_files/SRMTImpactStudy_091020_WebVersion.pdf.
206. *Id.* at 5–7.

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generations in mid-North America to heal the wounds of U.S. colonial history.²⁰⁷

A contemporary treaty would reset the imbalance that has been struck through the heavy, oppressive weight of fluctuating federal policies, U.S. judicial decisions, and U.S. federal agency oversight of tribal resources and authority. Eradicating the jurisdictional maze in Indian Country would lead to greater channels of commerce, communication, and partnership within the whole of mid-North America.²⁰⁸ It is a common practice to refine and revise international instruments of peace and trade, such as the treaties that were originally entered into between tribal leaderships and U.S. officials.²⁰⁹ In the mid-2000s, the time has arrived to return to the treaty-council circle and reformulate the friendship and common destiny of the indigenous peoples of mid-North America with the United States. The founders of the United States claimed independence from Great Britain in 1776, and now, over two hundred years later, the time for reaffirming bilateral relationships with the Tribal Nations, as the indigenous free peoples of this land, is at hand.

III. CONCLUSION – STRIKING A NEW BALANCE

The United Nations Charter embraces a list of purposes and principles in Article 1, including “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. . . .”²¹⁰ In the relations between Tribal Nations and the United States, the principle of peace and respect was articulated early on in many treaties of peace when the United States was newly formed.²¹¹ Over the past two hundred years, the bilateral

207. See THE ABORIGINAL HEALING FOUND. RESEARCH SERIES, HISTORIC TRAUMA AND ABORIGINAL HEALING 2, 81–82 (2004) (Can.), available at <http://www.ahf.ca/downloads/historic-trauma.pdf>.

208. See S. Chloe Thompson, *Exercising and Protecting Tribal Sovereignty in Day-to-Day Business Operations: What the Key Players Need to Know*, 49 WASHBURN L.J. 661, 671–74 (2010).

209. See, e.g., U.N. Charter, Introductory Note, available at <http://www.un.org/en/documents/charter/intro.shtml>; *id.* at art. 1, paras. 1, 3 (illustrating that five amendments were made to the Charter of the United Nations, an international treaty aimed at maintaining international peace and achieving cooperation in solving international economic problems).

210. *Id.* art. 1, para. 2.

211. See Treaty with the Foxes, U.S.-Fox Tribe, art. 2, Sept. 14, 1815, 7 Stat. 135, available at <http://digital.library.okstate.edu/kappler/vol2/treaties/fox0121.htm> (“There shall be perpetual peace and friendship between the citizens of the United States of America and all the individuals composing the said Fox tribe or nation.”);

relationships intended by tribal leadership and expressed by U.S. officials in the treaty-council circles have undergone complete transformation into the dominance of the United States over the Tribal Nations.²¹² The indigenous peoples of North America are suffering under this oppressive dominance in all indicators of social and economic quality-of-life measurements. It is time to strike a new balance in the relationships for the health and well-being of all peoples in mid-North America.

Several potential processes for re-structuring the relationships have been discussed in this article, including registry of Tribal Nations within the UN Trusteeship System²¹³ and listing Tribal Nations with the UN Decolonization Committee.²¹⁴ Either process holds the possibility of full independence and recognition on the international level for nation-statehood for each Tribal Nation. A third avenue for re-structuring the uneven balance currently in place would be to return to the treaty-council circles as allies. It is proposed that the Tribal Nations return to the process of treaty-making in twelve regional confederacies and the United States represent its component state and territorial governments.²¹⁵ Proactive measures are called for on both sides to assist in remedying the abuses and victimization occurring for the past two centuries and focusing on common futures through treaty-making.²¹⁶

As the indigenous peoples of North America, the Tribal Nations have endured under the repressive policy shifts of the U.S. government for long enough. It is by way of diplomatic interactions and kept promises that solid bonds are built between all peoples and

Treaty with the Kansa, U.S.-Kansa Tribe, art. 2, Oct. 28, 1815, 7 Stat. 137, available at <http://digital.library.okstate.edu/kappler/Vol2/treaties/kan0123.htm>; Treaty with the Sioux-Sisseton and Wahpeton Bands, U.S.-Sioux Indians, art. 1, July 23, 1851, 10 Stat. 949, available at <http://digital.library.okstate.edu/kappler/Vol2/treaties/sio0588.htm>.

212. See Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. REV. L. & SOC. CHANGE 217, 225 (1993) (“As a legal matter, Native American sovereignty was more respected by the European powers in 1492 and in the three centuries that followed than it has been by the United States government in the last 150 years.” (footnote omitted)).

213. See *supra* Part II.A.

214. See *supra* Part II.B.

215. See *supra* Part II.D.

216. See Casey, *supra* note 22, at 435–39.

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governments of the world.²¹⁷ As the United States heralds itself as the bastion of democracy and human rights around the world, it is time to bring those principles back to mid-North America and engage in real fairness with the indigenous peoples and governments of this land.²¹⁸ The extent of the benefit to be gained by a true alliance between Tribal Nations and the United States has yet to be realized, but it offers much promise for all the peoples in mid-North America.

217. See Wiessner, *supra* note 137, at 567 (“One of the cardinal principles of international law, if not the rock on which it stands, is the notion that nation-states are bound to keep their word.”).

218. See Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT’L L.J. 1, 3 (2011).

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