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ARTICLE: The Inapplicability of American Law to the Indian Nations

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SUMMARY:
... It is a fundamental premise of American law dealing with the Indian nations in the United States that the U.S. Constitution does not apply to regulate the conduct of Indian tribal governments. ... Not only has this recognition been reflected pursuant to treaty, but the United States has recognized the inherent sovereignty of the Indian nations from its founding, primarily through its common law. This has not been a radical proposition, as international law supports the notion that Indigenous nations possess attributes of sovereign states. ... More often than not, the lower federal courts have upheld the assertion of tribal jurisdiction in deference to the Indian nation's inherent sovereignty. ... But perhaps the most significant way in which American-trained lawyers undermine tribal sovereignty is through the process of assessing the proper extent of an Indian nation's inherent jurisdiction over persons and territory. American-trained lawyers have a tremendous impact on tribal sovereignty if they operate from the assumption that decisions of the U.S. Supreme Court and the entire body of American federal law apply to the Indian nations. ... There is a significant problem, however, if American law is applied to, or within, an Indian nation in the absence of any express authorization by tribal law or treaty. ... The second is when the tribal constitution, tribal law, or treaty provision expressly or implicitly provides that American law is inapplicable. ...

TEXT:
[*1596]

Introduction

It is a fundamental premise of American law dealing with the Indian nations in the United States that the U.S. Constitution does not apply to regulate the conduct of Indian tribal governments. n1 Despite this proscription, however, it is widely assumed by practitioners,n2 scholars, n3 and the Indians themselves n4 that American law applies to regulate the conduct of Indian nations and individual Indians. n5 The basis for this assumption is the [*1597] acceptance of a long line of U.S. Supreme Court cases that hold that the source and scope of tribal governmental power ultimately rests upon the authority of Congress to define its limits. n6 As the Constitution contains only three bare references to Indians, n7 American case and statutory law have thus taken on paramount importance in this inquiry. Perhaps the most significant of the Supreme Court's Indian law cases interpreting the scope of tribal powers establishes that the United States possesses "plenary" power over the Indian nations and thus has nearly absolute authority to take whatever action regarding the Indians it deems necessary. n8

Scholars and advocates have long criticized the arbitrary and self-serving manner in which the United States has rationalized its assumption of power over the Indian nations. n9 But in seeking to put forward solutions to this dilemma, they have failed to properly frame the nature of the inquiry. Understanding Indian nation sovereignty is not simply a

matter of finding [*1598] coherent meaning in the Supreme Court's Indian subjugation jurisprudence, n10 nor is it the more mundane challenge of determining whether the Court has "correctly" interpreted the relevant Acts of Congress or faithfully adhered to its own prior decisions that address the scope of tribal powers. Unfortunately, when addressing questions relating to the scope of an Indian nation's sovereign authority, Indian law practitioners and scholars almost always rely on the law of the colonizing nation as the exclusive source of authority to support their analysis.

As I see it, a complete and proper analysis of the powers of the Indian nations looks not just to the laws of the United States that purport to regulate them, but to the laws and governing documents of the Indian nations themselves. Thorough lawyers, judges, and scholars presented with Indian law questions will begin their analysis of an Indian nation's powers by examining the written and unwritten customary law, documents, and treaties that are the roots of the Indian nation's own legal traditions. n11 Invariably, however, this analysis is trumped by a secondary analysis that looks to American federal law as the definitive source of controlling legal precedent. n12 In this way, American federal law is thus assumed to be the only relevant source of law for determining the source and scope of tribal governmental powers. The consequence of this analytical approach is that those who practice and write about Indian law concede far too much authority to the United States at the expense of the Indian nations and their inherent sovereignty. n13

[*1599] The purpose of this Article is to argue that Indigenous nations and peoples are not subject to American law as a matter of their own law n14 and that organic Indigenous laws and treaties should be fully incorporated into any analysis assessing the source and scope of tribal governmental powers. In doing so, I will put forward an enhanced analytical approach that is rooted in a dual analysis of tribal sovereignty questions. This dual analysis requires an independent review of both the Indigenous and American law that is relevant to the inquiry. As might be imagined, such an inquiry can give rise to potential conflicts of law, as well as to potential conflicts of ethical responsibilities. The Article suggests how practitioners and scholars of Indian law can avoid these ethical problems when analyzing Indian law questions.

I. The Independent Foundation of Indigenous Legal Analysis

The United States and its colonial predecessors have long recognized the sovereign status of the Indigenous nations that lie within its borders. The foremost evidence of this acknowledgment is reflected by the historic reliance on treaties to conduct formal diplomatic relations with them. Not only has this recognition been reflected pursuant to treaty, but the United States has recognized the inherent sovereignty of the Indian nations from its founding, primarily through its common law. This has not been a radical proposition, as international law supports the notion that Indigenous nations possess attributes of sovereign states. On the basis of their inherent sovereignty, therefore, augmented by this external recognition, Indigenous nations have come to develop their own court systems. Naturally, these tribal judiciaries have taken on the responsibility of developing their own unique jurisprudential traditions.

[*1600]

A. Treaty Recognition

Prior to the formation of the United States, the colonial powers utilized treaties and other intergovernmental agreements to conduct relations with the Indian nations. n15 These treaties established the foundation colonial policy that diplomacy should be the preferred method for interacting with the Indigenous population. n16 Following the formation of the United States, treaty making continued for nearly one hundred years until the policy was unilaterally abandoned by the United States in 1871. n17 The treaties themselves dealt with a wide range of subjects, from straightforward matters such as defining boundary lines n18 to grand social engineering techniques designed to promote the assimilation of the Indians into American society. n19 Perhaps the most important treaty topic was the matter of peace and how it would be maintained between the parties. n20

[*1601] The existence of treaties between Indian nations and the colonists should be viewed as conclusive evidence of Indigenous statehood. n21 Treaty making, of course, is a power that lies exclusively within the province of states. That the Indian nations were (and are) states in a historic and legal sense is hard to argue against, given the long track record of diplomatic interaction between the European colonial governments and the Indian nations. Nonetheless, the colonists at various times sought to deny the statehood of the Indigenous nations through both formal and informal means. n22

Despite this equivocation, the Indian nations were primarily dealt with by the colonial powers on the same plane as the foreign powers of Europe. n23 Such was the case when the United States was formed. Like their colonial predecessors, n24 the Americans waged war against the Indians and sought [*1602] treaties of peace with them to secure the land base of their new nation. n25 Eventually, however, the balance of power shifted in favor of the United

States and so, too, did American policy for dealing with the Indians. n26 While treaties remained the currency of interaction, by the early nineteenth century the U.S. government sought to relocate the Indian nations in the East to lands in the West through military force and economic inducement. n27

B. American Common-Law Recognition

The most significant redefinition of the United States' relationship with the Indian nations occurred during this period. In Cherokee Nation v. Georgia, n28 decided in 1831, the U.S. Supreme Court concluded that the Indian nations were not to be recognized under American law as full sovereigns, but were instead to be considered as "domestic dependent nations." n29 This hybrid conception preserved recognition of the inherent sovereign character of the Indian nations, albeit subject to considerable limitation. Whereas in times past, the Indian nations were viewed - at least as a de facto matter - as sovereign states on a par with others in the world, the Court concluded that the Indian nations were no longer foreign to the United States in either a geographic or political sense. n30 The Court thus found it logical, convenient, and just to deny them recognition as fully independent sovereign states. Despite this narrowed conception of sovereignty (or maybe because of it), the United States has recognized Indian nations as sovereign entities to the present day. n31

[*1603]

C. International Law Recognition

Recognition of Indigenous statehood makes sense from both a legal and historic perspective. Many Indigenous nations today retain the same attributes associated with their historic antecedents and with the existing states in the world. Namely, they possess the following qualifications identified under international law as necessary for attaining state status: "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states." n32

Indigenous nations retain permanent populations by definition. The existence of the nation is dependent upon the existence of its people. While all Indigenous societies have integrated to some extent with colonizing peoples - and in some cases have even naturalized colonists as their own citizens - the citizenry of an Indigenous nation is a defined population separate and distinct from other peoples.

Indigenous nations also possess defined territories. Perhaps the foremost consequence of the treaties entered into with the United States is the establishment of these defined territories - the reservations. While some nations have had their territories diminished considerably over time (through both land sales and allotment), one of the defining characteristics of Indigenous nationhood in the United States is the continued existence of a defined Indigenous territory.

Indigenous nations also possess governments. Some Indigenous nations in the United States retain so-called traditional governments, in that these governments are substantially the same as those existing at the time of contact with the colonists. n33 Most, however, take a form that is the result of colonial influence. Either through their own democratic processes, or as the consequence of direct colonial intervention, most Indian nations today have some kind of constitutional government. n34 To be sure, not all of these governments work well, and in some cases there have been conflicts in which more than one government at the same time has claimed lawful governing authority over the territory and its people. Nonetheless, this criterion is easily satisfied.

The last factor, capacity to enter into relations with other states, can also be satisfied. The essence of this factor is that it focuses on capacity to enter into relations with other states, and not on the quality or nature of these [*1604] relations. Certainly the original treaty relationships between the Indian nations and the United States, as well as the many treaties entered into with the colonial predecessors of the United States, constitute evidence of capacity to enter into relations with other states. While it is no longer the case that the United States enters into treaties with the Indian nations, it does retain relations with them. Thus, Indian nations routinely engage in diplomatic relations with American officials and, in recent years, have entered into statutorily defined "self-governance compacts" reflecting these formal relationships. n35

Drawing from these principles of international law, it follows that an Indian nation is capable of asserting the sovereign authority of a state and should receive recognition as such. But the reality is that not all of an Indian nation's inherent powers are, in fact, recognized by the United States. For example, the United States does not recognize the authority of the Indian nations to enter into relations with foreign nations. n36 It does not recognize the assertion of criminal jurisdiction over non-Indians. n37 And it does not recognize exclusive tribal jurisdiction over a wide variety of activities conducted in Indian nation territories. n38

D. The Struggle for Jurisprudential Autonomy

These limitations, however, are not conclusive as they relate to the powers of Indian nations under American law. That a state does not recognize an assertion of authority by another state does not simply neutralize the existence of the latter state's authority. The Montevideo Convention expressly provides that the "political existence of the state is independent of recognition by the other states." n39 As a result, such non-recognition only serves as a barrier to the assertion of that sovereign authority with respect to the non-recognizing state. The inherent sovereign authority of the former state remains, albeit perhaps in a dormant or weakened condition, available to be invoked and exercised at any time in the future.

Indeed, the assertion of sovereign authority, its resistance by neighboring states, and its ultimate perseverance over time is the hallmark struggle for sovereignty that has been engaged in by all nation-states both [*1605] past and present. n40 As history amply reflects, sovereignty is not recognized until the asserting state convinces other states - through diplomacy or warfare - that its assertion should be recognized. n41 Thus, a properly reformulated conception of the sovereignty possessed by Indian nations is that the Indian nations are fully capable of exercising absolute sovereign authority over their own territories and the peoples located within them, but that in some cases this authority is not recognized by the surrounding state, the United States.

While this reformulation may sound bold, the concept is hardly controversial, even within American law. The difference is that the United States frames the limitation on tribal sovereignty in terms of extinguishment rather than non-recognition. Thus, to the U.S. Supreme Court:

The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. n42

This imperial orientation is best reflected by the cases the Court has handled in recent years that purport to define the scope of tribal judicial authority. As Indian nations have sought to assert greater jurisdiction over the activities occurring within their territories, and to obtain greater legitimacy in the eyes of American officials, they have established judicial systems for purposes of dispute resolution and law enforcement. n43 In many [*1606] cases this development is completely novel, as traditionally the method for resolving disputes or adjudicating offenses was reserved to chiefs in council or other traditional governing institutions. n44 While the establishment of courts, judges, and written law is obviously an accommodation to the Western legal tradition, it is a development that has intensified in recent years as Indian nations have become more and more integrated within the American economic and political system. n45

Associated with the development of tribal courts has been increased conflict with the United States and the individual states over the scope of tribal court jurisdiction. Invariably, these conflicts arise in situations where the Indian nation is seeking to exercise judicial authority over non-Indians relating to activities taking place within its territory. n46 The pattern is similar. Tribal councils pass laws purporting to exercise the widest measure of authority; tribal law enforcement officials seek to enforce such laws; and the tribal courts are called upon to decide whether the exercise of authority is authorized. n47 The tribal court then interprets the Indian nation's own laws, but also applies the relevant American law purporting to define the Indian nation's legislative and judicial authority. If the tribal court gets it "wrong" from the perspective of the aggrieved non-Indian, the non-Indian then proceeds to federal court to seek an injunction to prevent the tribal court from exercising authority over him. n48 The federal court, then, may issue such an injunction against the tribal court judge from proceeding further if it is concluded that the tribal court judge has exceeded her authority as dictated by the applicable federal law. n49

[*1607] On the basis of this oft-repeated factual scenario, the U.S. Supreme Court has rendered a series of decisions during the last three decades that have seriously eroded recognition of inherent tribal judicial authority. The Court has held that Indians do not have authority to exercise civil jurisdiction over non-Indian owned fee land within tribal territory, n50 over disputes between non-Indians occurring on state rights-of-way through tribal territory, n51 and over state law enforcement officials engaging in tortious conduct incident to an unlawful search within the tribal territory. n52 These decisions have been so devastating that a few scholars have begun to conclude that the powers of Indian nations, as a practical matter, only extend to purely internal matters involving citizens of that particular nation. n53 Despite recent trends, however, it appears that the Court will continue to recognize the fundamental inherent

authority of Indian nations to exercise civil adjudicatory authority over all who expressly consent to remain within tribal territory. n54

Consistent with and subsumed within this exercise of civil adjudicatory authority lies the power to develop and interpret law. Choice of law rules suggest that the law of the sovereign itself applies first in relation to matters proceeding in the judicial fora of that sovereign. n55 Accordingly, as Indian nations have developed formal Western-style judicial systems, they have enacted laws through their own legislative processes that define what law is to apply in their own courts. n56 In other instances, tribal courts have exercised their inherent authority to develop common law to arrive at a similar determination. n57 In both situations, the substantive and procedural laws of the Indian nation itself serve as the foundational rules upon which decisions are based. The application of tribal law, however, is not always deemed [*1608] exclusive; American federal (and sometimes even state) law is also applied in the Indian nation courts. n58

II. How American Law Has Come to Apply to the Indian Nations

Even though Indian nations have inherent authority to develop and apply their own law in their own courts, American federal (and, in some cases, state) law has nonetheless come to be widely applied to and within the Indian nations. This has happened in at least four ways: by agreement, by colonial fiat, by incorporated judicial limitation, and by incorporation through the work of lawyers, judges, and scholars.

A. By Agreement

As an initial matter, the question of whether American federal or state law applies to an Indian nation has been easily dealt with in those instances in which an Indian nation has simply agreed to comply with it. This stipulation occurred often in the context of treaty negotiations in which the Indian nation simply conceded that it would comply with federal law. n59 In others, mostly in the modern era, Indian nations have agreed to comply with federal or state law in the course of negotiating and receiving recognition as a sovereign by the United States, n60 or by entering into contracts and compacts for the receipt of federal funds. n61

[*1609]

B. By Colonial Fiat

Secondly, American law is applied to the Indian nations through direct executive, legislative, and judicial action. The United States, through the Bureau of Indian Affairs (BIA) in the Department of the Interior, continues to retain thousands of employees for purposes of administering a variety of services to the Indian nations. While increasingly these services relate simply to the administration of funds provided directly to the Indian nations under the Indian Self-Determination and Education Assistance Act of 1975n62 and the 1994 self-governance amendments to that Act, n63 the BIA continues to provide direct services to Indian nations. As a result, the BIA police in some Indian territories continue to enforce federal laws on Indians, the Courts of Indian Offenses continue to adjudicate matters involving Indians, and BIA employees continue to provide "technical assistance" on a wide variety of other matters, including approval of tribal laws and constitutional amendments.

In the course of administering Indian affairs, American officials are guided in their actions by the body of federal law applicable to the Indians. n64 Executive officials in the Interior Department are granted sweeping authority by Congress to "manage" all aspects of Indian affairs. n65 In addition, Congress has also applied American law to the Indian nations through direct legislative action. Laws such as the Indian Major Crimes Act,n66 the Indian Civil Rights Act, n67 and the Indian Gaming Regulatory Act n68 are all examples [*1610] of statutes enacted for the purpose of regulating the actions of Indians and Indian nation governments within their own territories. Indeed, much of the statutory law dealing with Indians contained in Title 25 of the U.S. Code is devoted to direct regulation of Indians, Indian lands, and Indian natural and financial resources. n69 In addition to these specific statutes, general American laws have also been held to apply to Indian nationsn70 and individual Indians. n71

C. By Incorporated Judicial Limitation

Thirdly, American law is applied to the Indian nations by requiring Indian nation courts to incorporate and apply American federal law as part of their decision making process. The United States has reserved to itself - as yet another manifestation of its plenary power over Indian affairs - the ultimate determination of how much judicial authority is possessed by the Indian nations. In National Farmers Union Insurance Cos. v. Crow Tribe, decided in 1987, the Supreme Court held that the scope of an Indian nation's jurisdiction is a federal question subject to federal court review.

n72 As a result, litigants resisting applications of tribal court jurisdiction - usually non-Indians - have frequently sought to obtain federal court review challenging that assertion. More often than not, the lower federal courts have upheld the assertion of tribal jurisdiction in deference to the Indian nation's inherent sovereignty. n73 But as discussed above, if cases such as these reach the Supreme Court, the Court has increasingly failed to adhere to its own precedent and has held that the Indian nation has been divested of the adjudicatory jurisdiction sought to be exercised. The reason for this development is not entirely clear, but it seems rooted in the Court's concern [*1611] that Indian nations should not exercise authority over non-citizens of the nation who do not have participatory rights. n74

Associated with the American government's assertion of control over Indian nation judicial proceedings is the requirement that litigants in tribal courts must exhaust their tribal remedies before proceeding to federal court to attempt to invalidate the assertion of tribal jurisdiction. n75 This exhaustion requirement has had a twofold impact. On the one hand, tribal courts certainly are afforded a greater degree of deference in handling nearly all matters that come before them. This has been viewed favorably by advocates of tribal courts as it is seen as a strengthening development. n76 On the other hand, the exhaustion requirement also means that tribal courts are relegated to a subordinate position to the federal government within the American legal system. Tribal court judges, as well as the litigants, are ever mindful of the fact that tribal judicial proceedings may border on the limits of the Indian nation's jurisdiction as it may be defined by federal law and thus may justify federal court review. n77

The concern about review by American courts has invariably led tribal court judges and advocates to more consciously impose upon themselves the restrictions on tribal court authority contained within American federal law. Indian nations may impose limitations on their own authority through explicit legislative acknowledgment that federal law applies to regulate tribal judicial proceedings. n78 In other situations, American law is simply [*1612] incorporated within a case and becomes part of the tribal common law. n79 As a practical matter, the supremacy of American federal law in tribal court is usually,n80 although not always, n81 presumed.

The fact that Indian nations impose upon themselves the strictures set forth in the laws of the colonizing nation reflects a novel kind of neo-colonial development that I call "auto-colonization." n82 Not only is it the case that the United States is unilaterally deciding what judicial powers are possessed by the Indian nations, the Indian nations themselves are assisting the United States by limiting their own authority according to what authority they believe is allowed to them by American law. Not surprisingly, this arrangement looks an awful lot like the federalism arrangement that exists between the federal government and the states. Indeed, some commentators have likened (rather fondly, it seems) the current federal-tribal relationship to just that - something they have coined "treaty federalism." n83 Whether [*1613] viewed positively or not, such a development is deemed a practical reality by its proponents. n84 Regardless of the justification, this theory concludes that the Supremacy Clause contained in the U.S. Constitution must be incorporated to bind the subordinate state and tribal sovereigns to the strictures of American federal law. n85

D. By Incorporation Through the Work of Lawyers, Judges, and Scholars

Lastly, American law regulating the Indians is applied to them by the lawyers and judges who work within Indigenous legal and governmental systems, as well as the scholars who study and write about them. Historically, lawyers have always had an influence on Indian affairs, going back to the earliest days of the American republic. Much of this early work focused on developing the legal rationales for waging war against the Indians and otherwise defending the colonization activities of the United States. n86 In the early nineteenth century, however, lawyers also began to provide assistance to the Indian nations in their dealings with the U.S. government and even with respect to handling internal matters. n87

In recent years, lawyers working for Indian nations or practicing in tribal courts have evolved as perhaps the most significant force promoting the application of American law to the Indian nations. In part, this is due to the fact that legal education is geared towards practice in the American legal system, a foundational experience that is difficult to tailor to the unique contours of tribal law practice. But much of this trend is driven by the surge in the business of "Indian lawyering" during the last thirty years. n88 More and more attorneys are becoming in-house counsel for Indian nations, as well as serving as tribal general counsels, tribal prosecutors, tribal judges, defense counsel, and general private practitioners. n89 So significant has this development been that some of the largest law firms in the country have developed Indian law practices. n90 Not surprisingly, the vast majority of these [*1614] lawyers are non-Indians, n91 and also not surprisingly, this development tracks the advent of Indian gaming. n92 Because of these developments, it would not be outrageous to assert that lawyers now have direct influence over every aspect of Indian life.

The "lawyerization" of the Indian nations also has a historic component related to the change in federal government policy from Termination to Self-determination in the early 1970s. n93 One of the significant attributes of this policy shift was the tremendous increase in federal funding that was made available to the Indian nations. This funding

increase was consistent with the notion that the Indian nations themselves, and not the federal government, should have a more direct role in providing services to reservation Indians. Lawyers were necessary to facilitate the Washington bureaucracy so that Indian nations could obtain their fair share of the available funds.

But lawyers were also necessary to help the Indian nations develop the internal bureaucracy necessary to handle these funds. So as to demonstrate accountability for the federal money, new internal procedures and laws for handling money and administering programs had to be developed. Lawyers, as well as accountants and technology professionals, were intimately involved in this process. Moreover, some of the federal program money made available dealt directly with legal affairs, such as the establishment and operation of tribal courts. n94 Given that most Indian nations at the time lacked any judicial institutions, tribal courts had to be created from scratch. [*1615] Thus, lawyers began to play an important role in writing the structural and procedural laws of the very first Indian nation court systems. n95

Naturally, the increased attention to written law also created a role for the lawyer in developing substantive tribal law. Most directly, this involved the drafting of codes and resolutions for adoption by the tribal council. But it also involved the lawyer's representation of the Indian nation or private clients in that nation's own court system, thus becoming a critical participant in tribal common law development. The emergence of tribal in-house counsel signified the complete incorporation of lawyers into the most intimate internal workings of tribal governments.

In promoting this development, Indian nations have contributed greatly to their incorporation into the American legal system. The lawyers working for Indian nations are American-trained lawyers. As a result, they bring with them all of the pros and cons associated with that training. To the extent that the values underlying the American legal system are not in conflict with that of the Indian nation, American trained lawyers seemingly would exist as harmonious contributors to that nation's legal development. But to the extent that differences in approach and substance exist - as would naturally be true with traditional Indigenous nations - the lawyer can thus become an agent of significant, and possibly unwelcome, cultural and social alteration. n96

One example of this potentially transformative effect is the American-trained lawyer's reliance on precedent as the foundation of judicial reasoning. Many traditional Indigenous societies did not rely heavily on precedent to decide cases, instead relying upon notions of fundamental fairness, i.e. a case-by-case approach, to resolve disputes. An American-trained lawyer working within such a system might try to "correct" this flaw and seek to work an unintended change within the tribe that she is representing. The same is true for matters of legal substance. A tribal lawyer unfamiliar with his or her own client's cultural foundation could very well [*1616] tread over that foundation in the course of rendering legal advice from their own cultural perspective.

But perhaps the most significant way in which American-trained lawyers undermine tribal sovereignty is through the process of assessing the proper extent of an Indian nation's inherent jurisdiction over persons and territory. American-trained lawyers have a tremendous impact on tribal sovereignty if they operate from the assumption that decisions of the U.S. Supreme Court and the entire body of American federal law apply to the Indian nations. It is a basic premise of the American legal system that federal law reigns supreme and that the Supreme Court holds the final word on matters of American constitutional and federal law. American-trained lawyers instinctively know this to be true. By accepting this premise, however, lawyers working for Indian nations must necessarily accept the application of the full panoply of Indian subjugation doctrines developed by the Court over the years such as the Doctrine of Discovery,n97 the Plenary Power Doctrine, n98 the Trust Responsibility Doctrine,n99 and the concept of Domestic Dependent Nationhood. n100

Now, this is not to say that lawyers representing Indian nations accept these cases, or even believe them to be right, but it is true that these lawyers generally behave as if these cases are relevant and that they thus must apply to the Indian nations. Certainly there are many lawyers who practice Indian law who believe these cases to be correct as well as relevant and applicable (generally, these lawyers would represent positions adverse to the Indian nations). But setting these lawyers aside, even the lawyers working on behalf of Indian interests would generally accept the practical reality that these cases exist and that they actually (even if not legitimately) give the United States absolute power over the Indian nations.

It can be especially transformative to an Indian nation to retain an American-trained lawyer who does not instinctively question the underlying legitimacy of U.S. Supreme Court decisions. First off, such lawyers can easily concede away much of their client's inherent sovereignty when appearing in [*1617] American courts. n101 But perhaps most prevalent is the situation that arises when a tribal lawyer advises his or her tribal client against taking such a challenging position because of concerns about "illegality" as a matter of American law despite this being the chosen path of the tribal client. n102 In such a situation, the lawyer is acting in accord with American colonial interests and not the interests of the client. If the lawyer is not actively opposed by the client (as rarely seems the case), the lawyer will

have thus played a critical role in ensuring that the American law regulating and suppressing tribal governmental authority is incorporated into that Indigenous society. In this way, the lawyer serves to promote the obedience of his or her client to the colonial power. n103

In a similar manner, judges working within tribal court systems run the same risk of promoting the incorporation of American law into Indigenous [*1618] societies. Indeed, it might be said that tribal judges pose an even greater risk than do the lawyers because it is the judge who actually has control over how the law will be shaped within that tribal jurisdiction. To be fair, many Indian nation judges take great pains to ensure that their decisions rest upon the laws and customs of the nations they are sworn to serve. n104 It is also true that judges are relatively passive regarding the questions presented and the legal issues that must be resolved in a particular case. Ordinarily, judges will simply limit their involvement to the issues raised by the parties rather than injecting new legal issues on their own motion. But too often tribal judges appear to uncritically apply American law in the course of deciding cases that come before them. n105

While in many cases this result may be inevitable given the way the relevant issues are framed before the court, it remains the case that judges always have discretion in the source of law that they apply in their final opinions. n106 Applying American law in tribal court, then, is more an exercise of discretion rather than of legal obligation. As a result, it is possible for a tribal court judge to resist the asserted application of American law in a particular case (assuming tribal law does not require it). n107

Lastly, scholars of Indian law can also serve as incorporators of American law into the Indian nations. n108 Uncritical analysis of federal Indian law issues has the effect of legitimizing this body of court decisions, statutes, and related materials by cleansing it of its colonial underpinnings. As with the lawyers, to the extent these decisions are accepted as applicable to the Indian nations, any analysis predicated upon such decisions promotes the [*1619] assimilation of American law by the Indian nations. While the audience for legal scholarship is primarily legal scholars, to the extent it is utilized by lawyers and non-lawyers working with Indians, as well as Indians themselves, the proliferation of such views contributes to the forces promoting the greater incorporation of the Indian nations into the United States.

III. The Problem of Applying American Law to the Indian Nations

From an American perspective, the incorporation of American law by the Indian nations is hardly problematic. Given that the Indian nations are geographically located within the United States, one can naturally draw the conclusion that American law should apply to them as well as to all of the activities that take place within their territories. n109 Even though U.S. policy now strongly favors the self-determination of Indigenous peoples, n110 the Self-determination Policy does have its limits. Pursuant to the doctrine of Domestic Dependent Nationhood, the United States does not recognize the sovereignty of Indian nations on a par with other nation-states. Moreover, the United States does not recognize the inherent right of Indigenous peoples to "secede" from the United States or, for that matter, to exercise full control over their own natural resources. n111 Similarly, the United States does not recognize the right of Indian nations to enter into agreements with foreign states. n112 As a result, even though the Indian nations are recognized by American law as possessing inherent sovereignty, American policy towards the Indian nations ultimately demands their substantial integration into American society.

This policy preference is not necessarily one-sided. The Indian nations, too, rely on American law in ways that suggest that they willingly accept its application to their territories and people. This is reflected by the myriad of [*1620] tribal laws, treaties, and intergovernmental agreements that acknowledge the application of American law to internal tribal affairs, as well as the way in which Indian nations rely upon the American courts for protection and vindication of sovereign rights.

Such reliance might be desirable for a number of reasons. In a positive sense, the application of American law may be quite beneficial to the Indian nations, such as the choice to accept the application of the Indian Gaming Regulatory Act for purposes of conducting gaming activities within tribal territory. In a protective sense, Indian nations might accept the application of American law to their affairs so as to, for example, prevent a state from imposing taxes on individual Indians or Indian lands. Of course, the motivation might also be purely economic, such as in the need to comply with American laws and regulations as a precondition to receiving federal funds. Regardless of the justification, there are many situations where the application of American law to an Indian nation is consensual and not the result of direct colonial influence. n113

As a threshold matter, then, there is no legal problem for an Indian nation that applies American law to itself if doing so is a reflection of its own choice to do so. If self-determination means anything, it means the ability to choose

when and how the laws of another sovereign might apply within one's own territory. While in the abstract, one might question the wisdom of choosing to fall under the influence of another nation's laws, self-determination ultimately means just that, regardless of whether the outcome, in the long run, actually furthers autonomy or not.

There is a significant problem, however, if American law is applied to, or within, an Indian nation in the absence of any express authorization by tribal law or treaty. This can occur in two different ways. The first is when the Indian nation's constitution, its laws or its applicable treaty provisions are silent on the question of American law applicability. The second is when the tribal constitution, tribal law,n114 or treaty provision n115 expressly or [*1621] implicitly provides that American law is inapplicable. In both instances, there is no express authorization as a matter of tribal law for the application of American law to or within that Indian nation.

When American law is applied in a situation where the tribal constitution, tribal law, or a treaty is silent, such application may or may not be significant. In such instances, it could even be said that the application of American law might actually further the development of tribal law and sovereignty. For example, American law could be borrowed to fill in the gaps in a tribal constitutional or statutory scheme, thus enhancing the effectiveness of the tribal legal system. n116

But where American law is applied to an Indian nation in direct conflict with its constitution, laws, or applicable treaties, that application constitutes a clear violation of the Indian nation's own laws. From an American law perspective, such a conflict should be resolved in favor of the United States because the Plenary Power Doctrine and the Supremacy Clause require that American law supersede inconsistent Indigenous law. But viewed from the perspective of the Indian nation's own laws, the application of the American law is in conflict with that nation's laws and is therefore unauthorized and illegal.

When a conflict like this occurs, there is a strong likelihood that important policy priorities of the Indian nation will be undermined or even completely neutralized. This can occur in a number of ways.

Assume, for example, that an Indian nation exercises its inherent legislative authority by enacting a statute to extend criminal jurisdictional authority over non-Indians for crimes committed by them within its territory. If the tribal judge overseeing the prosecution of a non-Indian believes the argument of the parties that American law requires the application of the U.S. Supreme Court's decision in Oliphant v. Suquamish Indian Tribe n117 to the [*1622] Indian nation, then she will hold that the Indian nation is outside of its authority and will bar such action. If the tribal judge adheres to the Plenary Power Doctrine, he will reach this conclusion notwithstanding the fact that the Indian nation's own laws expressly support the extension of such authority.

Or, for example, assume that an Indian nation embraces a conception of its territorial sovereignty that includes the right to sell tobacco products to non-Indians without collecting state sales taxes. A tribal attorney familiar with the adverse U.S. Supreme Court cigarette cases n118 would advise against this course of action. If the advice is accepted, American law would then be applied to the Indian nation upon the advice and counsel of the Indian nation's own attorneys to effectively frustrate the chosen tribal public policy priority.

Or, lastly, consider the situation where an Indian nation decides it wants to preserve its language by mandating through legislation that it be taught in the public schools located within its territory. Depending upon whether the federal or state government operate the school, such a law could run counter to both the substantive curriculum standards governing the educational process in the school, as well as the labor agreements and licensing standards of the teachers. A tribal attorney advising the Indian nation whether they could enact such a law might counsel against such an action given the federal and state law conflicts that would be presented.

Viewed most clearly, allowing American law to apply to Indian nations in such situations effectively subordinates the Indian nations to the United States at yet another level and thus undermines their inherent right of self-determination. n119 Being able to pursue desired policy objectives - even those that might be in conflict with American law - is the essence of the right of self-determination. Tribal lawyers and judges have no authority to impose the strictures of America's Indian regulatory laws upon the Indian nations which they represent and where they preside unless that is what the Indian nation itself wants to do. Certainly the right of self-determination extends to recognizing the ability of an Indian nation to comply with American law if it so chooses. But in the absence of consent to such application, the right of self-determination is not only being disrespected by these lawyers, it is being eliminated.

[*1623] Preserving the self-government and self-determination of Indigenous peoples should be the objective of any lawyer or judge sworn to uphold the laws of an Indian nation. But the historical theme guiding relations between Indigenous and colonizing peoples has been one of displacement and subjugation of the Indigenous population. In the

early days of this relationship, disease, diplomacy, and military force were used to promote the agenda of destroying Indigenous self-government and absorbing Indigenous peoples into the American policy.

Today, however, America's Indian incorporation agenda continues in a more benign form. Through the guise of self-determination, Indian nations have invited American law-trained professionals into their midst to "assist" them in strengthening their sovereignty through legal development. n120 Instead of doing so, however, these lawyers, judges, and law professors contribute to the incorporation of the Indian nations into the United States at newer and deeper levels than ever before. It matters not that these professionals intend no harm. Much like the "benevolent" nineteenth-century reformers hell-bent to civilize the Indians through the General Allotment Act, n121 or the modern day architects of the Alaska Native Claims Settlement Act n122 or Indian Gaming Regulatory Act seeking to promote tribal "development," lawyers working for Indigenous peoples today intend no ill will to their Indigenous clients. But the nature of what it means to be an American-trained lawyer consequently means that the "lawyerization" of Indian country can have grave consequences. Promoting the illegal application of American law within the Indian nations furthers the colonization and incorporation of Indigenous peoples into American society and thus jeopardizes their future as distinct societies.

IV. Resolving the Conflict of American and Indigenous Law

A conflict in the application of American and Indigenous law presents both a legal and ethical dilemma for the lawyers, judges, and scholars who regularly deal with Indian law issues. Heretofore, it has been widely assumed that no such conflict exists. Practitioners in the field, as well as academics, have simply concluded that the Plenary Power Doctrine and the Supremacy Clause require the suppression of any tribal law that is inconsistent with federal law. But this approach, while correct when dealing exclusively with matters of American law, leaves out half of the relevant analysis when dealing with matters relating to Indigenous law. When viewed from the perspective of an Indian nation's own laws, it is possible that the review of an [*1624] Indian law question might generate two entirely different answers - an Indigenous law answer as well as an American law answer. When this happens, what can be done to resolve the conflict of legal and ethical responsibilities?

A. Resolving the Legal Conflict

A conflict between Indigenous and American law reflects, in effect, a conflict between sovereigns. The twist in this conflict is that the United States views its law as being paramount over the Indian nations. The Plenary Power Doctrine contains no exceptions to the general supremacy of American law for occasions when American law conflicts with Indigenous law or Indian treaties. Indeed, suppressing the applicability of these conflicting laws and treaties is precisely the reason why the Plenary Power Doctrine was developed in the first place. The implication, then, is that failing to uphold the supremacy of American law in the face of a conflict with Indigenous law or and Indian treaty constitutes a refusal to uphold the American Constitution. This is obviously a situation that lawyers sworn to uphold American law generally like to avoid. There are two possible solutions to this dilemma.

1. Option One

One option is that the lawyer could ignore the conflicting American law and simply proceed to uphold the applicable Indigenous law. This is less cavalier than it sounds. As a matter of American constitutional law, the Supremacy Clause does not apply to the Indian nations; n123 therefore, the conflicting American law is without legitimate application. Accordingly, a lawyer declining to apply conflicting American law is, in effect, actually taking a position that upholds the integrity of the U.S. Constitution and the Indian Commerce Clause. Such an approach is very much like that taken by advocates for the preservation of state's rights, who invoke alternative legal defenses such as sovereign immunity to thwart the application of federal law against the states. n124 Nonetheless, while there is a principled basis for taking this position, and it has a certain legalistic logic to it, it is clearly at odds with the way the Supreme Court views the significance of its Indian Commerce Clause precedent. The consequences of taking such a position will be discussed below.

[*1625]

2. Option Two

Alternatively, an American lawyer in such a situation could opt to conduct a dual analysis of the legal issue involved so as to preserve the choice of law issue for the political officials of the Indian nation. As will be discussed below, the political officials of the nation, not its lawyers and judges, are the ones who should be making the decision whether to adhere to otherwise inapplicable American law. Lawyers, assuming that the conflict of law is properly identified, should restrict their role to addressing Indian law questions from both the American and Indigenous law perspectives. Judges

called upon to decide such a case should do the same and analyze the legal question presented from both the American and Indigenous law perspectives. Doing so would thus result in a judicial opinion in which there are two separate and distinct holdings.

A similar approach could be taken by lawyers providing advice to executive or legislative officials, and even by academics studying Indian law issues. Careful review of Indian law questions requires a determination of the applicability of tribal, federal, and maybe even state laws at issue. Under the traditional approach, Indigenous law issues are viewed against the backdrop of whether there exists any American law that trumps the tribal law and thus provides the definitive answer. Adopting a dual-analysis approach preserves for the Indian nation the possibility that its own laws can be enforced in the face of conflicting American law.

Given the potentially competing sovereign prerogatives at stake, the best actors to resolve this conflict are the political officials of the Indian nation and not the lawyers and judges who might be dealing with the issue in the first instance. It is the duly appointed or elected political officials of an Indian nation that are the rightful guardians of the sovereignty of the people and their right of self-determination. The lawyers and judges practicing in Indian nations may simply be appointees, employees, independent contractors or, worse, adversaries. Moreover, most of these lawyers and judges are non-Indians or Indians who are citizens of other nations. As such they have even less credibility to take policy positions with respect to the sovereign rights of the Indian nation than the political officials of that nation. Accordingly, important questions relating to the application of American law should be referred to them for resolution. n125

How would a dual analysis approach work? At first glance, such an approach might seem highly unworkable. With no clarity resulting from the judicial decision, chaos could reign. Parties to civil litigation would have potentially conflicting rulings and no guidance as to who is actually the [*1626] prevailing party. In the criminal context, this could be even more disruptive as there might be confusion over a defendant's guilt or innocence. It is hard to deny that competing verdicts have the potential to generate quite a considerable legal and political mess.

However, the primary impact of a dual analysis approach is to place whatever chaos might be generated by such a decision squarely in the lap of the tribal political officials. Ordinarily this responsibility would rest with the nation's executive officials who carry the general responsibility for enforcing laws and court decisions. It would be they who would then have to decide what to do with competing legal opinions, court orders, or verdicts. To the extent that this state of affairs requires negotiation and settlement of the applicability of the Indian nation's laws with American officials, this is a function best left to the nation's political officials, not to its judges or lawyers. n126

Requiring tribal political officials to act in such situations raises the possibility that the confusion associated with generating competing legal interpretations is compounded by the enhanced politicization of the Indigenous legal system. From a legitimacy perspective, it makes sense that the peoples' representatives decide which law is applicable. But from a justice perspective, it rarely makes sense to leave politicians in charge of making legal determinations. This is the consequence of a dual analysis approach. It is entirely possible that a tribal politician may make the decision not on the merits, but on the politics of the situation. One can easily imagine a tribal politician deciding that American law should prevail over his own nation's law and thus sacrificing his own nation's sovereignty to effectuate a personal political agenda.

While to some injecting this aspect of democracy into the legal calculus may reek of contamination to the Indigenous legal system, the alternative is far worse. Decisions to comply with the laws of the colonizing nation are huge, significant decisions in the lives of Indigenous peoples. Yes, there is a disturbing due process problem associated with leaving what appear to be purely legal decisions to political officials. But these decisions only appear to be legal. They are, in substance, incredibly important matters of policy that should not lie in the hands of the lawyers and judges who are the mere agents or employees of the nation. It is entirely possible that these decisions, [*1627] if left in the hands of Indigenous political officials, will be made on the basis of short-term political expediency rather than the long-term interests of the nation. But that, after all, is a consequence of self-government.

Given an acceptance of the dual-analysis approach, an Indian nation could take steps to protect itself from short-sighted self-interested leadership. It is possible to imagine legislation enacted that would dictate what, exactly, is to happen when the tribal executive official is confronted with the choice to accept or reject the application of American law to his nation. Or, such legislation could serve as a set of guidelines - much like sentencing guidelines - that provide parameters to support the exercise of executive discretion in these situations. In short, once the conflicts inherent between Indigenous and American law are identified and incorporated into reality, it makes sense that a new process for minimizing errors in execution must then be developed to safeguard the long-term interests of the Indigenous people and their sovereignty.

B. A Hypothetical Example

The following hypothetical demonstrates how a dual analysis approach might work. It also highlights the consequences of pursuing Option 1 (directly neutralizing the application of American law). Assume that an Indian nation is continually frustrated by its inability to obtain proper redress for acts of domestic violence committed against its female resident citizens. Because of the Oliphant decision, the nation is barred from taking action against the non-Indian spouses and partners of these women. n127 Further assume that federal prosecutors, who generally have jurisdiction over such offenses, have concentrated their efforts on handling the statutorily defined "major" crimes, n128 and thus do not have adequate resources to prosecute "non-major" domestic violence. The tribal council, in its frustration, responds by amending its criminal code to expressly allow the tribal police to arrest non-Indians for committing acts of domestic violence against its female resident citizens.

If a non-Indian is arrested, prosecuted, and sent to tribal jail under such a law, he would have a right to petition the federal district court for a writ of habeas corpus seeking his release. n129 On the basis of Oliphant, the federal district judge asked to issue an order directing tribal officials to release the defendant will have no problem doing so. At that point, the attorney advising the tribal executive official in charge of the tribal jail will be asked to give an opinion as to what to do next. Simply deferring to the federal judge's order will uphold Oliphant at the expense of the Indian nation's own [*1628] duly enacted law and policy designed to curb domestic violence. What should the lawyer advise?

If the lawyer advises the tribal executive official that tribal law says it is permissible to jail the non-Indian offender, but that American law says it is not permissible, then the lawyer has done her job. It is not for the lawyer in that instance to tell the tribal officials which law should prevail. She might then tell them that American law does not recognize that tribal law could supersede Oliphant, but that there is also nothing in tribal law that allows Oliphant to supersede tribal law.

She might also inform the tribal executive official of the potential consequences of the executive deciding to enforce his nation's own law in the face of this conflict. This is not to say that lawyers should aid the client in its efforts to, in effect, violate American law. Doing so would clearly be a violation of any obligation to uphold and defend such law. But to the extent the client embarks upon a course of conduct that anticipates this result, it would be within the lawyer's professional responsibility to advise the client of the consequences of such action. Moreover, the lawyer could also advise the client that she would be available to assist the client in remedying these consequences should a decision to proceed be made.

At the time that consultation is taking place, federal marshals might be on their way to the reservation to release the non-Indian from the tribal jail and the Indian nation's chief of police may be calling the tribal executive for guidance on what to do next. Well, at that point, the tribal executive and his nation are at the crossroads of their future. What he does next might affect the sovereignty of his nation and the self-determination of his people for generations to come. At that moment, the future is now.

These kinds of moments are the foundation of genuine self-determination. Lawyers, judges, and scholars who deal with Indian law issues should struggle to preserve these moments for the Indians they represent, preside over, and write about so that they can be used as opportunities for growth along the path of self-determination. If these growth moments are paved over by American law on the advice of the lawyer, or resolved by the unelected tribal judge, or eliminated by the legal scholar who writes that Indian nations are subordinate to the United States, then the lawyer, judge, and legal scholar have done a great disservice to Indian people and Indian nation sovereignty.

It should be kept in mind that a dual-analysis approach is only relevant in those situations in which there is either silence or an express prohibition in Indigenous law or Indian treaty regarding the application of American law to an Indigenous nation. Where there is a conflict, it is inevitable that some chaos - at least initially - will result. But the most important reason for engaging in this kind of analysis is to give proper deference and respect to the laws and sovereignty of the Indian nations as well as to the United States. Unless expressly accepted by an Indian nation [*1629] by treaty or statute, the Plenary Power Doctrine and related judicial doctrines designed to promote American governmental power over the Indian nations have no foundation in Indigenous law and thus no application to Indian nations. They thus cannot serve to bind the Indian nation as a matter of its own law. To simply gloss over this issue is to wholly subordinate the Indian nation to the United States in contravention of its own law.

This is not something that lawyers, tribal judges, or Indian law scholars should be doing. Instead, they should be struggling to find ways to uphold the Indian nation's law even in the face of conflict with American law. This is not just the legally appropriate course of action; it is also what is ethically required.

C. Resolving the Ethical Conflict

Lawyers and judges who practice Indian law within Indigenous territories inevitably confront ethical conflicts associated with their dual obligations to both the Indigenous and American legal systems. Since these tribal practitioners are quite often attorneys licensed to practice in one or more American states, n130 they have taken an oath to uphold the constitution and laws of the state and federal governments. n131 As tribal practitioners, however, they may have also taken an oath to uphold the constitution and laws of the Indian nation in which they practice. As a result of these competing obligations of loyalty, tribal lawyers and judges may have conflicting ethical responsibilities when the laws of the Indian nation and the United States diverge.

For purposes of analyzing the impact of this potential conflict, it is necessary to explore what might be the consequences for a state-licensed attorney if he were to fail to uphold the tribal law when practicing within the Indian nation as required by his oath to do so. To the extent that officials within the Indian nation perceive the breach of loyalty, it is certainly possible that the Indian nation (or the tribal court of that nation) may decide to render its own sanction. But it is also the case that a lawyer in such a situation potentially runs afoul of the ethical demands of the state in which he is licensed. Since codes of ethical and professional behavior vary by state, [*1630] an analysis drawn from the American Bar Association Model Rules of Professional Conduct (Model Rules) will be used to illustrate the potential problem.

As a general matter, the rules and canons governing lawyers and judges require utilization of the law applicable in the jurisdiction, or at the least, disclosure of the choice of law problem to the client or parties. The Model Rules provide that a "lawyer shall not knowingly ... make a false statement of material fact or law to a tribunal." n132 The comments to this rule expand upon the obligation of the lawyer in the regard that "legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities." n133

What this rule suggests is that it is unethical for an attorney practicing within a tribal court to not disclose to the court that American law may not be applicable as a matter of tribal law. To simply conclude that American law trumps inconsistent tribal law is to mislead the court into believing that the law of the Indian nation itself is irrelevant. This would obviously not be the case and would put the attorney at risk of noncompliance with this ethical rule.

A similar ethical standard exists within the ABA Model Code of Professional Responsibility, which provides that "in his representation of a client, a lawyer shall not ... knowingly make a false statement of law or fact." n134 Such a requirement is consistent with the law governing lawyers throughout the United States. n135 Moreover, the ABA Code of Judicial Conduct requires that a "judge shall be faithful to the law and maintain professional competence in it." n136

While these standards do not provide explicit guidance in dealing with a conflict between American and Indigenous law, they do stand for the ethical proposition that tribal lawyers and judges cannot simply ignore the conflict. Perhaps the most important ethical canon of all is the obligation for the lawyer to zealously represent his or her client. n137 Simply ignoring an Indigenous nation's law on the basis of an internalized bias in favor of upholding American law constitutes a serious ethical lapse. At best, this lapse constitutes a breach of the oath sworn to uphold that Indian nation's laws. [*1631] At worst, it contributes to the subordination of the Indian nation to the United States and an erosion of its inherent sovereignty.

Conclusion

The purpose of this Article has been to expose the conflict of law inherent in any situation in which the law or treaty of an Indian nation does not expressly provide that American law should apply within its territory. Admittedly, this might seem to be an archaic problem better suited to a time when the Indigenous nations and the United States were more obviously foreign to one another in territory, law, and culture. But the fact that American law has become increasingly applicable within Indian country has at least as much to do with the lawyers, judges, and scholars who deal with Indian law issues as it does with the U.S. Supreme Court.

As Wilma Mankiller, former Principal Chief of the Cherokee Nation, reminds us, it is these individuals, not the justices, who are the ones who have been "bringing the law" to the Indians as of late:

The tribe that I worked for in the late 1960s took the position that they did not need federal recognition because they did not recognize the United States. They were part of the international community of governments. Therefore, many of us

were surprised when various Indian lawyers initiated litigation conceding that the U.S. Congress had plenary power over Indian nations. Now, unfortunately, the notion that Congress has plenary power over tribes is accepted as conventional wisdom. n138

Given their training in American law schools, lawyers and judges working for Indian nations and the scholars who write about them possess a mind set that makes it very difficult for them to see the autonomous integrity of Indigenous jurisprudence. The cost of being blind to this perspective comes at the direct expense of Indigenous peoples and their ability to self-determine. Might there be greater costs associated with preserving the conflict between Indigenous and American law? Certainly; n139 but my goal in this Article is to help lawyers, judges, fellow scholars, and other students of Indian law see this problem for perhaps the first time and to pursue a remedial course that more properly respects the law and sovereignty of the Indigenous nations. That remedial course means preserving for Indigenous peoples the right to decide for themselves such things as the applicability of American law to their lives.

FOOTNOTES:

n1. See *United States v. Lara, 124 S. Ct. 1628, 1636 (2004)* (stating that "the Constitution does not dictate the metes and bounds of tribal autonomy"); *United States v. Wheeler, 435 U.S. 313, 326-27 (1978)* (concluding that the Double Jeopardy Clause of the U.S. Constitution is inapplicable due to the inherent sovereignty of Indian nations); *Talton v. Mayes, 163 U.S. 376, 381-82 (1896)* (concluding that the jury trial provisions of the Fifth Amendment to the U.S. Constitution are inapplicable due to the inherent sovereignty of Indian nations).

n2. See, e.g., Brief of Respondents the Tribal Court in and for the Fallon Paiute-Shoshone Tribes and the Honorable Joseph Van Walraven in *Response to Brief for Petitioners at 7-8, Nevada v. Hicks, 533 U.S. 353 (2001)* (No. 99-1994) (stating that Indian tribes "retain all sovereign powers which have not been taken away from them by the Federal Government."); *Brief for Respondents at 9, Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001)* (No. 00-454) ("The power to tax is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status."); *Brief of Petitioners at 8, Strate v. A-1 Contractors, 520 U.S. 438 (1997)* (No. 95-1872) ("The fundamental principle of federal Indian law is that the sovereignty of Indian tribes is inherent and exists unless and until it has been divested by Congress.").

n3. See, e.g., Timothy W. Joranko, Exhaustion of Tribal Court Remedies in the Lower Courts After National Farmers Union and Iowa Mutual: Toward a Consistent Treatment of Tribal Courts by the Federal Judicial System, *78 Minn. L. Rev. 259, 263 (1993)* ("The Supreme Court developed the "plenary power' doctrine, which vests Congress with virtually unlimited authority to legislate concerning Indian affairs."); Nell Jessup Newton, Federal Power Over Indians: Its Sources, Scope, and Limitations, *132 U. Pa. L. Rev. 195, 197 (1984)* ("Indian tribes are subject to the ultimate sovereignty of the federal government: they govern within the territorial borders of the United States, and their members are United States citizens."). See generally Robert Laurence, Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams' Algebra, *30 Ariz. L. Rev. 413 (1988).*

n4. See, e.g., National Congress of American Indians (NCAI), Resolution No. ABQ-03-130, at 2 (2003) ("Be it further resolved, that Congress must honor and uphold the trust relationship, tribal sovereignty, and the letter of the law as contained in the hundreds of treaties [with Indian nations]."), available at http://www.ncai.org/data/docs/resolution/annual2003/03-130.pdf (on file with the Iowa Law Review); Maui Loa, U.S. Senate Bill S.344 Could Jeopardize All Indigenous Peoples' Rights, Indian Country Today, Feb. 21, 2003 (arguing that S.344 would give new rights over Indians to the states), http://www.indiancountry.com/?1045839479 (on file with the Iowa Law Review); Tribal Leaders Share Views on Threats to Sovereignty, Indianz.Com, Jan. 20, 2004 ("Marc Macarro, chairman of the Pechanga Band of Luiseno Indians, called the Supreme Court "hands down' the single biggest threat, pointing to recent decisions, including some that originated in the state, that have chipped away at tribal sovereignty."), at http://www.indianz.com/News/archives/003312.asp (on file with the Iowa Law Review).

n5. For the benefit of the mildly shocked, I use the term Indian as well as Indigenous to describe the first peoples of what is now called America, rather than the increasingly conventional term Native American. I do so because: (1) the term Native American is a colonialist term reflecting and promoting the incorporation of Indigenous peoples into the American polity; (2) the origins of the term Indian are unclear and reflect either Columbus's mistaken belief that he arrived in India or is a derivation of the Spanish term en dios, meaning in god; and (3) regardless of its origins, in my personal experience the term Indian is used widely by Indians to describe themselves as part of a broader population when they are not using a term from their own language (e.g., Ongwehoweh, the Seneca term for "the real people") or the English equivalent.

n6. See *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 787 n.30 (1984)* ("All aspects of Indian sovereignty are subject to defeasance by Congress."); *Rice v. Rehner, 463 U.S. 713, 719 (1983)* ("It must be remembered that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the states'" (quoting *Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980))); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)* (stating all "aspects of tribal sovereignty ... [are] subject to the superior and plenary control of Congress"); *United States v. Wheeler, 435 U.S. 313, 319 (1978)* (stating it is an "undisputed fact that Congress has plenary authority to legislate for Indian tribes in all matters"); *Santa Ynez Band of Mission Indians v. Torres, 262 F. Supp. 2d 1038, 1042 (C.D. Cal. 2002)* ("The Tribe's inherent powers must necessarily arise under federal law, since federal law defines the outer boundaries of an Indian tribe's power over non-Indians.").

n7. See U.S. Const. art. I, 2, cl. 3 (regarding Indians "not taxed" for apportionment purposes); id. 8, cl. 3 (regarding the authority of Congress to regulate commerce with the "Indian tribes"); id. amend. XIV, 2 (reiterating the exclusion of Indians "not taxed").

n8. See *United States v. Lara, 124 S. Ct. 1628, 1633 (2004)* ("The Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as "plenary and exclusive.'"); *Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903)* ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."); see also Felix S. Cohen, Felix S. Cohen's Handbook of Federal Indian Law 207 (1982 ed.) ("The federal-tribal relationship is premised upon broad but not unlimited power over Indian affairs, often described as "plenary.'"). But see *Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84 (1977)* (stating that plenary power "does not mean that all federal legislation concerning Indians is ... immune from judicial scrutiny").

n9. See Judith Resnik, Dependent Sovereigns: Indian Tribes, States, and the Federal Courts, *56 U. Chi. L. Rev. 671, 695-96 (1989)* ("It is difficult to "interpret' the Constitution in a manner that supports the proposition that the Congress has "plenary' control over intra-Indian tribe activities... . Instead of the expected (if complex) references to consent and to a federal government of limited powers, other often unspoken rationales - conquest, violence, force - are the primary sources of the power exercised by the federal government over Indian tribes.").

n10. See Philip P. Frickey, Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law, *110 Harv. L. Rev. 1754, 1754 (1997).* Frickey states:

More than any other field of public law, federal Indian law is characterized by doctrinal incoherence and doleful incidents. Its principles aggregate into competing clusters of inconsistent norms, and its practical effect has been to legitimate the colonization of this continent - the displacement of its native peoples - by the descendants of Europeans.

Id.

n11. See generally Means v. Dist. Court of the Chinle Judicial Dist., 26 Indian L. Rptr. 6083 (Navajo 1999) (upholding the authority of the Navajo Nation to exercise criminal jurisdiction over a non-member Indian on the basis of the Nation's own traditional customary law and treaties with the United States, as well as relevant Federal common law).

n12. See generally Vintage Petroleum, Inc. v. Tax Comm'n of the Kickapoo Tribe, 6 Okla. Trib. 125 (Kickapoo 1999) (analyzing the scope of the Kickapoo Tribe's tax authority exclusively on the basis of what Federal common law allows).

n13. See Steven Tullberg & Robert Coulter, The Failure of Indian Rights Advocacy: Are Lawyers to Blame?, in Rethinking Indian Law 51 (National Lawyers Guild ed., 1982). Tullberg and Coulter state:

A review of some of the transcripts of oral arguments made before the Supreme Court in Indian rights cases decided during the past few years shows that lawyers representing Indians have time and again given away at least half of the legal battle and have actively favored a "hand-out" theory of Indian sovereignty which helps erode Indian rights. In short, lawyers who are supposed to be representing the Indian position have repeatedly conceded that the United States government has virtually unchecked political power over Indians, Indian governments and Indian property.

Id.

n14. The companion inquiry to the question presented in this Article - whether American law applies to the Indian nations as a matter of federal, rather than tribal, law - has recently been analyzed by Professor Robert Clinton. See Robert N. Clinton, There Is No Supremacy Clause for Indian Tribes, *34 Ariz. St. L.J. 113 (2002).* He concludes that

there is no acceptable, historically-derived, textual constitutional explanation for the exercise of any federal authority over Indian tribes without their consent manifested through treaty. Reduced to its starkest statement, this thesis means that, unlike the legal primacy the federal government enjoys over states by virtue of the Supremacy Clause of the United States, the federal government has no legitimate claim to legal supremacy over Indian tribes. Consequently, neither Congress nor the federal courts legitimately can unilaterally adopt binding legal principles for the tribes without their consent.

Id. at 115-16.

n15. See generally Early American Indian Documents, Treaties and Laws (Alden T. Vaughn, gen. ed.).

n16. See Vine Deloria, Jr. & Raymond J. Demallie, Documents of American Diplomacy: Treaties, Agreements, and Conventions, 1775-1979 (1999).

n17. See Act of Mar. 3, 1871, ch. 120, 1, 16 Stat. 544, 566 (codified as amended at *25 U.S.C. 71* (2000)) ("Hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation ... with whom the United States may contract by treaty.").

n18. See Treaty Between the United States and the Wyandot, Delaware, Chippawa, and Ottawa Nations, Jan. 21, 1785, art. III, 7 Stat. 16, 17. The treaty states:

The boundary line between the United States and the Wiandot and Delaware nations, shall begin at the mouth of the river Cayahoga, and run thence up the said river to the portage between that and the Tuscarawas branch of Meskingum; then down the said branch to the forks at the crossing place above Fort Lawrence; then westerly to the portage of the Big Miami, which runs into the Ohio, at the mouth of which branch the fort stood which was taken by the French in one thousand seven hundred and fifty two; then along the said portage to the Great Miami or Ome river, and down the southeast side of the same to its mouth; thence along the south shore of lake Erie, to the mouth of Cayahoga where it began.

Id.

n19. See Treaty Between the United States and the Creek Nation, Aug. 7, 1790, art. XII, 7 Stat. 35, 37 ("That the Creek nation may be led to a greater degree of civilization, and to become herdsmen and cultivators, instead of remaining in a state of hunters, the United States will from time to time furnish gratuitously the said nation with useful domestic animals and implements of husbandry.").

n20. See Treaty Between the United States and the Delaware Nation, Sept. 17, 1778, art. II, 7 Stat. 13, 13. The treaty states:

That a perpetual peace and friendship shall from henceforth take place, and subsist between the contracting parties aforesaid, through all succeeding generations: and if either of the parties are engaged in a just and necessary war with any other nation or nations, that then each shall assist the other in due proportion to their abilities, till their enemies are brought to reasonable terms of accommodation: and that if either of them shall discover any hostile designs forming against the other, they shall give the earliest notice thereof, that timeous measures may be taken to prevent their ill effect.

Id.

n21. See discussion relating to the Montevideo Convention infra Part I.C.

n22. One prominent example involved the case of the Mohegan Indians against the colony of Connecticut, which was pending for seventy years. See Joseph Henry Smith, Appeals to the Privy Council from the American Plantations 442 (1965) ("This case affords an extreme example of the difficulties faced in enforcing an unpopular adjudication against a colony enjoying quasi-sovereignty. Yet the cause is distinguishable in its difficulties in that one party, the Mohegans, although jurisdically [sic] regarded as sovereign, did not enjoy de facto sovereignty."); see also *25 U.S.C. 71* (2000).

n23. See *Worcester v. Georgia, 31 U.S. 515, 559-60 (1832)*, where the Court opined that:

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

them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

Id.

n24. See *id. at 548-49.* The Court stated:

Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted: she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.

Id.

n25. See *id. at 549.* The Court further stated:

The colonists had much cause for the apprehension that the Indian nations would, as the allies of Great Britain, add their arms to hers. This, as was to be expected, became an object of great solicitude to congress. Far from advancing a claim to their lands, or asserting any right of dominion over them, congress resolved "that the securing and preserving the friendship of the Indian nations appears to be a subject of the utmost moment to these colonies."

Id.

n26. Robert B. Porter, A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law, *31 U. Mich. J.L. Reform 899, 923-25 (1998).*

n27. *Id. at 923-26.*

n28. *30 U.S. (5 Pet.) 1 (1831).*

n29. *Id. at 17.*

n30. *Id. at 16-17.*

n31. See *United States v. Mazurie, 419 U.S. 544, 557 (1975)* ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory ... . [They] are a good deal more than "private, voluntary organizations ... ."'). Despite this long-held policy of recognition, the United States has, in its history, periodically denied this recognition. Foremost, this occurred pursuant to the course of implementing the termination policy in the mid-twentieth century.

n32. Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 3100, 165 L.N.T.S. 19, 25 [hereinafter Montevideo Convention] (signed at Montevideo). Bolivia alone amongst the states represented at the Seventh International Conference of American States did not sign the Convention. See id. at 3102-03 (no signature from Bolivia). The United States, Peru, and Brazil ratified the Convention with

reservations directly attached to the document. Id. at 3101-02. Such reservations did not implicate the rights of Indigenous peoples.

n33. Robert B. Porter, Strengthening Tribal Sovereignty Through Government Reform: What Are the Issues?, *7 Kan. J.L. & Pub. Pol'y 72, 74-75 (1998).*

n34. *Id. at 75-76.*

n35. See Porter, supra note 26, at 969-74 (discussing the reform effort that led to the Indians implementing a self-governance project).

n36. See *Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17-18 (1831)* (finding that since Indian tribes are "completely under the sovereignty and dominion of the United States, ... any attempt [by foreign nations] to acquire their lands, or to form a political connexion [sic] with them, would be considered by all as an invasion of our territory, and an act of hostility").

n37. See *Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 191 (1978).*

n38. See *Strate v. A-1 Contractors, 520 U.S. 438, 439 (1997)* (denying tribal courts civil adjudicatory authority in cases arising within tribal territory but involving only non-Indians).

n39. Montevideo Convention, supra note 32, art. 3, 49 Stat. at 3100, 165 L.N.T.S. at 25.

n40. See generally Franke Wilmer, Domination and Resistance, Exclusion and Inclusion: Indigenous Peoples' Quest for Peace and Justice, 3 Peace & Conflict Stud. 3 (June 1996), at http://www.gmu.edu/academic/pcs/wilmer.htm.

n41. See generally James Crawford, The Creation of States in International Law (1979).

n42. *United States v. Wheeler, 435 U.S. 313, 323 (1978).*

n43. See Russel Lawrence Barsh, Putting the Tribe in Tribal Courts: Possible? Desirable?, *8 Kan. J.L. & Pub. Pol'y 74, 74 (1999)* ("American Indian tribal courts evolved from police courts instituted in the 1880s by the superintendents of Indian reservations to help pacify tribes and promote "civilized' values."). The federal government has also created courts for application within Indian territories. See Gloria Valencia-Weber, Tribal Courts: Custom and Innovative Law, *24 N.M. L. Rev. 225, 234 (1994).* Weber states:

Usually judicial authority is asserted by two types of tribally initiated courts: the courts of Indian offenses and specific tribal courts. The Bureau of Indian Affairs (BIA), through the authority of the Department of the Interior, organizes the court of Indian offenses. Tribal governments, pursuant to their inherent sovereignty, establish and control specific tribal courts. The tribally authorized courts have civil and limited criminal jurisdiction over lands designated as "Indian Country."

Id.

n44. See Robert B. Porter, Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies, *28 Colum. Hum. Rts. L. Rev. 235, 251-59 (1997)* (discussing the peacemaking method of dispute resolution).

n45. See Elizabeth E. Joh, Custom, Tribal Court Practice, and Popular Justice, *25 Am. Indian L. Rev. 117, 117 (2001).* Joh states:

Tribal courts in the United States have undergone dramatic changes in the past forty years. Encouraged both by recent federal Indian policy and by a burgeoning sovereignty movement, tribal courts in Indian country are no longer the conscious instruments of assimilation and external control that they were in the nineteenth century. While there is wide agreement that they have changed, what modern tribal courts do represent, however, is open to debate.

Id.

n46. See *Atkinson Trading Co. v. Shirley, 532 U.S. 647, 674 (2001)* (rejecting an effort by the Navajo Nation to impose a hotel occupancy tax on a non-Indian doing business on allotted fee land within Navajo territory).

n47. See Joseph W. Singer, Publicity Rights and the Conflict of Laws: Tribal Court Jurisdiction in the Crazy Horse Case, *41 S.D. L. Rev. 1, 2 (1996)* (discussing how the tribal court must determine whether it has legislative jurisdiction over the matter before proceeding).

n48. See *Wilson v. Marchington, 127 F.3d 805, 805 (9th Cir. 1997)* (seeking review of a trial court judgment).

n49. Id.

n50. *United States v. Montana, 450 U.S. 544, 565-66 (1981).*

n51. *Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997).*

n52. *Nevada v. Hicks, 533 U.S. 353, 374-75 (2001).*

n53. See, e.g., L. Scott Gould, The Consent Paradigm: Tribal Sovereignty at the Millennium, *96 Colum. L. Rev. 809, 814 (1996)* ("The Court has fashioned a crabbed version of sovereignty based upon consent. With very few exceptions, inherent powers now extend to only tribal members - those who expressly or implicitly consent to membership - and to nonmembers who enter consensual relationships with tribes.").

n54. See *Hicks, 533 U.S. at 359 n.3* (recognizing that Indian nations have authority to exercise civil adjudicatory authority when a non-member enters a consensual relationship with the tribe).

n55. See *Restatement (Second) of Conflicts of Law 6(1)* (1971) ("A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.").

n56. See Robert D. Cooter & Wolfgang Fikentscher, The Role of Custom in American Indian Tribal Courts (Part I), *46 Am. J. Comp. L. 287, 295-96 (1998)* (discussing the power Indian tribes have to govern themselves).

n57. See id.; Robert D. Cooter & Wolfgang Fikentscher, The Role of Custom in American Indian Tribal Courts (Part II), *46 Am. J. Comp. L. 509, 562 (1998)* ("Indian common law mostly develops orally ... .").

n58. See Nell J. Newton, Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts, *22 Am. Indian L. Rev. 285, 299-300 (1998)* (analyzing the choice of law in tribal courts).

n59. See, for example, Treaty with the Navajos, Sept. 9, 1849, art. III, 9 Stat. 974, 974, which states:

It is agreed that the laws [of the United States] now in force regulating the trade and intercourse, and for the preservation of peace with the various tribes of Indians under the protection and guardianship of the aforesaid Government, shall have the same force and efficiency, and shall be as binding and as obligatory upon the said Navajoes, and executed in the same manner, as if said laws had been passed for their sole benefit and protection ... .

Id. See also Treaty with the Creek Indians, Jun. 14, 1866, art. X, 14 Stat. 785, 789 ("No law shall be enacted inconsistent with the Constitution of the United States, or the laws of Congress, or existing treaty stipulations with the United States, nor shall said council legislate upon matters pertaining to the organization, laws, or customs of the several tribes, except as herein provided for.").

n60. See the Wampanoag Tribal Council of Gay Head, Inc., Indian Land Claims Settlement Act of 1987, Pub. L. No. 100-95, 7(a), 101 Stat. 704, 707 (codified as amended at *25 U.S.C. 1771e* (2000)), which states:

The Wampanoag Tribal Council of Gay Head, Inc., shall not have any jurisdiction over nontribal members and shall not exercise any jurisdiction over any part of the settlement lands in contravention of this subchapter, the civil regulatory and criminal laws of the Commonwealth of Massachusetts, the town of Gay Head, Massachusetts, and applicable Federal laws.

Id. See also the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116, 15(c), 107 Stat. 1118, 1137 (codified at *25 U.S.C. 941m* (2000)), which states:

The provisions of any Federal law enacted after October 27, 1993, for the benefit of Indians, Indian nations, tribes, or bands of Indians, which would affect or preempt the application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the South Carolina State Implementing Act, shall not apply within the State of South Carolina, unless such provision of such subsequently enacted Federal law is specifcally [sic] made applicable within the State of South Carolina.

Id.

n61. See Model Compact of Self-Governance Between the Tribe and the Department of the Interior, 25 C.F.R. 1000, App. A (2003) ("The Tribe shall abide by all Federal regulations as published in the Federal Register unless waived in accordance with Section 403(i)(2) of Pub. L. 93-638, as amended.").

n62. Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at *25 U.S.C. 450a*-450n and throughout titles 5, 25, 42, and 50).

n63. Pub. L. No. 103-413, 108 Stat. 4250 (codified as amended at *25 U.S.C. 450*-458hh).

n64. See generally 25 U.S.C. (2000).

n65. See id. 2 ("The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.").

n66. *18 U.S.C. 1153* (2000).

n67. *25 U.S.C. 1301*-1303 (2000).

n68. Id. 2701-2721.

n69. See, e.g., id. 171-202 (protection of Indians); id. 271-304b (education of Indians); id. 1901-1903 (Indian child welfare); id. 3501-3506 (Indian energy resources); id. 3901-3908 (Indian lands open dump cleanup); id. 4001-4061 (American Indian trust funds management reform).

n70. See, e.g., *Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 118 (1960)* (upholding application of the Federal Power Act to reservation land).

n71. See, e.g., *United States v. Dion, 476 U.S. 734, 745 (1986)* (upholding application of the Bald Eagle Protection Act and the Endangered Species Act to a Yankton Sioux Indian taking bald eagles for ceremonial purposes).

n72. *471 U.S. 845, 852 (1985)* ("Whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is [a question] that must be answered by reference to federal law and is a "federal question' under [28 U.S.C.] 1331.").

n73. See *Texaco, Inc. v. Hale, 81 F.3d 934, 936 (10th Cir. 1996)* (applying the exhaustion rule to require a non-Indian oil company to exhaust tribal court remedies).

n74. See *Atkinson Trading Co. v. Shirley, 532 U.S. 645, 647 (2001)* (holding that a Indian tribe does not have the authority "to tax nonmember activity occurring on non-Indian fee land").

n75. See *Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987)* ("Unless a federal court determines that a Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues").

n76. See Melissa Koehn, Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts, *29 Ariz. St. L.J. 705, 722-23 (1997).* Koehn states:

As the pace of improvement of tribal courts has accelerated, the Supreme Court has responded by cutting off the routes litigants use to avoid tribal court jurisdiction... . By leaving the door open for federal review of the jurisdictional question, the Supreme Court was able to enhance the authority of tribal courts without causing enormous controversy.

Id.

n77. See Means v. Dist. Court of the Chinle Judicial Dist., 26 Indian L. Rptr. 6083, 6088 (Navajo 1999) ("The Navajo Nation has kept its word to its treaty ally, the United States of America. Accordingly, we call upon the United States of America to support its treaty ally and put to rest the problem of who has the power to deal with crime and social disruption [within the Navajo Nation].").

n78. See Nation Code tit. 7, 204(A) (1985) ("In all cases the Courts of the Navajo Nation shall apply any laws of the United States that may be applicable and any laws or customs of the Navajo Nation not prohibited by applicable federal laws."); id. 204(C) ("Any matters not covered by traditional customs and usages or laws or regulations of the Navajo Nation or by applicable federal laws and regulations, may be decided by the Courts of the Navajo Nation according to the laws of the state in which the matter in dispute may lie.").

n79. See Nash v. Absentee Shawnee Tribe, 5 Okla. Trib. 140, 140 (Absentee Shawnee 1996) (incorporating as tribal law the U.S. Supreme Court decisions that Indian nations are divested of criminal jurisdiction over non-Indians but, due to Congressional acknowledgment, possess criminal jurisdiction over non-member Indians).

n80. See Chamberlain v. Peters, No. 99-CI-771, slip op. 12 (Saginow Chippewa App. Ct., Jan. 5, 2000) ("In addition, the Tribe is presumptively bound by the mandates of the Indian Civil Rights Act of 1968, *25 U.S.C. 1302*(8), in particular, its references to "due process of law' and "equal protection of the laws.'"); Hopi Res. H-12-76 (1996), cited and discussed in Hopi Indian Credit Ass'n v. Thomas, 25 Indian L. Rptr. 6168, 6169 (Hopi App. Ct. 1996) ("Federal law, Arizona state law and the common law are only "persuasive' ... . The only recognized exception to this precedence is when the U.S. Constitution's Supremacy Clause applies.").

n81. See Hopi Tribe v. Mahkewa, 25 Indian L. Rptr. 6144, 6145 (Hopi App. Ct. 1995). The court states:

Under Resolution H-12-76, federal and state law are persuasive, not mandatory, authorities. Section 2(a) directs the Hopi Trial Courts to look to seven listed authorities "in deciding matters of both substance and procedure." The authorities include: (1) the Hopi Constitution and By-laws; (2) Ordinances of the Hopi Tribal Council; (3) Resolutions of the Hopi Tribal Council; (4) the customs, traditions and culture of the Hopi Tribe; (5) federal law; (6) Arizona law; and (7) the common law. The last three authorities are persuasive, not mandatory. The only restriction on the courts' discretion to apply the listed authorities is the Section 2(b) requirement that the courts not recognize federal, state or common law if inconsistent with Hopi law or custom.

Id.

n82. Robert B. Porter, Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples, 5 Yale Hum. Rts. & Dev. L.J. 123, 133 (2002) ("Auto-colonization

is the process by which Indigenous peoples, because of their inability to possess, retain, or maintain memories of the colonization process, actually seek resolutions of their colonization-induced problems in a way that promotes the colonizing nation's agenda rather than remedies its aftereffects.").

n83. Russel Lawrence Barsh & James Youngblood Henderson, The Road: Indian Tribes and Political Liberty 270-82 (1980); Richard A. Monette, A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy, *25 U. Tol. L. Rev. 617, 131-33 (1994).*

n84. Frank R. Pommersheim, Is There a (Little or Not So Little) Crisis Developing in Indian Law: A Brief Essay, *5 U. Pa. J. Const. L. 271, 286 (2003)* ("Treaty federalism concedes the facts of tribal absorption into the national politic and the practical inability to withdraw.").

n85. But see Clinton, supra note 14 (arguing that the federal government has no supremacy over Indian nations as a matter of American law).

n86. See *Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 567-71 (1823)* (discussing the defendant's argument against Indian sovereignty).

n87. See *id. at 562-67* (discussing the plaintiff's argument for Indian sovereignty).

n88. See Lewis Kamb, As Tribes Prosper, They Need Lawyers, Seattle Post-Intelligencer, Oct. 13, 2003, at A1, available at http://seattlepi.nwsource.com/local/143663_lawyers13.html (on file with the Iowa Law Review).

n89. See id. ("More and more frequently, tribes are hiring their own in-house lawyers to handle tribal business dealings, as well as attorneys to prosecute, defend and judge cases in tribal court. Indian lawyers also are winning prominent positions at high-powered law firms and atop government payrolls.").

n90. See Holland & Knight LLP, General Practice Areas: Indian Law, at //www.hklaw.com/Practice/Practice.asp?GeneralPAID=13 (last visited Mar. 15, 2004) (on file with the Iowa Law Review); Dorsey & Whitney LLP, Indian and Gaming, at http://www.dorsey.com/services/service_detail.aspx?page=overview&FlashNavID=services_industries&serviceid=3687003 (last visited Mar. 15, 2004) (on file with the Iowa Law Review).

n91. See Kamb, supra note 88 ("Although the number of Native American lawyers nationwide remains relatively minuscule, practitioners of Indian law are making big strides in professional visibility particularly in the Northwest.").

n92. Kamb further states:

And both Native and non-Native attorneys who practice Indian law are drawing work, as the legal matters of economically burgeoning Indian tribes, bolstered by gaming revenues, have reached from the reservation into mainstream America.

... .

"When I started, most people practicing Indian law were doing it for reasons of social justice," said Seattle attorney John Arum, a non-Native who has been practicing Indian law since 1990. "Now, people are going into it because it's lucrative. Tribes have more money and more demand for lawyers."

Id.

n93. See Porter, supra note 26, at 933-38 (discussing the change from the termination policy to the self-determination policy).

n94. National Tribal Justice Center, BIA Tribal Court Funding, at http://www.tribalresourcecenter.org/resources/funding/fundingdetails.asp?53 (last visited Apr. 7, 2004) (on file with the Iowa Law Review).

n95. See Vine Deloria, Jr. & Clifford M. Lytle, American Indians, American Justice 139-60 (1983).

n96. See Robert B. Porter, The Tribal Law and Governance Conference: A Step Towards the Development of Tribal Law Scholarship, *7 Kan. J.L. & Pub. Pol'y 1, 2 (1997).* Porter states:

The resulting effect ... of sending would-be tribal lawyers and judges to American law school is to train them in a way that ill-equips them for the environment in which they seek to practice. This effect is compounded by the fact that too many law schools and too many lawyers have come to think of "Indian law" as only one thing - federal Indian law... . Simply given the volume of material that lawyers working with Indians must understand about how the federal government views its relationship with the Indian nations, it should be of little surprise that federal Indian law has overshadowed any other conception of what "Indian law" is all about.

Id.

n97. See *Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 567-68 (1823)* (discussing how the Indian nations lose inherent fee title to their own land due to discovery by the colonizing nation).

n98. See *Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66 (1903)* (stating that Congress has plenary authority to enact laws that contradict treaties between the United States and Indian nations when such laws are for the best interest of the Indian nation).

n99. See *United States v. Kagama, 118 U.S. 375, 384 (1886)* (upholding the legality of the Indian Major Crimes Act on the basis of a "duty of protection" derived from the dependent status of the Indians).

n100. See *Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18-19 (1831)* (stating that Indian tribes are not foreign nations because they are not foreign to the United States).

n101. See Tullberg & Coulter, supra note 13, at 53, describing an exchange during oral argument between a U.S. Supreme Court justice and the attorney for the Sioux Nation in *Sioux Nation v. United States, 448 U.S. 371 (1980):*

QUESTION BY THE COURT: Under a treaty a reservation is set up for an Indian tribe and at some time later, the Government, the Congress just says, "Well, we think the reservation is too big. We are going to cut it in half and open the rest up." So it just cuts it in half and redraws the reservation. Now, is that both a breach of the treaty or is it a taking, or both?

ATTORNEY FOR THE SIOUX: It is a breach of the treaty and the United States has the power to breach the treaty.

QUESTION BY THE COURT: That is Lone Wolf.

ATTORNEY FOR THE SIOUX: That is Lone Wolf.

QUESTION BY THE COURT: Right.

ATTORNEY FOR THE SIOUX: Lone Wolf tells us that Congress - if Congress determines that the reservation should be cut in half, Congress can come in and do it; it can do it without the consent of the Indians and it can do it in violation of the treaty. It is also a taking and when Congress does it, it has to pay for it.

Id.

n102. See Justice Talking: Nations Within: The Conflict of Native American Sovereignty (NPR radio broadcast, Sept. 10, 2001) (interviewing Kevin Gover, former Assistant Secretary of the Interior-Indian Affairs). Gover states:

In terms of sovereignty, I understand your point that the federal government claims the authority to define what Indian sovereignty is... . I've had clients ask me, wait, how can they do that? That's not fair. And I say, well very simply because they have the numbers and you don't. And that's in many respects what it [is]. The United States has the power, clearly, to define what tribal authority [is] in this day and age.

Id.; see also Robert B. Porter, The Meaning of Indigenous Nation Sovereignty, *34 Ariz. St. L.J. 75, 90-91 (2002)* (describing an experience in which a tribal official described Indian sovereignty as "quasi-sovereignty" seemingly under the advice of counsel).

n103. See Porter, supra note 102, at 91-100.

n104. See Means v. Dist. Court of the Chinle Judicial Dist., 26 Indian L. Rptr. 6083, 6087 (Navajo 1999) (looking at tribal laws and customs in determining whether a non-Indian was a member of the tribe, which ultimately determined whether the court had jurisdiction over the non-Indian).

n105. See generally Cavenham Forest Indus., Inc. v. Colville Confederated Tribes, 18 Indian L. Rptr. 6037 (Colv. Ct. App. 1991) (upholding the civil regulatory authority of the Confederated Tribes over a non-Indian wood products company doing business within its territory through an extensive analysis of the federal common law purporting to determine the scope of the Tribes' authority).

n106. This discretion is to some extent limited by the issues presented to the court by the parties. If litigants do not raise, for example, the prospect that federal law may be inapplicable, then the court might be pressed to not raise the issue.

n107. See Bolding v. Lujan, 4 Okla. Trib. 239, 247-48 (Sac & Fox 1995). The court states:

The Indian Civil Rights Act purports to make certain of the United States' Constitutional amendments applicable to Indian Tribes. This Court finds that a United States' Constitutional right which does not exist, such as the right to a jury trial for indirect civil contempt, cannot be made applicable to Sac and Fox Nation by the Indian Civil Rights Act. This Court specifically reserves whether and to what extent the United States Constitution is applicable.

Id. at 248.

n108. See Porter, supra note 102, at 96-100 (discussing how professors who write about Indian law have an effect on how lawyers and judges perceive Indian law).

n109. See *United States v. Kagama, 118 U.S. 375, 384-85 (1886).* The Court stated:

The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.

Id. (emphasis added).

n110. Porter, supra note 26, at 963.

n111. See U.S. Dep't of State, Position of the United States on the Draft Declaration on the Rights of Indigenous Peoples (2002) (on file with author).

n112. See *Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 153-54 (1980)* ("This Court has found such a divestiture [of tribal powers] in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations."); *Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17-18 (1831)* (discussing the

reasons why Indian nations cannot enter into treaties with foreign nations - because Indian nations receive the protection of the United States, and foreign nations consider the Indian nations as part of the United States).

n113. This is absolutely true if one sets aside the possibility that the choices now being made are somehow derivative of conditions induced by hundreds of years of European colonization, i.e. such choices are symptomatic of auto-colonization. See Porter, supra note 102, at 108 (discussing the impact of European colonization on Indian nation sovereignty).

n114. See, for example, 24 MLBSA 2007(a) (1994), which states:

In all civil cases the Court of Central Jurisdiction shall apply the written statutory and case law of the Non-Removable Mille Lacs Band of Chippewa Indians. In the event of the lack of written Band law, the Court shall apply any pertinent laws of the United States of America. In the event of the lack of existence of said written law, the Court shall apply any laws of the State of Minnesota that do not conflict with the unwritten customs and traditions of the Band since time immemorial.

Id.

n115. See, for example, Treaty Between the United States and the Six Nations of the Haudenosaunee, Nov. 11, 1794, art. IV, 7 Stat. 44, 45, which states:

The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof.

Id.

n116. See, e.g., Husband v. Wife, No. MPCA-2001-1065, 2003 NAMP 0000002 (Mash. Peq. Ct. App. 2003) (VersusLaw) (incorporating federal and state common law interpretations of full faith and credit and comity to resolve ambiguity in tribal legislative scheme); Seminole Nation Dev. Auth. v. Morris, 7 Okla. Trib. 67 (Muscogee (Cr.) D.Ct. 2000) (incorporating federal common-law definition of a corporation for purposes of assessing membership qualifications in accordance with the Seminole Constitution).

n117. *435 U.S. 191 (1978).* In Oliphant, the Suquamish Tribe sought to exercise criminal jurisdiction over non-Indians who assaulted tribal police officers and resisted arrest. The Supreme Court held that the Tribe did not have such authority because "by submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id. at 210.*

n118. See generally *Dep't of Taxation & Fin. v. Milhelm Attea & Bros., 512 U.S. 61 (1994)* (holding that a state could regulate tax on the sale of cigarettes by an Indian nation to a non-member); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991)* (same); *Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980)* (same); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976)* (same).

n119. See International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 1.1, S. Exec. Doc. D, 95-2, at 23 (1976), 999 U.N.T.S. 172, 173 ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.").

n120. See Porter, supra note 102, at 91-92 (giving an example of an Indian nation that received advice from an American lawyer).

n121. Indian General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at *25 U.S.C. 331*-358 (2000)).

n122. *25 U.S.C. 1601*-1629 (2000).

n123. Clinton, supra note 14, at 115-16.

n124. See generally Daan Braveman, Enforcement of Federal Rights Against States: Alden and Federalism Non-Sense, *49 Am. U. L. Rev. 611 (2000)* (discussing federalism and the judicial enforcement of federal rights).

n125. See Tullberg & Coulter, supra note 13, at 55 ("Whenever Indians insist on their fundamental, sovereign rights, there is a legal, ethical duty which the Indians' lawyers must fulfill by zealously advocating those rights. If compromises must be made, it is the Indians and not the lawyers who are entitled to make them.").

n126. It is in this regard that I disagree with my colleague Frank Pommersheim and those who share his view that the tribal judiciary is the "crucible of sovereignty." See generally Frank R. Pommersheim, The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction, *31 Ariz. L. Rev. 329 (1989).* The true crucible of sovereignty rests with the people themselves and, while not always a perfect reflection of their will, their political representatives. To be sure, tribal courts invariably are called upon to address many important and difficult issues that affect the lives of Indigenous nations and individual Indigenous people. But the big picture issues, such as whether an Indian nation should place itself under American authority, and thus whether or not it retains its sovereign right of self-determination, is the responsibility of the nation's political officials.

n127. *Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211 (1978).*

n128. *18 U.S.C. 1153* (2000) (defining the fourteen Indian "major crimes").

n129. *25 U.S.C. 1303* (2000).

n130. Tribal practitioners include non-lawyers and so-called "lay advocates," who are not law school graduates, but who have been admitted to practice in the courts of a particular Indian nation. Frank R. Pommersheim, Looking Back and Looking Forward: The Promise and Potential of a Sioux Nation Judicial Support Center and Sioux Nation Supreme Court, *34 Ariz. St. L.J. 269, 293 (2002)* ("In addition, most tribes permit "tribal advocates' or "lay advocates' - usually identified as individuals who are tribal members and who possess minimal education requirements (usually a high school diploma) - to practice before tribal courts.").

n131. Some Indian nations require an oath to uphold both tribal and federal law. See, e.g., 2 MLBSA 8 (1996) ("I, (name of officer), do hereby swear that I will support, honor and protect the Constitution of the Minnesota Chippewa Tribe, the Constitution of the United States of America, and the laws of the Non-Removable Mille Lacs Band of Chippewa Indians ... .").

n132. Model Rules of Prof'l Conduct R. 3.3 (2004).

n133. Id. cmt. 4.

n134. Model Code of Prof'l Responsibility DR 7-102(A)(5) (1969).

n135. See *Restatement (Third) of the Law Governing Lawyers 111(A)* (2000) ("In representing a client in a matter before a tribunal, a lawyer may not knowingly ... make a false statement of a material proposition of law to the tribunal ... .").

n136. Model Code of Judicial Conduct Canon 3 (1990).

n137. See Model Rules of Prof'l Conduct R. 1.3 cmt 1 (2004) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

n138. Wilma Mankiller, Tribal Sovereignty Is a Sacred Trust: An Open Letter to the Conference, *23 Am. Indian L. Rev. 479, 479* (1998-99).

n139. See, e.g., *25 U.S.C. 72* (1995) ("Whenever the tribal organization of any Indian tribe is in actual hostility to the United States, the President is authorized, by proclamation, to declare all treaties with such tribe abrogated by such tribe if in his opinion the same can be done consistently with good faith and legal and national obligations.").

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